

THE UNIVERSITY OF HULL

**A Legal Analysis of the Development of Arbitration in Oman
with Special Reference to the Enforcement of International
Arbitral Awards**

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In our time, international arbitration is increasingly considered as the most effective dispute settlement mechanism, and hence a necessary tool for promoting international trade and investment. Thus, treaties and laws have been adopted, and specialised institutions have been set up, in order to facilitate and improve the functioning of arbitration. In Oman, alongside the modernisation of the legal system, since 1984, there has been a progressive trend towards the codification of arbitration and adoption of advanced arbitration laws, such as Decree 47/1997 on the Arbitration Law and Decree 29/2002, a part of which is on the enforcement of awards, whether domestic, international or foreign. Oman has also joined various important international and regional conventions on arbitration, such as the Washington Convention and particularly the New York Convention on the enforcement of foreign awards. At the regional level, Oman adopted the Charter of the GCC Commercial Arbitration Centre, co-founding the Centre, whose awards are enforceable in all GCC states. A thorough examination of the Omani law of arbitration and case law shows that, under the law, arbitration is a regulated and reliable method of dispute resolution resulting in binding and enforceable awards, with a limited scope for court intervention. The law recognises foreign arbitration, and, to some extent, treats it more favourably, compared to domestic arbitration. It has also a pro-enforcement approach, particularly with regard to international and foreign awards. The present study not only has a developmental perspective, whereby discussing the development of arbitration law in Oman, during the last four decades, but also follows a comparative approach. Hence, various aspects of the Omani arbitration law are compared with international conventions and model laws on arbitration, as well as with arbitration laws of some other Arab and GCC states, particularly Egypt, on whose law the Omani law of arbitration is mainly modelled. It is also assessed what impact the Islamic jurisprudence has had on the arbitration law of Oman.

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Table of Contents

ACKNOWLEDGMENTS	II
INTRODUCTION.....	1
1 International Trade in Oman.....	1
2 Importance of Arbitration in International Trade	2
3 Arbitration in the GCC States	6
4 Questions and Hypothesis.....	13
5 Methodology	14
6 The Background to the Study	17
7 Structure of the Thesis.....	19
CHAPTER ONE: ARBITRATION IN INTERNATIONAL TRADE.....	22
1 Introduction	22
2 Arbitration: An Overview	24
2-1 Arbitration Agreement	29
2-2 Arbitrators	32
2-3 The Arbitral Process.....	33
2-4 The Laws of Arbitration.....	34
2-5 Award	35
2-6 Recognition and Enforcement	39
3 International Conventions and National Rules on Enforcement of Arbitral Awards	41
National Rules	51
4 Refusing Enforcement of Arbitral Awards.....	57
5 Setting aside Arbitral Awards by a Court	76
5-1 Procedural Review of the Award	81
5-2 Reviewing Substantive Accuracy of the Award	87
Appealing Against an Award.....	92
6 Conclusion.....	93
CHAPTER TWO: THE BACKGROUND TO THE ARBITRATION LAW IN OMAN: THE DEVELOPMENT OF THE OMANI LEGAL SYSTEM	96
1 Introduction	96
2 Modernisation of Omani Law	97

Adjudicative Bodies.....	100
3 Legal Requirements of Foreign Companies' Operation in Oman: the Need for Stipulating Resort to International Arbitration.....	107
4 Shari'a Law in Oman.....	114
Arbitration and the Ibadi Doctrine of Islam	116
General Features of Arbitration under the Ibadi Doctrine	120
5 Conclusion.....	129
CHAPTER THREE: ARBITRATION UNDER OMANI LAW	131
1 Introduction	131
2 Arbitration in Oman: General Features	133
Institutional and <i>ad hoc</i> Arbitration.....	133
Coverage	134
International Arbitration under Omani Law	137
Waiver of the Right to Object.....	139
3 Arbitration Agreement	141
Conditions of the Validity of an Arbitration Agreement	146
4 Arbitration Tribunal.....	153
4-1 Appointment Procedure	154
4-2 Challenging the Appointment of an Arbitrator	160
4-3 Arbitrators' Responsibility	164
4-4 Jurisdiction of the Tribunal	165
Power to Enforce Orders for Interim Measures.....	168
5 Arbitration Procedure	168
Procedural law of arbitration	169
Date, Place and Language.....	170
Time-Schedule	172
The Adversarial Procedure	174
Suspension and Interruption of the Arbitration Proceedings	182
6 Substantive Law of Arbitration	183
7 Arbitral Awards	187
Binding Awards, without the Possibility of Appeal	189
Interim Measures	190
Settlement during Proceedings	193
Formal Features of an Award	194

Interpretation, Correction and Additional Awards	196
8 Formal Features of Arbitration	198
9 Conclusion.....	199
CHAPTER FOUR: COURT INTERVENTION: VACATION AND	
ENFORCEMENT OF ARBITRAL AWARDS MADE UNDER OMANI	
LAW	202
1 Introduction	202
2 Inadmissibility of a Case about which there is an Arbitration Agreement	203
3 Court's Competences Regarding the Arbitration Process	205
4 Setting Aside an Arbitration Award.....	207
Lack of Valid Arbitration Agreement.....	211
Incapacity to Enter into an Arbitration Agreement	212
Lack of Due Process	212
Failure to Apply the Applicable Law	213
Wrong Composition of the Tribunal.....	214
Lack of Jurisdiction	215
Defect in the Award or in the Proceedings	216
Being Against Public Order	217
5 Enforcing an Arbitral Award.....	218
5-1 Background and General Points	219
5-2 Procedure of Enforcement of Awards	220
The Tribunal's Power to Grant Enforcement of Orders	224
5-3 Grounds for Refusing Enforcement of an Arbitral Award Made under	
Omani Law	225
6 Public Policy under Omani Law	230
7 Conclusion.....	237
CHAPTER FIVE: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS	
IN OMAN.....	240
1 Introduction	240
2 Background of Enforcing Foreign Arbitral Awards in Oman	241
3 General Provisions	244
4 Grounds for Non-Enforcement of Foreign Arbitral Awards	251
4-1 Not Being Issued by a Competent Body	252

4-2 Non-Compliance with Omani Law or a Court Decision.....	256
4-3 Improper Summons and Legal Representation.....	258
4-4 Non-Arbitrability of the Dispute	260
4-5 Non-Enforceability of the Foreign Award in the Country Where It Is Made	261
Non-Final Awards	263
4-6 Being against Public Policy and Rules of Morality	264
5 Court's Competence.....	266
Not Considering the Merit of the Case	266
Ordering Interim Measures	267
6 The Procedure for Executing Enforcement Orders for a Foreign Award	268
7 Conclusion.....	269
CHAPTER SIX: MULTILATERAL TREATIES FOR THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS JOINED BY OMAN	272
1 Introduction	272
2 The Washington Convention of 1965	274
3 The Riyadh Convention of 1983.....	288
4 Regional Arrangements: the GCC Arbitration Centre	290
Arbitration Agreements	296
Arbitration Tribunal.....	298
The Applicable Law	300
The Award	305
Enforcement.....	308
5 Conclusion.....	312
CONCLUSION	314
APPENDIX A: THE PROCEDURE FOR EXECUTING THE ENFORCEMENT ORDER FOR AN AWARD	325
APPENDIX B: ROTANA HOTEL MANAGEMENT CORPORATION LIMITED (CHANNEL ISLANDS) V. GULF HOTELS (OMAN) LIMITED (SAGG) ..	332
GLOSSARY.....	338
TABLE OF ABBREVIATIONS.....	340
TABLE OF CASES	341
TABLE OF STATUTES	347
TABLE OF RULES	351

TABLE OF TREATIES	352
BIBLIOGRAPHY	354

Introduction

1 International Trade in Oman

Omanis have been involved in regional and international trade for centuries.¹ Oman's geographical position provides it with an advantage that has been exploited by its population to exert immense influence on the trade in the region. The country is situated in the east of the Arabian Peninsula. In the south, it has access to the Indian Ocean, in the east, to the Oman Sea, and in the north to the Hormuz strait. The importance of the Hormuz Strait is that it links Persian Gulf, which is the only waterway for many countries of the region, to the open seas. Hence, it can be said that Oman functions as the gateway to western and northern part of the region.

With the discovery of oil in 1955, and particularly after a hike in the price of crude oil in the 1970s, the economic situation of Oman has changed dramatically. Since then, Oman has increasingly become the receiving side of most international trade, by importing manufactured products and agricultural goods and services. In this period, many big import/export and construction contracts between the Omani

¹ See, for instance, Abdul Aziz Al-Ashban, "The Formation of the Oman Trading Empire under the Ya'aribah Dynasty(1624-1917)", *Arab Studies Quarterly*, vol. 1, no. 4 (1971), at 354-370.

government or private parties and foreign contractors have been signed. With the decline in the price of oil, since the 1990s, and the globalisation gaining its momentum, responding to a new need became urgent for the economy of Oman, that is, the need for foreign investment. Increasing engagement of Oman with the world economy and the opening of the Omani economy to international trade has required providing reliable legal means of dispute settlement. Lack of legal rules for resolving trade disputes, can be an obstacle to the development of international business, and particularly foreign investment in Oman. The investor will invest, only if he is persuaded that real protection and remedies are guaranteed by the law.²

2 Importance of Arbitration in International Trade

Among various methods of resolving international commercial differences, arbitration is considered as the most prominent instrument.³ Hence, there has been an increasing interest in international arbitration with the growth of international trade. One reason is that the traditional method of dispute settlement, that is, recourse to the court, is usually a long and costly process, whereas arbitration can be arranged in a speedy manner and at lower costs.⁴ A specific problem with regard to international commercial disputes is that courts of more than one country might be competent to decide upon these disputes.⁵ On the other hand, either party may not often have

² Loukas A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations", *International Lawyer*, vol. 34, no. 3 (2000), at 1056.

³ United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration*, UNCTAD/EDM/Misc.232/Add.38, (New York and Geneva: United Nations, 2005), at 36.

⁴ *Id.*, at 15.

⁵ "Exclusive jurisdiction clauses", which require disputes between the parties to be referred to a particular court, and to be decided under particular laws, might solve the problem. However, the validity of exclusive jurisdiction clauses varies from one country to another. Some national laws do not recognize the validity of these clauses, if a foreign court decision is to be enforced in their territory.

confidence in the judicial system of its adversary.⁶ Resolving international trade disputes through non-judicial ways is particularly important, because there is no unified international legal system to have jurisdiction to hear such disputes. The complexity of legal procedures and expansion and diversification of international trade require a variety of ways of settling commercial disputes. Recourse to “Alternative Dispute Resolution” (ADR), such as mediation, conciliation and arbitration, has been considered in this context.⁷ They provide outside the court solutions.

Parties to international trade contracts prefer arbitration as a method of dispute settlement, because like other ADR mechanisms, it can be speedy, less costly and confidential.⁸ More importantly, it provides the parties with a method of resolving differences that is based on their contractual agreement. For settling their disputes through arbitration, the parties are able to choose a set of procedural and substantive laws that are neutral and familiar to both parties, while recourse to the court might not have such features.⁹

On the other hand, arbitral awards, like court judgements and unlike other ADR decisions, are enforceable at law. As a matter of fact, an advantage of arbitration over litigation in international trade is that it is easier to enforce a foreign arbitral

⁶ See Thomas J. Brewer, “Challenging Awards Is No Simple Task”, *National Law Journal*, October 29, 2001, at B13.

⁷ For more details, see, for instance, Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, (London: Butterworths, 1998). ADR includes other methods of out of court settlement, such as setting up a mini-trial or panel of experts.

⁸ Although there is no evidence indicating that arbitration is necessarily less expensive and less lengthy than litigation, as the parties may exploit various procedural opportunities in arbitration, it is said that the parties can adopt a kind of arbitration process that has the above features (United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration*, at 15).

⁹ While party autonomy is what distinguishes arbitration from litigation, many argue that party autonomy is not absolute, and must yield to, among others, fairness and the requirements of international trade and economy (see, for instance, the discussions of the 16th Congress of the International Council of Commercial Arbitration, in “16th ICCA Congress: International Commercial Arbitration: Important Contemporary Questions – 12-15 May 2002, London”, *GCC Commercial Arbitration Centre Bulletin*, issues 22/23 (June 2002), at 20.

award than a foreign court decision, not least because of the abundance of multilateral conventions and bilateral treaties facilitating enforcement of foreign awards. Moreover, courts mostly prefer to enforce foreign arbitral awards than foreign court judgment, since the former are the outcome of a private procedure, whereas the latter have the stamp of another country's sovereignty. Nevertheless, the execution of an arbitral award made in a foreign jurisdiction is quite a complicated matter.

Arbitration may be used for resolving various types of disputes in international trade. Five areas of international arbitration can be identified as contracts for providing goods and services,¹⁰ development projects,¹¹ exploitation of natural resources, technology transfer, and investment.¹² In particular, in the Middle East, including Oman, two areas of international trade arbitration are of paramount importance: construction¹³ and oil and gas industries.¹⁴ Work in these areas has been the engine of economic activities in the region for several decades. The petroleum industry, which mainly involves exploration and exploitation of oil and gas

¹⁰ Particularly maritime trade.

¹¹ Arbitration has been considered as the dispute settlement mechanism in many important international projects such as Channel Tunnel (between UK and France), Vasco da Gama Bridge over the Tagus River (between the Portuguese government and the Concessionaire), mass transit system in Athens (Greece), Lesotho Highlands Development Project (between Lesotho and South Africa), the Extran Hydro Development (China), the Longtan Hydro Development (China), the Xiaolangdi Multipurpose Project (China), Nathpa Jhakri Dam (India), Øresund Bridge, Minimetro in Copenhagen (Denmark and Sweden), and several bridges and river bank protection projects in Hong Kong and Bangladesh (see Pierre M. Genton, "the DRB/DAB, a True Complement to Arbitration", *GCC Commercial Arbitration Centre Bulletin*, issue 7 (December 1997), at 18-20. Regarding arbitration in construction industry, see E. Yahiel and R. M. Cranston, "Arbitration and Dispute Resolution in the International Construction Industry", *International Construction Law Review*, vol. 2 (1985), at 231-257.

¹² Even in securities industry, where not many disputes are considered as arbitrable or referred to arbitration, it is predicted that there will be a tendency towards arbitration (see Philippe Leboulanger, "Arbitrability of Securities Transactions Disputes", *GCC Commercial Arbitration Centre Bulletin*, issue 14 (March/April 2000), at 13.

¹³ See Alastair Hirst, "Contemporary Mercantile Jurisdiction in Oman", *Arab Law Quarterly*, vol.7, no.1 (May 1992), at 30.

¹⁴ See, for instance, "Arbitration in Petroleum and Other Energy Contracts: A Two-day Seminar Organized Jointly by the GCC Commercial Arbitration Centre and the Abu Dhabi Commercial Conciliation and Arbitration Centre Held in Abu Dhabi on October 13th and 14th 1998", *GCC Commercial Arbitration Centre Bulletin*, issue 10 (Dec. 1998).

resources, has been the main source of foreign income for most Middle Eastern countries. Construction industry, on the other hand, is involved in infrastructure modernisation projects. In construction arbitration, the amount is limited, but the arbitration involves complex and inter-related claims.¹⁵ On the other hand, arbitration in oil and gas industries has a political nature, in which one party is usually a state. In such disputes, huge amounts of money are involved, since they are about concessions and licence agreements, long term investments, price formula, and long term energy supply.¹⁶

The attraction of arbitration is not limited to international trade; at the national level, too, many parties prefer referring their disputes to arbitration. Hence, treaties or statutes have been adopted, and specialised institutions have been set up, in order to facilitate and improve the functioning of arbitration within a country. International conventions and municipal laws usually provide for each other's functioning. Conventions usually grant national laws the discretion to determine issues such as the capacity of the parties to an arbitration agreement, the formation of the arbitration tribunal, arbitration procedure, the due process, arbitrability and public policy. On the other hand, national laws may allow a convention or treaty to prevail over their own provisions, under certain circumstances. In order to examine the regime of enforcement of awards in a country, it is necessary to explore to which multilateral convention or bilateral treaty the country has acceded as well as its municipal laws. They both provide for the enforcement procedure and the grounds

¹⁵ See Nael G. Bunni, "Construction Arbitration in the Middle East", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 6-11. A complex variety of parties, contractors and sub-contractors, are involved in most engineering projects (see Charles L. Brown, "Multi-Party Arbitration in Engineering Contracts – the Problems and the Solutions", *GCC Commercial Arbitration Centre Bulletin*, issues 22/23 (June 2002), at 5-9).

¹⁶ Nigel Truscott, "The Character of Oil and Gas Arbitrations", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 13.

for the denial of recognition and enforcement of foreign awards. In this thesis, we focus on Oman.

3 Arbitration in the GCC States

In most Arab and Muslim countries, attitudes towards arbitration as a method of settling business disputes were unreceptive, until recently. By an Arab party, domestic arbitration was seen as depriving him of his right to be heard by a competent court, while foreign arbitration was regarded as a concession to the foreign party. Foreign arbitration was, in particular, considered as a disguise for protecting Western interests at the expense of the interests of the local communities.¹⁷ This attitude is rooted in the region's negative experience in arbitration concerning international petroleum concessions in the early years of the discovery and exploitation of oil resources.¹⁸ The states of the Gulf Co-operation Council (GCC) and Oman, in particular, have been no exception to this misgiving about arbitration. Hence, arbitration legislation and practice in the GCC states lagged behind many other regions in the world,¹⁹ to the extent that some writers recommended that the GCC states do not constitute an ideal or even advisable forum for international arbitration, mainly due to the existing uncertainty in this area of

¹⁷ Henry Brown and Arthur Marriott, *ADR Principles and Practice*, (London: Sweet and Maxwell, 1993), at 81-83.

¹⁸ Two famous international arbitration cases, among others, gave rise to a negative attitude towards international arbitration in the GCC states, in particular, and the Middle East, at large. The first was *Petroleum Development (Trucial Coast) Ltd. V. The Sheikh of Abu Dhabi* (*International and Comparative Law Quarterly*, vol. 1, at 247) in 1952, in which the English umpire excluded the law of Abu Dhabi from being applied to the dispute, by claiming that "it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.". The second case was *Saudi Arabia v. Arabian American Oil Company (ARAMCO)* (*International Law Reports*, vol. 27, at 117) in 1963, which was resolved in favour of the ARAMCO, after excluding Saudi law rooted in *Shari'a* because it was claimed not to comply with "the general principles of law".

¹⁹ This problem is by no means restricted to Arab or Gulf states. Alabama state, in the US, does not yet have a modern arbitration law that requires the enforcement of arbitration agreements (Robert T. Gerig and Inna Reznik, "Current Development in Enforcement of Arbitration Awards in the United States", *Arbitration*, vol. 68, no. 2 (2002), at 131).

legal practice in these countries.²⁰ Most Arab countries, including GCC states, Iraq, Yemen and Syria until recently, lacked a codified and developed law of arbitration similar to those of many Western countries. Others have outdated arbitration regulations and concepts. Hence, Western companies were advised to be wary of referring a dispute to arbitration, if the other party is from the Middle East. Another reason contributing to such suspicion has been lack of understanding of Islam,²¹ which is a main source of law in this part of the world, and which some Western commentators think opposes arbitration by non-Muslims,²² or opposes execution of awards made in non-Muslim countries by non-Muslim arbitrators. In this regard, the long history of recourse to arbitration in the pre-modern Arab Middle East, whether in relationships within themselves or with foreign parties, has been ignored.

In recent years, however, there has been a tendency towards recourse to arbitration for settling disputes in the GCC states, particularly in the area of international trade.²³ This has been because of the demand of the business community, which considers arbitration as the most appropriate method of dispute settlement in international business. There have been attempts at cooperation as well as competition in the region, regarding international commercial arbitration. The GCC states, on the one hand, have cooperated with each other to facilitate arbitration

²⁰ W. M. Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", *Essays and Addresses on Arab Laws*, (Richmond: RoutledgeCurzon, 2000), at 44. Also, see Julian D. M. Lew, "the Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East", *Arbitration International*, vol. 1 (1985), at 161.

²¹ Lew, at 161.

²² See, for instance, Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice, A Comparative Study*, (London: Kluwer Law International, 1999), at 229.

²³ Ups and downs with regard to arbitration are not restricted to Arab or GCC states, but can be seen in most developing countries. An interesting case is Indonesia, where a misunderstanding of arbitration continued up to the last decade of the twentieth century. For recent developments of recourse to arbitration and enforcement of arbitral awards in the country, see Karen Mills, "Judicial Attitude to Enforcement of Arbitral Awards and other Judicial Involvement in Arbitration in Indonesia", *Arbitration*, vol. 68, no. 2 (2002), at 106-119.

in their ever-increasing commercial relations.²⁴ They have agreed to refer to arbitration certain disputes arising from such relations.²⁵ The establishment of GCC Arbitration Centre, as a private and independent body to consider commercial disputes involving nationals of more than one GCC country, in 1995, has been a significant step to bypass the problem of diversity of legal systems in the region. What is important is that the awards made by the Centre are enforceable in all GCC states. Moreover, approximation and unification of laws of member states have been among important aims of the GCC.²⁶ Although no formal attempt has so far been made at approximation of arbitration law of the GCC states, there has been a tendency toward it. On the other hand, some GCC countries have competed with each other to attract international arbitration to their countries, by providing advanced legal frameworks, and establishing arbitration centres.²⁷ This is because international arbitration is now a service industry over which competition is intense.²⁸ If the services provided are not what businessmen expect, they will go

²⁴ For some details, see Hussain M. Al-Mahdi, "Intra-GCC and International Trade: the Need for Arbitration", *GCC Commercial Arbitration Centre Bulletin*, issue 3 (August 1996), at 8.

²⁵ For instance, disputes arising out of the agreement on the Gulf Investment and its interpretation, as well as disputes regarding some decisions made by the GCC Financial and Economic Co-operation Committee (See [Mohammad Soud Al-Sayad], "Arbitration Aspects in the Region", *GCC Commercial Arbitration Centre Bulletin*, issue 3 (August 1996), at 5). Disputes arising from the GCC Unified Economic Agreement are specifically referred to the GCC Arbitration Centre.

²⁶ Approximation of economic and commercial laws is also required from EU candidate and associated states (Mistelis, at 1057). As a matter of fact, in our increasing interdependent world, countries are under external as well as internal pressure to opt for legal uniformity (id., at 1067).

²⁷ See, for example, Yousif Zainal, "Prevalence of Arbitration in the GCC States", *Journal of International Arbitration*, vol. 18, no. 6 (2001). The intention of Bahrain to compete in international commerce, particularly the insurance and reinsurance industry, through providing for international arbitration, has been highlighted by the Bahraini Minister of Commerce (Liz Hall, "Arbitration in Insurance and Reinsurance: [A Report on the Two-day Seminar Held in Bahrain on March 3rd and 4th, 1998]", *GCC Commercial Arbitration Centre Bulletin*, issue 8 (April 1998), at 6).

²⁸ For instance, see Saville LJ observations, before the enactment of the 1996 English Arbitration Act, regarding the need for an update and user friendly arbitration law in the UK, if London is to keep its place as a centre for international arbitration and also 'as a significant selling point for City services generally' (Mark Saville, "the Denning Lecture 1995: Arbitration and the Courts", *Arbitration*, vol. 61 (1995), at 159.).

elsewhere.²⁹ All GCC states have joined the New York Convention, Kuwait being the first, in 1978, and the UAE the last, in 2006.

Bahrain was the first Gulf country to adopt statutory laws on arbitration. In 1971, the country took a major step regarding domestic arbitration by the enactment of Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures. The law also governs enforcement of arbitral awards, whether domestic or foreign.³⁰ In 1994, Bahrain adopted the UNCITRAL Model Law on International Commercial Arbitration of 1985, as its law for regulating international commercial arbitration.³¹ The relative advancement of Bahrain's legal system with respect to international arbitration and the enforcement of foreign awards can be attributed to its policy of maintaining its position as the financial centre of the Gulf.

Kuwait, more than other GCC states, has adhered to economic liberalisation, particularly after the Gulf war. Kuwaiti Law No. 38 of 1980 on Civil and Commercial Procedure governs arbitration and enforcement of foreign awards in the country.³² The most recent piece of legislation on arbitration is Kuwaiti Law No. 11 of 1995 on Arbitration in Civil and Commercial Matters.

Some of the earliest provisions on arbitration can be found in Saudi Arabia, where Saudi Royal Decree No. 32 of 1931 on the Commercial Court Law contained several articles on commercial Arbitration.³³ Arbitration is currently regulated, in the

²⁹ Roy Nolan, "International Arbitration and Crossborder Trade", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 72.

³⁰ Articles 252 and 253, Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures. These provisions set the conditions for enforcement of foreign judgments, and state that the same conditions apply would apply to foreign awards.

³¹ Bahraini Legislative Decree No. 9 of 1994 Promulgating the International Commercial Arbitration Law.

³² Articles 173 to 188 of the law govern arbitration. Articles 199 and 200 are on enforcement of foreign awards. These provisions set the conditions for enforcement of foreign judgments, and state that the same conditions apply to foreign awards.

³³ Mouteb Saleh Hamad Al-Eshiwiy, *Arbitration Regulations in the Gulf Co-Operation Council (GCC) States: A Comparative Study*, unpublished PhD Thesis, University of Exeter, 1997, at 140.

country, by the Saudi Royal Decree No. M/46 of 1403 H [1983] on Arbitration Law.³⁴ On the other hand, Qatari legal system was the least developed system, compared to other GCC states, regarding arbitration legislation. Only the Qatari Law No. 4 of 1963 Establishing the Chamber of Commerce and Industry contained some provisions on arbitration.³⁵ A more detailed statutory law on arbitration came into force by the adoption of the Qatari Law No. 13 of 1990 on Civil and Commercial Procedures.³⁶

Despite the UAE efforts to spearhead competitiveness in international trade, the country lacked laws specifically addressing arbitration, until very recently. Given the federal legal system in the UAE, the issue of enforcement of foreign awards in this GCC country used to be more complicated,³⁷ particularly because of the absence of any law in this regard in some of these semi-sovereign constituent Emirates.³⁸ There are a limited number of provisions about arbitration in the UAE law, that is, Articles 203 to 218 of Part III of the UAE Law No. 11 of 1992 on Civil Procedures. Articles 235 to 238 of the Civil Procedures Law, which are the applicable provisions to enforcement of foreign court judgments, also govern enforcement of arbitral awards in the country.³⁹ The UAE has signed several bilateral treaties with other countries for enforcement of foreign awards, including agreements with India⁴⁰ and France.⁴¹

³⁴ Husain M. Al-Baharna, "the Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain", *Arab Law Quarterly*, vol. 4 (May 1989), at 339. Some legal situations, which are inevitably created by modern economy, but are not recognised by the Islamic law, the *Shari'a*, are referred to arbitration, in Saudi Arabia. An example of such cases is insurance. Hence, disputes on insurance and reinsurance are usually resolved through arbitration, in the country (see Liz Hall, "Arbitration in Insurance and Reinsurance: [A Report on the Two-day Seminar Held in Bahrain on March 3rd and 4th, 1998]", *GCC Commercial Arbitration Centre Bulletin*, issue 8 (April 1998), at 7).

³⁵ Al-Eshwiwy, at 140-41.

³⁶ Articles 190 to 210, Qatari Law No. 13 of 1990 on Civil and Commercial Procedures.

³⁷ It is more difficult to examine the UAE arbitration law than those of other GCC countries, because the UAE consists of seven separate jurisdictions.

³⁸ Al-Baharna, at 337-8.

³⁹ The UAE Federal Law No. 26 of 1999 on Conciliation and Settlement Committees at the Federal Court prohibits Federal Civil or *Shari'a* Courts from hearing civil or commercial disputes, unless it

The law of arbitration in Oman, including its regulations on enforcement of awards, whether domestic or foreign, has gone through deep changes in recent decades. Until 1984, Oman lacked any statutory law regulating arbitration, though there was a progressive trend in the country, and particularly by the courts to recognise arbitration agreements and awards.⁴² Under Sultani Decree 32/1984⁴³ on the Rules for the Hearing of Law Suits and Arbitration, arbitration was codified for the first time in Oman. A breakthrough came about when Sultani Decree 47/1997 promulgated the new Omani Law of Arbitration in Civil and Commercial Disputes, as a distinct piece of legislation. It was later amended by Sultani Decree 3/2007 Amending Some Provisions of the Law of Arbitration in Civil and Commercial Disputes. Provisions regarding arbitration can also be found in other Omani legislations, such as Sultani Decree 13/1997 on the Establishment of the Commercial Court, and, particularly, Sultani Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes, which governs the procedure of executing enforcement orders for foreign arbitral awards.

It is important to note that in their attempt to modernise their arbitration law, the GCC states, to a large extent, have drawn upon Egyptian law,⁴⁴ and in some cases have even adopted laws identical to Egyptian laws. GCC states followed the

has already been considered by the Conciliation and Arbitration Committee associated with the designated court.

⁴⁰ The UAE Federal Decree No. 33 of 2000 Promulgating the Agreement between the UAE and the Republic of India on Juridical and Judicial Co-operation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Judicial Commissions, Execution of Judgments and Arbitral awards.

⁴¹ The UAE Federal Decree No. 31 of 1992 Promulgating the Judicial Co-operation Treaty between the UAE and France. The Treaty came to force on 27 April 1992 (“Enforcement of Foreign Judgments [by the Abu Dhabi Court of Cassation]”, *GCC Commercial Arbitration Centre Bulletin*, issue 14 (March/April 2000), at 7).

⁴² See, for instance, Samir Saleh, “the Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law”, *Arab Quarterly Law*, vol. 1, no. 2 (Feb 1986).

⁴³ Oman Official Gazette 286/1984.

⁴⁴ Zainal, “Prevalence of Arbitration in the GCC States”.

Egyptian model not only with regard to arbitration law, but also in many other areas of legislation. The Egyptian legal system with its long history, compared to relatively recent modern legal systems in most GCC countries and their limited judicial precedents, provides judges in GCC jurisdictions with rich jurisprudence.⁴⁵ Particularly when there is no provision in the local law to govern a dispute, or when there is some ambiguity or conflict in such provisions, the case law of the Egyptian Court is a source of legal inspiration for judges in GCC states. In these countries, including Oman, legal practitioners and judges, some of whom are actually Egyptian, usually refer to the best-known Egyptian writers on commercial matters, particularly Al-Sanhoury's *Al-Waseet*.⁴⁶ In many countries, "legal transplants"⁴⁷ of such nature has given rise to the suspicion that opinionated and expensive foreign experts may try to export their legal system without any concerns as to its compatibility with the legal system in the recipient country.⁴⁸

Egypt's first law provisions governing arbitration were Articles 818 to 850 of the Egyptian Law No. 77 of 1949 on Civil and Commercial Procedures. The law was

⁴⁵ Jalila Sayed Ahmed, "Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain", *Arab Law Quarterly*, vol. 14, no. 2 (May 1999), at 169.

⁴⁶ For instance, the wording of the principle of freedom to contract contained in Case 393/1984, BSCD Judgment, *Majmou'a*, vol. I, at 128, is the exact restatement of Al-Sanhoury's discussion of the adoption of the theory of *autonomie de la volonté* into the Egyptian Civil Code (See Abdul Razzaq Al-Sanhouri, *Al-Waseet fi Sharh Al-Qanoon Al-Madani*, vol. 1: *Nazariyyat Al-Iltizam bi Wajhin 'Am: Masader ul-Iltizam*, Beirut: Dar Al-Ehya' Al-Torath Al-'Arabi, 1973, Book One: "Min Taghnin Al-Madani Al-Jadid: Al-Iltizamat bi Wajhen 'Am", Part One: "Al-'Aqd", Introduction, Section Two: "Mabda' Soltan Al-Irada [*Autonomie de la Volonté*]", at 153-162). Also, Case 483/1984, BSCD Judgment, *Majmou'a*, vol. II, at 147, that considers mutual accord and matching intentions as the basis of contract paraphrases Al-Sanhoury's wording regarding offer and acceptance as being the ground for contract (See id, Book One: "Min Taghnin Al-Madani Al-Jadid: Al-Iltizamat bi Wajhen 'Am", Part One: "Al-'Aqd", Chapter One: "Arkan Al-'Aqd", Title Two: "Tawafoq Al-Iradatayn", Section Two: "Al-Mot'aqedan La Yajma'homa Majlis Wahid [Contract par correspondance on entre absents]", at 252-65). Hirst points to other basic principles of mercantile law put forward in BSCD decisions that can be traced back to the Egyptian Civil Code (see Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 24).

⁴⁷ The term is defined as 'the movement of legal norms or specific laws from one state to another during the process of law-making or legal reform' (Mistelis, at 1067).

⁴⁸ Id., at 1064. For some examples of this type of legal transplants within Muslim countries, see Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Sharī'a and Statute Law*, (London: Graham & Trotman, 1984), at 85-7.

repealed by Egyptian Law No. 13 of 1968 on the Code of Civil and Commercial Procedures, whose Articles 501 to 513 were on arbitration.⁴⁹ Later, the Egyptian Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters replaced the provisions of the Law 13/68 on arbitration. As touched upon before, Egyptian arbitration law has been the main source of inspiration for the GCC states, and particularly Oman. As a matter of fact, the Omani law of arbitration has followed the development of Egyptian law in this regard. The new Omani law of arbitration is very similar to the Egyptian Arbitration Law No. 27 of 1994, which, in turn, is based on the UNCITRAL Model Law on International Commercial Arbitration, with some modifications.⁵⁰

4 Questions and Hypothesis

A main question to be answered in this thesis is to what extent Omani law is facilitative of enforcement of arbitral awards, particularly international and foreign ones. An accurate and detailed answer to this question requires a comprehensive examination of arbitration law in Oman. Therefore, another important question to be answered in this thesis is whether Omani legislation and case law on arbitration have developed enough to deal with various and complex disputes that might arise in vast areas of international trade. Since the enforcement of some awards is covered by multilateral or bilateral treaties, other relevant questions are to which international or

⁴⁹ the Egyptian Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters was circulated by the Ministry of Justice in November 1988 (Ahmed S. El-Kosheri, "Egypt", in A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XV, (London: Kluwer, 1990) at 305), and came into force on 15 May 1994. It was published in the Official Gazette no. 16 (Supplement) of 21 April 1994.

⁵⁰ Hani Salah Sarie-Eldin, "Financial Disputes in the Arab Middle East, with Special Reference to Egypt", in Norbert Horn and Joseph Jude Norton, *Non-Judicial Dispute Settlement in International Financial Transactions*, (London and Boston: Kluwer Law International, 2000), at 168-9. Also, Abdul Hamid El-Ahdab, *Arbitration in Arab Countries*, 2nd ed., (London and Boston: Kluwer Law International, 1998), at 479.

regional conventions on enforcement of arbitral awards Oman has joined, and how facilitative of enforcement of international awards these conventions are.

Clear and detailed responses to the above questions are not only of academic interest, but also of practical importance, both for practitioners involved in arbitration in Oman and for those wishing to improve the Omani law of arbitration. In such study, potential parties to commercial arbitration in Oman and their legal representatives may find insights that make them aware of procedural opportunities as well as perils and anomalies existing in Omani arbitration regulations. Since there are not sufficient, if any, in-depth studies to deal with these and some other relevant questions thoroughly, it has been imperative to embark on such study.

The hypothesis in this research is that, with the opening up of the Omani economy and particularly its trade section towards the world, the Omani law of arbitration has been transformed substantially in recent decades. Progress can be noticed especially with regard to the law enforcing national as well as international awards. Omani law of arbitration is now more or less in line with universally accepted standards and practice. Accession to international and regional conventions has widely contributed to such progress.

5 Methodology

This thesis is a critical examination of the Omani law of arbitration, while studying its links to other parts of Omani law. For this purpose, two main methods have been utilised. First, various written documents, including legislations, conventions and treaties, case law, and conference and periodical papers, have been consulted. Second, several interviews were conducted with legal professionals, such as judges and lawyers, involved in arbitration in Oman. I have also drawn upon my own work experience in the judicial system of Oman, in composing this thesis.

With regard to written material and documents, primarily provisions of various Omani laws are analysed, so far as they may have an impact on arbitration practice in Oman. They include the Omani law of arbitration as well as other pieces of legislation that determine how arbitration is to be implemented in the country. Then, the jurisprudence of the Omani court is drawn upon. Legal precedents, which are selectively published, do not have the binding effect of legislation, but are increasingly cited in later judgments, for the purpose of consistency of judgments and confidence in the judicial process. This is notwithstanding the fact that a civil law system dominates the Omani jurisdiction. Given lack of modern statutes in some legal areas in Oman, the case law is of paramount importance in enriching the legal thought. The earlier reported decisions of Omani judicial bodies, such as the Board for the Settlement of Commercial Disputes, contained basic principles,⁵¹ later turned into law provisions. Nevertheless, only few arbitration cases are reported in Oman. It is difficult to obtain full data on arbitration cases referred to the court, whether for enforcement or otherwise, save for very important cases. In this thesis, for citing most reported cases, only their numbers are referred to, because the names of the disputants and the actual *dispositif* are omitted from the Omani case law reports, for legal reasons.

Interviews conducted for this thesis were unstructured, being tailored according to the interviewees' expertise and professional background. Mr Khalifa Al-Hadhrani, the Deputy President of the Omani Supreme Court, Mr Majid Al-'Alawi, the President of the Administrative Court, Mr Al-Rashdi, the President of the Muscat Court of Appeal, Mr Ahmed Al-Rahbi, member of staff at the Department of Enforcement at the Muscat Court, and Mr Ahmed Al-Hajri, lawyer were among

⁵¹ Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 23 and 28.

distinguished people interviewed for this thesis. The questions asked in the interviews were designed to serve the aim of finding relevant Omani statutes and cases as well as international and regional conventions on arbitration joined by Oman. More importantly, the questions were aimed at assessing the impact of such cases, statutes and conventions on arbitration practice in the country, clarifying the complexities of Omani law, as well as pointing to the roots of Omani law of arbitration in other legal systems. Some interviewees were, for instance, asked about the advantages and disadvantages of the Omani arbitration law compared to the arbitration laws of some other countries and international conventions on arbitration. It is unfortunate that due to the diversity of the topics discussed in the interviews, the individual contribution of each interviewee cannot be specified.

The thesis follows a developmental perspective, in which the development of Omani legislation, particularly in the last four decades, in the area of commercial arbitration, and enforcement of foreign arbitral awards, is examined. Improvements made and difficulties created in this process are considered accordingly.

The thesis has also a comparative dimension, whereby the arbitration law of Oman is compared with the universally approved standards. Hence, various aspects of the arbitration law of Oman are compared with international conventions on arbitration, such as the New York Convention of 1958, model laws, such as the UNCITRAL Model Law on International Commercial Arbitration, as well as arbitration laws of some other Arab and GCC states. Given the possibility of the exchange of legal knowledge and experience, such a comparative study sheds a light on the way in which Omani law of arbitration has developed, and may develop in future. In recent decades, modern civil laws adopted by other Arab countries have

been regarded as a source of legal principles by Omani judges and legislators.⁵² This is particularly so with regard to Egyptian law, from which the bulk of GCC states civil and commercial law is derived, and to which civil and commercial laws of some GCC countries are identical.⁵³ Hence, referring to Egyptian law and judicial precedents helps a better understanding of Omani law of arbitration, its background and development.

Oman and other Arab countries also share the tradition of Islamic jurisprudence, which has heavily influenced their legal practice as a whole. Such a tradition has affected the legal system of each Muslim country to a different extent.⁵⁴ More importantly, Muslim countries adhere to various schools of Islam, and hence differ in their approach to Islamic law, that is, the *Shari'a*. Nevertheless, similarities among these schools are more than their differences. Oman adheres to the Ibadi doctrine of Islam, as compared to the Sunni as well as the Shi'ite schools.⁵⁵ Arbitration in the Islamic jurisprudence, and the varieties of its interpretation, are also discussed in this thesis, when necessary. Two conflicting trends towards and away from the *Shari'a* can be identified within the legal systems of most Muslim countries. It is important to see how the Omani legal system strikes a balance between the two trends, with regard to arbitration.

6 The Background to the Study

⁵² Id., at 22.

⁵³ Sayed Ahmed, "Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain", at 169.

⁵⁴ Hussein Hassan, "Book Review on *Essays and Addresses on Arab Laws*, by W. M. Ballantyne (Richmond: RoutledgeCurzon Press)", *Journal of Islamic Studies*, vol. 14, no. 1 (2003), at 75.

⁵⁵ Differences among Muslim denominations are rooted in their views about the right to religious and political leadership. The Sunnis believe in four Caliphs, respectively Abu Bakr, 'Omar, 'Othman and 'Ali, who were all from Prophet Mohammad's tribe, the Quraysh. The twelve Shi'as consider 'Ali and eleven of his descendants, who were from Prophet Mohammad' clan, the Banu Hashim, to be rightful Imams, or religious and political leaders, after him. The Ibadis argue that Imams need not to be from a particular race, tribe or clan. Such differences developed into various jurisprudential approaches adhered by each school with detailed disparities, while having significant similarities.

There is a shortage of modern scholarly works dealing with issues covered in this thesis. The same is with reliable sources and up to date information on arbitration cases and practice in this part of the world. Attempts were made to overcome this difficulty by establishing personal contacts, conducting interviews, and particularly using different sources and comparing their information. On the other hand, with regard to the background of arbitration in Oman and other GCC as well as Muslim countries, that is, the *Shari'a*, traditional sources are available.⁵⁶ These sources have been referred to in various modern works on arbitration in Muslim states, but their systematic and analytical examination has not yet been fulfilled. A comprehensive review of these rich sources of Islamic jurisprudence, alongside paying full attention to western standards and requirements of modern economies, can provide Muslim jurists with necessary conceptual tools to work out natively inspired patterns for legal practices, including arbitration. Works of Egyptian known authors such as Ahmad Abul Wafa⁵⁷ and Samiya Rashid⁵⁸, and more importantly, Abdul Razzaq Al-Sanhouri⁵⁹ have paved the way for such a development.

Lack of sources and material is much more evident on the issue of arbitration and particularly enforcement of foreign and international awards in Oman. Few existing works dealing with the issue of arbitration in Oman fall into two categories, namely,

⁵⁶ For instance, 'Abd al-'Aziz ibn Ibrahim al-Mus'abi, *Kitab al-Nil*, (Cairo: 1305 H), and Muhammad ibn Yusuf Atfiyyash, *Sharh al-Nil wa Shifā al-'Alil*, 10 vols., (Cairo: 1343 H.), 'Abdullāh ibn Humayd Al-Sālimī, *Jawhar al-Nizām fi 'Ilm al-Adyān wal-Ahkām*, 2 vols., (Cairo: 1344 H) and 'Abdullah ibn Humayd Al-Hārithi, *Al-'Uqūd al-Fiddiyya fil Usul al-Ibadiyya*, Beirut. (the Ibadi School); Abi Bakr Muhammad bin Ahmed al-Sarakhsi, *Kitab al-Mabsut*, (Cairo: al-Sa'ada, 1331 H) (the Hanafi School); Abu al-Qasim ibn Hossein al-Khiraqi, *Al-Mukhtasar*, (Damascus: 1964) (the Hanbali School); Mohiuddin Yahya Ibn Sharaf al-Nawawi, *Minhaj al-Talibin*, (Beirut: Dar al-Ma'rafa) (the Shafe'i School), Abu al-Walid al-Baji, *Ihkam al-Fosul fi Ahkam al-Usul*, (Dar al-Gharb al-Islami, 1981) (the Maliki School); Mohammad ibn Hasan ibn 'Ali al-Tusi, *Al-Mabsut fi Fiqh al-Imamiyya*, (Tehran: al-Maktaba al-Mortadawiyya) (the Ithna 'Ashari Shi'a School).

⁵⁷ Ahmad Abul-Wafa, *Al-Tahkim al-Ikhtiyari wa al-Ijabari*, 5th ed., (Cairo: Mansha'at al-Ma'arif, 1988).

⁵⁸ Samiya Rashid, *Al-Tahkim fi 'Alaqat al-Dowaliyya al-Khasa*, Kitab al-Awwal: *Ittifaq al-Tahkim*, (Cairo: Dar al-Nihda al-'Arabiyya, 1984).

⁵⁹ Al-Sanhouri, Abdul Razzaq, *Al-Waseet fi Sharh Al-Qanoon Al-Madani*, 10 vols, (Beirut: Dar Al-Ehya' Al-Torath Al-'Arabi, 1973).

those that consider the Omani law of arbitration or part of it, and those that consider the law in the context of a wider comparative study. The first category usually does not extend beyond short papers,⁶⁰ and the treatment of the Omani law in the latter is also very brief.⁶¹ More importantly, recent developments in the law have not been discussed sufficiently in the existing literature. Hence, a comprehensive study centring around the Omani law of arbitration, having both comparative and developmental approaches, seems necessary.

7 Structure of the Thesis

This thesis consists of six chapters. The first chapter is a general examination and analysis of arbitration in international trade. It sets the framework for the thesis, and informs us what type of discussions, with regard to Oman, are expected to be followed in the rest of the thesis. It points to various stages of arbitration, particularly those involving the potential intervention of the court, such as setting aside or, above all, enforcement of arbitral awards. For this purpose, the universally approved standards and model laws, as well as international conventions, particularly the New York Convention of 1958, and some municipal laws are drawn

⁶⁰ Some important works, in this category, are: Terence M. Lane and William S. Morton, "Enforcement of a Foreign Award in Oman", *Arbitration International*, vol. 2, no. 1 (1986); Sigvard Jarvin, "Enforcement of an Arbitration Award in Oman", *Journal of International Arbitration*, vol. 2, no. 4 (1985); Alastair Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987); Alastair Hirst, "Contemporary Mercantile Jurisdiction in Oman", *Arab Law Quarterly*, vol. 7, no. 1 (May 1992); and Abdul Hamid El-Ahdab, "The New Omani Act in Civil and Commercial Matters", *Journal of International Arbitration*, vol. 14, no. 4 (1997).

⁶¹ Some important works, in this category, are: Saleh, *Commercial Arbitration in the Arab Middle East*; Samir Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", *Arab Quarterly Law*, vol. 1, no. 1 (1985), at 19-31. Samir Saleh, "the Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law", *Arab Quarterly Law*, vol. 1, no. 2 (Feb 1986) Abdul Hamid El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries", *Arbitration International*, vol. 11, no. 2 (1995), at 169-182; Abdul Hamid El-Ahdab, *Arbitration in Arab Countries*, 2nd ed., (London and Boston: Kluwer Law International, 1998); as well as some works by W. M. Ballantyne, such as *Essays and Addresses on Arab Laws*, (Richmond: RoutledgeCurzon, 2000).

upon. Such standards enable us to explore the extent to which the Omani law of arbitration is developed and is facilitative of enforcement of arbitral awards.

Chapter two considers the background to the arbitration law in Oman. It examines the process of the modernisation of Omani law, the development of its adjudicative bodies, as well as the status of Islamic law, the *Shari'a*, within the Omani legal system. Such examination is carried out, paying special attention to the dominant version of the *Shari'a* in Oman, that is, the Ibadi doctrine, and to the issue of arbitration. In this chapter, it is also explored what legal requirements, under Omani law, exist for the operation of foreign companies in Oman. Such legal requirements, and mainly the need for entering into a partnership with Omani parties, may make it necessary for a foreign party to contemplate the conclusion of an arbitration agreement.

Chapter three analytically explores the existing Omani law of arbitration at length. Such a comprehensive examination is a pre-requisite of assessing the regime of enforcement of international and foreign awards in Oman. Moreover, the Omani arbitration law applies not only to domestic arbitration but also to international arbitration taken place outside Oman, upon the agreement of the parties. In this chapter, the Omani law of arbitration is compared with the UNCITRAL Model Law on International Commercial Arbitration and also with the arbitration laws of some other Arab and GCC states, particularly that of Egypt.

The important issues of court intervention in the arbitration process and particularly enforcement of domestic and foreign arbitral awards are respectively examined in chapters four and five. In these chapters, it is assessed to what extent Omani law is facilitative of enforcement of arbitral awards, whether domestic or foreign. Thus, the background and general provisions of Omani law regarding

enforcement, the procedure for such enforcement, the competence of the court, particularly the grounds for refusing enforcement of awards, and finally the procedure for the execution of enforcement orders are discussed in these chapters. Provisions considered in chapter five apply to foreign arbitral awards that cannot be enforced under international conventions or bilateral treaties joined by Oman.

Chapter six deals with multilateral conventions and treaties on arbitration acceded to by Oman. When a dispute falls within the ambit of such a treaty, its rules prevail over the provisions of the Omani law. The Washington Convention of 1965 and regional arrangements in the Arab world, particularly GCC Arbitration Centre are examined, in this chapter.

Chapter One: Arbitration in International Trade

1 Introduction

Arbitration is increasingly regarded as the favourite method of dispute settlement in international trade. In the absence of a single international court having jurisdiction over international commercial disputes, the parties to such disputes have to resort to settlement mechanisms upon which they can all agree. Arbitration provides the parties with such a mechanism. They would be able to choose the arbitrators, the procedure and the substantive law that they find appropriate for their type of disputes. They can arrange for the seat of arbitration to be in a neutral country, convenient for both parties. This also means that in arbitration the parties to a dispute have more control over the way the dispute is handled. Moreover, it is a quick and confidential way of settling differences, though such confidentiality is not absolute.¹ Although arbitration is not necessarily less expensive than litigation,² it is

¹ Within the context of English law, it has been said that there are four exceptions to the confidentiality of arbitration documents: 1) when the parties agree on disclosure of the documents, 2) when the court orders disclosure for the purpose of an action by another court, 3) when disclosure is reasonably necessary for protecting the interests of one of the parties, and 4) when disclosure is in public interest (Indira Carr, *International Trade Law*, 3rd ed., (London: Cavendish Publishing Ltd., 2005), at 619-20). Moreover, when a legal action is taken to set aside or enforce an award, or enforce it against a third party, it may become public (Andrew Bandkura, "Use of

possible to arrange its various stages in such a way that avoid excessive expenses, particularly since arbitral awards are not subject to appeal. Usually, arbitration is an informal, quick and, more importantly, flexible mechanism for resolving commercial disputes. Although all alternative dispute resolution (ADR) mechanisms provide the parties with a consensually agreed settlement method, the advantage of arbitration over other ADR methods that are based on negotiation, such as mediation, is that it leads to binding awards. Another important feature of arbitration is that arbitral awards can be enforced at law. In other words, awards have legal effects. Enforceability of awards is particularly important with regard to international commercial disputes, because while foreign court rulings might not easily be recognised in a country, there are many international conventions that facilitate enforcement of foreign arbitral awards.

In this chapter, the issue of enforcing arbitral awards is considered. At the beginning, main features of arbitration are discussed. This paves the way for a detailed discussion on the enforcement of arbitration awards in international trade. For this purpose, first, international or multilateral conventions as well as various municipal laws on the enforcement of arbitral awards are briefly examined. Then, the grounds for refusing enforcement of awards, as provided for in the main international conventions and some domestic laws, are analysed. Finally, the possibility of judicial review of arbitral awards in the country where it has been made is considered.

This chapter provides us with a theoretical framework to examine in the following chapters the approach adopted by the Omani legal system in enforcing

Arbitration in Insurance and Banking”, *GCC Commercial Arbitration Centre Bulletin*, issue 9 (August 1998), at 3).

² For instance, it has been argued that, under the English old regime of arbitration, the cost of arbitration sometimes exceeded that of litigation (see Bandkura, at 4).

international arbitral awards. It directs us to the relevant points, and guides us where in Omani law to look for these points. This chapter indicates how important the membership of international conventions is for enforcement of awards. It also shows how various national laws affect enforcement of arbitral awards, and how they may lead to setting aside an award made at the seat of arbitration. In particular, this chapter provides us with theoretical tools to examine the mandatory rules and public policy under Omani law.

2 Arbitration: An Overview

Arbitration is regarded as the most favoured ADR method, as touched upon earlier. It is conducted in a variety of forms in different legal systems. Even within a legal system, there might be various types of arbitration. It is important to choose the form that is appropriate for the type of disputes that might arise within the context of a contract.

Arbitration can be used for settling various categories of disputes, including commercial disputes. The latter are different from employment, personal or family disputes, or disputes between states. Under Article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration of 1985:

The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: 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 co-operation; carriage of goods or passengers by air, sea, rail or road.

Arbitration can be domestic or international. In order to distinguish between domestic and international arbitration, usually two main criteria are adopted: the nature of arbitration, and the location of the business or residence of the parties. On

the basis of the first criterion, arbitration is “international”, if what is at stake is “the interests of international trade”. Some legal systems, such as the French system³ and the International Court of Arbitration of the ICC, have adopted this criterion. Under ICC rules, arbitration is international, when the contract in context of which the dispute has arisen extends beyond national borders. This happens, if, for example, two nationals of the same country make a contract to do business in another country, or if there is a contract between the subsidiary of a firm incorporated in another country and the state of that country. According to the second criterion, if the parties involved have different nationalities, or their places of residence or business are located in different countries, arbitration is considered as international. Swiss law and the European Convention on International Commercial Arbitration of 1961 have adopted this criterion for distinguishing between domestic and international arbitration.⁴ Under US law, an award is considered as being not domestic, if the parties are not US citizens, or if their “relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”⁵ Also, according to the New York court, awards rendered in or under the law of a foreign jurisdiction are considered as being not domestic.⁶

A mixed approach is adopted by the UNCITRAL Model Law on International Commercial Arbitration. Article 1(3)(a) of the Model Law reflects the second criterion, and states that an arbitration is international if the places of business of the parties to the arbitration agreement is located in different countries. Article

³ Article 1492, the French Code of Civil Procedure.

⁴ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (London: Sweet and Maxwell, 1999), at 14-18.

⁵ US Federal Arbitration Act, 9 USC, Section 202.

⁶ Robert T. Gerig and Inna Reznik, “Current Development in Enforcement of Arbitration Awards in the United States”, *Arbitration*, vol. 68, no. 2 (2002), at 121.

1(3)(b)(ii) reflects the first criterion, and provides that an arbitration is international, if ‘any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected’ is situated outside the state where the parties have their place of business. Similarly, if ‘the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country’, it is an international arbitration.⁷ To these possibilities, the Model Law adds that if the place of arbitration is outside the country in which the place of business of the parties is located, it is considered as an international arbitration.

Making a distinction between international and domestic arbitration is necessary, because it is expected that states follow a more relaxed approach with regard to the judicial review and enforcement of international arbitral awards.⁸ Moreover, in international arbitration, the award is often intended to be enforced in a country different from the seat of arbitration tribunal. This is because the parties to an arbitration agreement usually select as the place of the arbitration tribunal a third country to which none of them have a special connection, whether of business, cultural or other types. For instance, such a country is not usually their main place of business or properties. The intention is to put all the parties on an equal footing. This gives rise to another categorization: domestic and foreign awards.

A foreign award is an award that is sought to be enforced in a country other than the seat of arbitration. In such arbitration, the parties as well as the arbitrators may have the same nationality, the place of arbitration may be their own country, and applicable law may be their country’s municipal law, but since the award is sought

⁷ Article 1(3)(c), The UNCITRAL Model law on International Commercial Arbitration.

⁸ Redfern and Hunter, at 12.

to be enforced in another country, in that country it is regarded as a foreign award. The New York Convention provides a definition of foreign awards that also covers international awards. Under Article I(1) of the Convention, foreign awards are defined as those 'made in the territory of a State other than the State where the recognition and enforcement of such awards are sought', as well as awards 'not considered as domestic awards in the State where their recognition and enforcement are sought.'

An important question is who can be a party to an international arbitration. Private individuals or undertakings or state companies acting as private agents can be a party to an international arbitration agreement. It is also argued that a state when exercising 'a commercial function, either by itself or through a state entity, and enters into a business relationship with a private party,' may be a party to an international arbitration.⁹ As a matter of fact, in such situations, private parties mostly prefer international arbitration to the referral of a dispute to the court of the concerned country.¹⁰ This is because states have significant influence over their own courts. A state enjoys immunity from jurisdiction of other states. So, they cannot to be subject to the jurisdiction of a foreign court, because it might compromise their sovereignty.¹¹ Nevertheless, states can enter into contractual agreements, such as arbitration, for settling commercial disputes as being incompatible with the sovereignty of states. Entering an arbitration agreement, a state waives its jurisdictional immunity.¹² This means that not only the arbitration tribunal is authorised to decide on a dispute related to such a state, but also that a foreign

⁹ Id, at 53.

¹⁰ Id.

¹¹ Id, at 478.

¹² See J. R. Delaume, "Sovereign Immunity and Transnational Arbitration", in J. D. M. Lew (ed.), *Contemporary Problems in International Arbitration*, (Dordrecht: Martinus Nijhoff Publishers, 1987), at 315.

relevant court may be involved, considering the award for the purpose of its annulment or enforcement. The latter approach is explicitly adopted by the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. The International Centre for the Settlement of Investment Disputes and the Permanent Court of Arbitration in The Hague are two international arbitration institutions that only consider disputes in which one of the parties is a state or state entity.¹³ Under some legal systems, nonetheless, state immunity might give rise to some difficulties in enforcing an award. In order to avoid such a possibility, a letter of no objection may be obtained from the state concerned at the beginning of arbitral proceedings or when an arbitration agreement is concluded.

In general, there are two forms of arbitration: *ad hoc* and institutional. In institutional arbitration, a permanent institution, such as the International Court of Arbitration of the ICC, the International Centre for the Settlement of Investment Disputes, the Arab Centre for Arbitration, CEPINA (the Belgian Centre for Mediation and Arbitration), or the London Court of International Arbitration conducts the arbitration procedure. These institutions help the parties to agree on arbitration clauses, choose arbitrators and arbitration procedural and substantive rules, and provide administrative support.¹⁴ Since institutional arbitration is more regulated, it is more reliable. In institutional arbitration, the parties are restricted in their choice of rules and arbitrators, but in *ad hoc* arbitration, they themselves should agree upon the arbitrators and the rules and procedure of arbitration. In practice, a combination of *ad hoc* and institutional arbitration is mostly opted for by the

¹³ Redfern and Hunter, at 53-54.

¹⁴ Ronald Bernestein and Derek Wood, *et al.*, *Handbook of Arbitration Practice*, (London: Sweet and Maxwell, 1993), at 464-473.

parties.¹⁵ All forms of arbitration share some features to be discussed in the following.

2-1 Arbitration Agreement

Arbitration agreement is the legal basis of arbitration. If there is no arbitration agreement, or if it is invalid, a dispute cannot be submitted to arbitration, and even if it is submitted, the arbitral award would not be legally binding. Under most legal systems and multilateral conventions, an arbitration agreement must be written. Nevertheless, at common law, an oral arbitration agreement is also valid.¹⁶ Under Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration, an arbitration agreement should be written, but so far as the existence of an agreement is alleged by one party and not denied by another, it can be in any other form. Article 178(1) of the Swiss Federal Act of Private International Law of 1987 provides that ‘the arbitration agreement shall be valid if made in writing, by telegram, telex, telecopier or any other means of communication that establishes the terms of the agreement by a text.’ German Arbitration Law¹⁷ as well as English Arbitration Act provide a more comprehensive view on the writing requirement, with the latter stating ‘References in this Part to anything being written or in writing include its being recorded by any means.’¹⁸ The English law, however, does not

¹⁵ UNCITRAL Legal Guide on International Countertrade Transactions, adopted by UNCITRAL on 12 May 1992 and by the UN General Assembly in its Forty-Seven Session, A/RES/47/34 (9 February 1993), at 175.

¹⁶ Carr, at 615, footnote 5.

¹⁷ Section 1031, German Arbitration Law of 1986.

¹⁸ Section 5, English Arbitration Act of 1996. The English Act goes further and states ‘Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.’ In other words, the parties may consent to submit their disputes to arbitration by an oral agreement or by performance of the contract, on the condition that the terms of a reference to arbitration are in writing.

require the agreement to be signed by the parties.¹⁹ The law of some other countries, on the other hand, is less specified about the writing requirement.²⁰

A narrow interpretation of the writing requirement flies in the face of new communication technologies as well as current developments in arbitration practice, as agreements are concluded by data messages in e-commerce, or they are concluded in accordance with usage recognised by the parties, or usage of which the parties are aware or should be aware.²¹ Hence, in recent years, there has been a tendency towards a wider interpretation of the written requirement, particularly with the introduction of new tools for communication. UNCITRAL Working Group II (Arbitration and Conciliation), which was devoted to a possible revision of the UNCITRAL Model Law on International Commercial Arbitration and issues raised with the interpretation of the New York Convention,²² considered it as essential that the arbitration agreement should be in a form that is “accessible so as to be useable for subsequent reference”.²³ The Working Group reviewed Article 7, and provided a draft Article 7 that, among others, regarded data message as a form of writing. It defined data message as ‘information generated, sent, received or stored by

¹⁹ Carr, at 638.

²⁰ See, for instance, Article 1021, the Netherlands Arbitration Act of 1996

²¹ For example, when a contract was concluded orally through radio for maritime salvage, referring to a standard contract form containing an arbitration clause, such as the Lloyd’s Open Form, or a contract concluded by performance, referring to certain standard contract forms, such as documents established by the Grain and Food Trade Association (see Renaud Sorieul, “UNCITRAL’s Current Work in the Field of International Commercial Arbitration”, *Journal of International Arbitration*, vol. 22, no. 6 (2005), at 544 and 547).

²² The Working Group work began in March 2000. For more details, see Renaud Sorieul, “Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration”, *Journal of International Arbitration*, vol. 17, no. 3 (2000), at 163-84.

²³ Renaud Sorieul, “UNCITRAL’s Current Work in the Field of International Commercial Arbitration”, at 546.

electronic, optical or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.²⁴

If arbitration agreements come as a part of the main contract or with, though separate from, it, they are categorised as “arbitration clauses”. If they are made with regard to a dispute that has already been arisen, they are classified as “submission agreements”. An arbitration agreement indicates the details of an arbitration process, for instance, the kinds of disputes to be resolved, the way arbitrators are to be selected and their powers, the procedure to be followed, and the substantive law to be applied. Only people who have the legal capacity to enter into an arbitration agreement, under the contract law of a relevant country, can do so, otherwise the agreement is void.

An established principle in most legal systems is the autonomy of arbitration clauses from the main contract.²⁵ This means that if the main contract is considered as invalid, the arbitration clause can still be valid.²⁶ This is in line with the Kompetenz-Kompetenz theory according to which the arbitration tribunal may rule on its own jurisdiction.²⁷ The rationale for the autonomy of arbitration clauses is that if one of the parties disputes the validity or existence of the main contract, still the arbitration tribunal may have jurisdiction to consider the dispute. The autonomy of arbitration clause also means that even if the tribunal decides that the main contract is invalid or void, since the arbitration clause is valid, the parties may have some rights. Lack of such autonomy would mean that the invalidity of the main contract

²⁴ UNCITRAL Working Group II (Arbitration and Conciliation), 3-7 October 2005, "Settlement of commercial disputes: Preparation of a model legislative provision on written form for the arbitration agreement", U.N. Doc. A/CN.9/WG.II/WP.136.

²⁵ See, for instance, Article 16(1) UNCITRAL Model Law on International Commercial Arbitration; and Section 7, English Arbitration Act of 1996.

²⁶ Marielle Koppenol-Laforce *et al.* International Contracts: Aspects of Jurisdiction, Arbitration and Private International Law, (London: Sweet and Maxwell, 1996), at 99.

²⁷ *Id.*

brings about the invalidity of the arbitration clause. In such a case, the tribunal would not have any power to decide on the validity of the main contract, and this result would automatically be to the advantage of the party claiming the invalidity of the main contract.

2-2 Arbitrators

The parties to an arbitration agreement choose a third party, or arbitrators, to decide on their disputes. This is of paramount importance, as it is said “The choice of the persons who compose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only as good as the arbitrators”.²⁸ The parties usually choose experts who are familiar with the law and the actual or potential disputes between them. For instance, they might appoint experts in international trade, or in certain national and international laws, or even professionals, such as engineers or scientists. Arbitrators should, on the one hand, know the nature of the disputes, in order to be able to arbitrate.²⁹ On the other hand, they should know the applicable national and international law, in order to conduct arbitration and make an award that satisfies legal principles, and is enforceable.

The number of arbitrators is also important. While a sole arbitrator expedites the arbitration process, a panel of arbitrators can assure the quality of the process by bringing more expertise. A panel of arbitrators, each representing a party or having a specific expertise, is preferred. In a panel of, for instance, three arbitrators, each party might appoint one arbitrator, and the third is selected consensually, or by the

²⁸ Redfern and Hunter, at 9.

²⁹ Based on his experience in construction claims in Kuwait, Brian W. Totterdill remarks that civil engineers, not lawyers, are the best people to resolve construction disputes by ADR procedures. He argues, ‘who knows more about the causes of disputes than people with experience of causing disputes on their own projects?’ (Brian W. Totterdill, “Construction Claims: Results from Major Tribunal Findings in Kuwait”, *Arbitration*, vol. 68, no. 2 (2002), at 154).

two arbitrators or an appointing professional or legal authority.³⁰ Under some national laws, some rules with regard to the number of arbitrators and other features of a tribunal must be complied with.

Arbitrators identify the issues, as put forward in writing by a party, follow the procedure, and conduct the proceedings. They should examine the events leading up to the dispute, and assess the damage, where applicable. Arbitrators can also suggest several possible solutions to the disputants before reaching the final decision. Ultimately, they issue their award, by applying the substantive laws.

2-3 The Arbitral Process

The procedural law governing arbitral proceedings is, in principle, chosen by the parties. Taking into account the nature of their trade, the parties can choose appropriate rules that provide a quick and efficient way of dealing with the disputes that might arise. Some states, however, have mandatory or non-mandatory rules of laws for regulating arbitral proceedings. For instance, the 1996 English Arbitration Act lists mandatory provisions of the Act.³¹ Most other municipal arbitration laws do not make such a clear distinction between their mandatory provisions and otherwise. It is important that, in making an award, the mandatory rules of laws in the country where arbitration proceedings are taken place are complied with. Otherwise, it might render the award invalid in that country, and probably in any other places where it is to be enforced.³² Permanent bodies of international arbitration may also provide procedural rules for conducting arbitration, and sometimes restrict the power of the parties to choose the regulations as they wish. The UNCITRAL Model Law introduces certain rules for arbitral proceedings that are increasingly used in

³⁰ UNCITRAL Legal Guide on International Countertrade Transactions, at 178.

³¹ Schedule I, the English Arbitration Act of 1996.

³² Bernestein and Wood, *et al.*, at 446-7.

international arbitration, and seen as satisfactory in many legal systems.³³ In some *ad hoc* arbitrations, the procedural rules are left to the arbitrators to determine.

The parties also choose the language as well as the place of arbitration proceedings and the place of issuing its award. They usually choose a third country, or a country where suitable law or professional help is available, or where the law facilitates enforcement of the award. Selecting a country as the seat of arbitration is sometimes regarded as the implicit consent of the parties for applying the national law of that country on their disputes.³⁴ The seat of arbitration is legally significant to arbitration so that some legal systems, for instance, English law, do not recognise an arbitration without a seat, or an arbitration that does not have any attachment to the law of a state or territory.³⁵ On some occasions, arbitration proceedings may take place in more than one place. In such cases, establishing the seat of arbitration becomes a task undertaken by legal officials, taking into account all relevant circumstances.³⁶

2-4 The Laws of Arbitration

The parties to an international arbitration decide about the substantive law that is to govern the ruling in an arbitral process. Article 33 of the UNCITRAL Arbitration Rules of 1967 reads: ‘The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.’ The parties might choose, for

³³ UNCITRAL Legal Guide on International Countertrade Transactions, at 176.

³⁴ Mauro Rubino-Sammartano, *International Arbitration Law*, (Deventer, Boston: Kluwer Law and Taxation Publishers, 1990), at 256.

³⁵ Pierre Mayer, “The Trend towards Delocalisation in the Last 100 Years”, in Martin Hunter, Arthur Marriott, V. V. Veeder (eds.), *The Internationalization of International Arbitration*, London, Boston: Graham & Trotman/M. Nijhoff, 1995.

³⁶ Carr, at 625.

instance, the national law of any country, principles of international law or general principles of the law.³⁷

Regarding all substantive or procedural issues, the parties can express their choice or tacitly imply it, unless it is prohibited by the mandatory rules of law at the seat of arbitration.³⁸ When no explicit or implicit choice is made by the parties, the arbitrators have to choose the substantive law.

2-5 Award

The arbitral award is the final outcome of an arbitration process. It will be issued by the arbitration tribunal. Such a decision which is binding on all the parties involved is the rationale for arbitration and the end of its function. The award is recognised under most national laws, in the sense that it will have legal effects. In principle, there cannot be an appeal against an award. Most legal systems also restrict the possibility of the judicial review of arbitral awards.

In an arbitration procedure, the arbitration tribunal may make various types of decision, such as final, interim, partial, preliminary or interlocutory awards, injunctions and procedural orders. Under Article 26.7 of the London Court of International Arbitration Arbitration Rules of 1998, ‘The arbitral tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effects as any other award made by the arbitral tribunal.’ A difficulty is that there is no clear distinction between these terms, and under various national legal systems and arbitration regimes, a similar term might be used differently. Confusion may occur, particularly when enforcement of a decision not disposing of

³⁷ Redfern and Hunter, at 98-9; and Aron Broches (Chair of the Panel), “New Developments in International Arbitration”, *Contemporary International Law Issues: Opportunities at a Time of Momentous Change - Proceedings of the Second Joint Conference held in The Hague, The Netherlands, July 22-24, 1993*, at 96.

³⁸ *Id.*, at 252.

all the issues referred to arbitration is sought abroad.³⁹ Final awards are those that resolve a dispute completely. Hence, a final award that does not dispose of all the disputes between the parties or leave some of them undecided or in doubt cannot be maintained.⁴⁰ On the other hand, interim and preliminary awards settle issues that have to be resolved before the substantive dispute is considered. These include issues such as the power of the arbitrators, the arbitral procedure, the jurisdiction of the tribunal, and the substantive applicable law. Partial awards resolve some parts of a dispute.⁴¹ Interlocutory awards are those that are necessary for protecting the rights of a party before the tribunal reaches the final decision. This kind of award usually provides for interim relief or security for the recovery of final awards or protection from the possibility of dissipation of the assets of one of the parties. Interim injunctions and orders are also granted for the purpose of providing interim relief and conservatory measures. To this classification of awards should be added declaratory awards that are based on the principle of liability.⁴²

Interim measures of protection cannot be justified, unless it is proved that there would be “harm not adequately reparable by an award of damages”. It is, however, argued that this criterion excludes any measure for covering losses that might be compensated for by a final award of damages. So, it is believed that interim awards may be rendered, when repairing the harm is relatively more complicated by the award of damages. For the issuance of interim measure, there should be a “reasonable” possibility that the requesting party will succeed on the merits of the

³⁹ Klaus Reichert and Mr Justice Roderick Murphy, “Enforceability of Foreign Arbitration Decisions: *Publicis SA v. True North Communications Inc*”, *Arbitration*, vol. 64, no. 4 (2001), at 369.

⁴⁰ M. J. Mustill and SC Boyd, *Law and Practice of Commercial Arbitration in England*, 2nd ed., (London: Butterworths, 1989), at 384.

⁴¹ Some municipal laws allow interim awards of cost. Regarding a case involving such an award, see Hew R. Dundas, “Non-Party Disclosure and Witness, Enforcement of Foreign Awards and Costs: Recent Decisions in the English Courts”, *Arbitration*, vol. 71, no. 2 (2005), at 176-8.

⁴² Pierre-Yves Gunter, “Enforcing Arbitral Awards, Injunctions and Orders”, <http://www.psplaw.ch/Publications/AMBAR-1.html> (available on 10/10/02).

dispute,⁴³ and that there is a “balance of convenience” between the harm done to the requesting party in the absence of the measure and the harm done to the other party by the measure.⁴⁴ The UNCITRAL Working Group II has provided a detailed provision addressing various aspects of interim measures of protection.⁴⁵

⁴³ On the condition that determining such a possibility does not affect the discretion of the tribunal to make other decisions.

⁴⁴ Sorieul, “UNCITRAL’s Current Work in the Field of International Commercial Arbitration”, .

⁴⁵ The Working Group at its fortieth and forty second sessions adopted the following text as the revised version of draft Article 17 of the UNCITRAL Model Law on International Commercial Arbitration:

- “(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.
- “(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - “(a) Maintain or restore the status quo pending determination of the dispute;
 - “(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [, or to prejudice the arbitral process itself];
 - “(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - “(d) Preserve evidence that may be relevant and material to the resolution of the dispute.
- “(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:
 - “(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - “(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- “(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.
- “(5) The requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.
- “(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the arbitral tribunal’s own initiative, upon prior notice to the parties.
- “(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.
- “(7) (a) Unless otherwise agreed by the parties, a party may file, without notice to the other party, a request for an interim measure of protection together with an application for a preliminary order directing the other party not to frustrate the purpose of the interim measure requested.
 - “(b) The provisions of paragraphs (3), (5), (6) and (6 bis) of this article relating to interim measures also apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.
 - “(c) The arbitral tribunal may grant a preliminary order provided it considers that there is a reasonable concern that the purpose of the requested interim measure will be frustrated where prior disclosure of the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
 - “(d) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to the party against whom the preliminary order is requested of the request for the interim measure, the application for the

It is important to distinguish between final awards and other types, because various conventions deal with these awards differently, when they are to be enforced. For instance, under the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, the court at the forum country can postpone the recognition of a partial award.⁴⁶ Under the New York Convention, however, only awards that are not yet binding, irrespective of being final or not, can be denied recognition. It has been argued that ‘interim or partial awards are also enforceable under the Convention as long as they *finally* resolve a part of the dispute.’⁴⁷

Arbitral tribunals’ decisions may be labelled as awards, orders, findings and the like. Given that there is no consensus on the meaning of the terms in the legal communities, it is prudent that the rendering authorities use the label very carefully. The term “award” has legal implications that are particularly important when enforcement is sought. It has been said that the term covers final awards disposing of all claims submitted to the tribunal as well as any other decision rendered by the

preliminary order, the preliminary order, if any, and all other communications, including indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

“(e) At the same time, the arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case at the earliest practicable time. The arbitral tribunal shall decide as promptly as required under the circumstances.

“(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure of protection adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

“(g) The arbitral tribunal shall require the requesting party to provide security in connection with such preliminary order, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

“(h) Until the party against whom the preliminary order has been requested has presented its case, the requesting party shall have a continuing obligation to disclose to the arbitral tribunal all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order.” (UNCITRAL Working Group II (Arbitration), 3-7 October 2005, “Settlement of commercial disputes, Interim measures of protection”, UN Doc.A/CN.9/WG.II/WP.138.)

⁴⁶ Article 2, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

⁴⁷ Gunter.

tribunal on the issues of substance, competence or procedure, only if the tribunal labels its decision as an award.⁴⁸

2-6 Recognition and Enforcement

An arbitration tribunal, unlike a court, does not have the power to enforce its award. However, since the parties give their consent in the arbitration agreement to be bound by the tribunal's decision, the binding award issued by the tribunal is capable of being enforced legally. Therefore, if the losing party does not comply with the award, the other party can ask the court to enforce it. In most legal systems, domestic arbitration awards are usually enforced by the court, though they must go through a formal procedure. In some countries, awards are automatically regarded as court decisions, and are enforced as if they were issued by the court. There are more complications with regard to foreign arbitral awards. Nevertheless, as we see later in this chapter, judges usually do not refuse enforcing arbitration awards, save for reasons such as incompatibility with public policy or procedural irregularity in the arbitration procedure.⁴⁹ It is shown that only less than 5% of arbitral awards have been refused enforcement by courts.⁵⁰

Although parties to international business disputes usually comply with arbitral awards, some parties might not do so, or there are some companies linked to governments that are not quick enough in complying with the awards.⁵¹ In these cases, enforceability of arbitration awards is important. What makes arbitration a preferred mechanism of dispute settlement in international trade is that it is relatively

⁴⁸ Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, (The Hague, Boston: Kluwer Law International, 1999), at 737.

⁴⁹ Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, (London: Butterworths, 1998), at 213.

⁵⁰ Gunter.

⁵¹ Bockstiegel, Karl-Heinz, *Arbitration and State Enterprises – A Survey on the National and International State of Law and Practice*, (Deventer: Kluwer Law and Taxation Publishers, 1984), at 49.

easy to ask for enforcement of an arbitral award in a foreign country, whereas court rulings issued in a country are not easily enforceable in another.⁵² Although there are international treaties for enforcement of both arbitral awards and court rulings, ‘the international treaties that govern the enforcement of an arbitral award (such as the New York Convention) have much greater acceptance internationally than treaties for the reciprocal enforcement of judgments’.⁵³

There are many international or multilateral conventions as well as treaties for enforcing awards that are made in one country and are to be enforced in another. The single important convention for enforcement of awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. It is these conventions and treaties, as well as national rules, on enforcement of awards to which we turn in the next section. We will see how these multilateral or bilateral treaties, as well as some national rules, facilitate enforcement of foreign awards. Specifically, this paves the way to examine, later in the thesis, how Oman’s membership of these treaties, alongside Omani law, helps enforcement of foreign awards in the country.

The New York Convention requires not only enforcement of foreign awards, but also their recognition. Some other international conventions or municipal laws only stipulates enforcement of awards, or do not make a distinction between recognition and enforcement. Recognition usually considered as the first step before enforcement. It is the declaration of a legal position, and as such does not call for any action. Enforcement, on the other hand, entails a positive action in the form of legal sanctions, such as seizure of assets or imprisonment, to compel the debtor to

⁵² Marielle Koppenol-Laforce *et al.* at 93.

⁵³ Redfern and Hunter, at 24.

carry out its obligation under the award.⁵⁴ When there is no liability in an award, its recognition, rather than enforcement, may be requested.⁵⁵ Similarly, awards of declaratory nature, such as those on the applicable law, the jurisdiction of the tribunal and the like, merely entail recognition. Moreover, recognition of an award means that it cannot be subject to another proceeding, whether judicial or arbitral. Particularly, this may be of interest to a winning defendant who wants to protect himself against future legal actions based on similar claims.⁵⁶ In such a case, recognition of the negative effect of a *res judicata* award is sought.⁵⁷ In some cases, a request for the enforcement of an award may be postponed, for instance, because the losing party does not possess sufficient property. Thus, given that recognition is the first step before enforcement, the winning party may apply for the recognition of the award, in order to make enforcement quicker in later stages, when sufficient property is available.⁵⁸

3 International Conventions and National Rules on Enforcement of Arbitral Awards

The number and influence of conventions on enforcement of foreign arbitral awards have increased by the growth in international trade in time. The role of these conventions is to overcome the difficulties of local rules for enforcement of awards through international co-operation. Conventional codification of enforcement of awards also brings about legal certainty and predictability, which is much needed in any area of social relationships, particularly international commercial relationships.

⁵⁴ See *Id.*, at 449.

⁵⁵ Reichert and Murphy, “Enforceability of Foreign Arbitration Decisions: *Publicis SA v. True North Communications Inc*”, at 370.

⁵⁶ See Redfern and Hunter, at 449

⁵⁷ See Reichert and Murphy, “Enforceability of Foreign Arbitration Decisions: *Publicis SA v. True North Communications Inc*”, at 372, footnote 8.

⁵⁸ Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge, New York, Port Melbourne: Cambridge University Press, 2001), at 745-46.

They provide identifiable mechanisms for recognition and enforcement of awards.⁵⁹ Moreover, since conventions are by their nature reciprocal, they relieve the courts of deciding on the condition of reciprocity, which is a requirement of enforcement of foreign awards under many national legal systems.⁶⁰

The Geneva Protocol on Arbitration Clauses of 1923 was the first important convention on arbitration to be adopted internationally. Article 1 of the Protocol provides that Contracting States recognise the validity of agreements between parties who are subject to the jurisdiction of different Contracting States to refer commercial or otherwise differences to arbitration. They are also agreed to facilitate all steps in the arbitration procedure to be taken in their own territory.⁶¹ Under Article 3 of the Protocol, the Contracting States undertake to ensure the execution by its authorities of arbitral awards made in their own territory. As can be seen, the Protocol was limited to domestic enforcement of awards. Article 4 provides that tribunals of each Contracting State, when seized of a dispute regarding which an arbitration agreement covered by the Protocol does exist, must refer the disputes to arbitrators as decided under the arbitration agreement. From the very beginning, however, the limitation of the Geneva Protocol was clear, as arbitration was to be used in international trade disputes, where awards made in a country were to be enforced in another.

Hence, the next step forward was the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, which did not replace, but complemented the Geneva Protocol. The Convention's focus was enforcement of foreign awards, and, unlike the Geneva Protocol, did not limit itself to enforcement of domestic arbitral

⁵⁹ Michael Quilling, "The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: North-South Perspective", *Georgia Journal of International and Comparative Law*, vol. 11 (1981), at 642.

⁶⁰ Habib Mohd. Sharif al Mulla, "Conventions of Enforcement of Foreign Judgments in the Arab World", *Arab Law Quarterly*, vol. 14, issue 1 (Feb 1999), at 34-35.

⁶¹ Article 2, the Geneva Protocol.

awards. The Convention set requirements for recognition and enforcement of awards, as well as conditions for refusing enforcement of such awards,⁶² and listed the documents necessary for requesting enforcement of an award.⁶³ With the growth of international commerce in the post-War era, it became more and more clear that the Geneva Convention, too, did not meet the requirements of ever expanding international arbitration. Under the Convention, for recognition and enforcement of an award, not only must it have been made in the territory of a signatory state, but also the parties to the dispute must have been subject to the jurisdiction of a High Contracting Party.⁶⁴ On many occasions, however, both these conditions cannot be met, as arbitration is usually conducted in a country to whose jurisdiction none of the parties were subject. The parties prefer a third neutral country as the seat of arbitration. Hence, enforcement of foreign awards needed a more pro-enforcement and comprehensive regulatory regime.

This was achieved by coming to force of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which replaced previous conventions on enforcement and recognition of awards. The New York Convention is one step beyond the Geneva Convention, in the sense that it applies to arbitral awards irrespective of where they are made. Under Article I(1), '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 not considered as domestic awards in the State where their recognition and enforcement are sought.' The

⁶² Articles 2 and 3, the Geneva Convention.

⁶³ Article 4, the Geneva Convention.

⁶⁴ Article 1, the Geneva Convention.

emphasis on awards that are made in the territory a state, but not considered as domestic is important, because some awards, though issued in the territory of the enforcing state, still might be considered as international awards. These awards might have been issued on disputes between nationals of foreign countries in a Contracting State. For instance, in *Bergesen v. Joseph Muller Corporation*, where an award made on a dispute between a Norwegian and a Swiss national, the US District Court for the Southern District of New York decided to apply the Convention in order to recognise and enforce the award. On the other hand, under US law, the Convention does not apply to awards made in disputes between citizens of the United States.⁶⁵

Under Article I(3) of the Convention, Contracting States are allowed to limit the scope of the Convention ‘to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.’ However, since the term “commercial” is to be defined under the statutory law of each country, it might give rise to some difficulties, as it can be defined narrowly or broadly. For example, China, adopting the commercial reservation, defines “commercial” in a way that excludes ‘all important commercial relationship in an arbitration between a foreign investor and the host country.’⁶⁶ Under Article I(3), the Contracting States have also the choice of declaring that the Convention will be applied to the recognition and enforcement of awards made only in the territory of another Contracting State. Many countries have opted for the reservation. The UK has subscribed to the second, but not the first,

⁶⁵ Monroe Leigh, “Decision: Arbitration – Enforcement of Arbitral Awards – New York Convention”, *The American Journal of International Law*, vol. 77, no. 2. (April 1983).

⁶⁶ Lucy F. Reed, “Experience of Practical Problems of Enforcement”, in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (The Hague: Kluwer Law International, 1999), at 564.

reservation.⁶⁷ Because of the reciprocity reservation, it is said that ‘when seeking a suitable state in which to hold an international commercial arbitration, it is advisable to select a state that *has* adopted the New York Convention, so as to improve the chance of securing recognition and enforcement of the award in other Convention countries.’⁶⁸ Although 142 countries are parties to the New York Convention, some States, such as Yemen, Iraq and Libya have not joined it.⁶⁹

Article II of the Convention provides that written agreements for referring differences to arbitration shall be recognised by the Contracting States, and that their national courts, ‘when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.’ More importantly, under Article III, ‘each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon’ without imposing ‘substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.’ As will be seen, the enforcement procedure for foreign awards, under the New York Convention, is a mixed method, according to which rules of both the rendering and enforcing states apply to the enforcement of a foreign award. The Convention also provides for its own requirements for the enforcement of a foreign award, such as supplying the original

⁶⁷ Carr, at 637.

⁶⁸ Redfern and Hunter, at 456.

⁶⁹ “United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws”, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, (available on 17/8/2006).

award and agreement or their certified copy, or their certified translations, if necessary.⁷⁰

The New York Convention is considered as the most important and successful convention in international commercial law.⁷¹ It has been applied in over 700 court decisions in which the national courts have generally supported the Convention to a significant extent.⁷² Nevertheless, it was still felt that international commercial arbitration practice needed more back-up in the form of specialist as well as regional multilateral treaties. Specialist conventions may address particular requirements of trade relationships in a specific area of commerce, while regional conventions provide more incentive and confidence for encouraging countries to join.

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as a specialist convention addressing foreign investment disputes, was adopted in 1965. More than 143 countries have joined the Convention.⁷³ The Washington Convention provides for international methods of settlement and, particularly, international conciliation or arbitration. These facilities are made available through the International Centre for the Settlement of Investment Disputes (ICSID) to which Contracting States and nationals of Contracting States may submit their investment disputes if they so desire. It is, however, the task of Conciliation Commissions and Arbitral Tribunals constituted under the Convention to conduct conciliation and arbitration. It is a feature of the ICSID that it considers

⁷⁰ Article IV, the New York Convention. This is while, regarding enforcement procedure of *foreign court judgments*, the general rule adopted by most conventions is that the law of the state in which enforcement is sought applies (Sharif al Mulla, "Conventions of Enforcement of Foreign Judgments in the Arab World", at 51).

⁷¹ Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, UN Doc. A/40/17 annex 1, para. 47.

⁷² Gunter.

⁷³ At present, 155 States have signed the ICSID Convention. However, 143 States have deposited their instruments of ratification, acceptance or approval of the Convention to become ICSID Contracting States. See "List of Contracting States", <http://www.worldbank.org/icsid/constate/c-states-en.htm>, (available on 11/01/2008).

only disputes to which a State or State entity is a party. Under the Preamble of the Convention, ‘mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with’ More importantly, Contracting States must recognise and enforce arbitral awards made by the ICSID, as if they were final judgments of their national courts.⁷⁴ Because the scope of the Convention is limited to investment disputes, it is not examined in this theoretical chapter. Such a task, to some extent, will be undertaken in chapter six .

The first regional convention, the European Convention on International Commercial Arbitration of 1961, was adopted to facilitate arbitration in commercial relations within Europe and particularly between the western and eastern European states. It is not restricted to the recognition and enforcement of arbitral awards, and covers other dimensions of arbitration. Article I(1)(a) provides, ‘This Convention shall apply to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States.’ The Convention provides for grounds for refusing enforcement of awards as well as for setting them aside. Under Article IX, the Convention restricts the setting aside of awards, and states that denial of enforcement on basis of setting aside can only be grounded on reasons for setting aside mentioned in the Convention.⁷⁵

⁷⁴ Article 54(1), the Washington Convention.

⁷⁵ Redfern and Hunter, at 475.

The Panama Inter-American Convention on International Commercial Arbitration was adopted by the Organization of American States in 1975. Twelve American countries, including the US, have joined the Convention. Under Article 4 of the Convention, ‘An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.’ Although the Convention follows the regime of enforcement set by the New York Convention, unlike the latter, it does not distinguish between foreign and domestic awards.

The Amman Convention on Commercial Arbitration of 1987 was agreed by the Arab Ministers of Justice, and signed by thirteen Arab states in 1987. After its ratification by eight states, namely Jordan, Iraq, Lebanon, Libya, Palestine, Sudan, Tunisia and Yemen, the Convention came into force in 25 June 1992. Until 25 June 1998, however, no other State ratified or acceded to the Convention. The preamble of the Convention refers to ‘the need to conceive unified Arab rules on commercial arbitrations which would find their place amongst the international and regional arbitration rules.’ Under Article 4 of the Convention, the Arab Centre for Commercial Arbitration (with headquarters in Rabat, Morocco) will be established for the settlement of commercial disputes particularly between Arab entities. Nevertheless, the Centre has not been established yet, and the Convention has not yet become operative. Consequently, no commercial dispute has been referred to arbitration under the Convention.

There are many other regional conventions as well as bilateral or multilateral treaties between countries for the recognition and enforcement of awards. For instance in Latin America, there exist the Las Lenas Protocol of Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR of 1992 as well as the Inter-American Montevideo Convention on the Recognition and Enforcement of Court Decisions and Arbitration Awards of 1979 . Regarding bilateral treaties, Switzerland is a good example, which has signed such treaties with Spain on 19 November 1896, (former) Czechoslovakia on 21 December 1926, Germany on 2 November 1929, Italy on 3 January 1933, Sweden on 15 January 1936, Belgium on 29 April 1959, Austria on 16 December 1960 and Liechtenstein on 25 April 1968.⁷⁶ Although by the emergence of widely accepted multilateral conventions, the bilateral treaties on enforcement of awards have lost their significance, some of them are considered as important, since they provide a more favourable regime on enforcement than multilateral convention do.⁷⁷ It is noticeable that a country might be a party to several conventions or treaties for facilitating enforcement of foreign awards. Various international conventions or multilateral and bilateral treaties facilitating enforcement of arbitral awards give rise to different legal effects. Some of these conventions provide for more favourable regimes of enforcement of awards than others do. As an example, under the European Convention of 1961, an award vacated in the country where it has been made can be refused enforcement in its Contracting States, only if it is vacated for restricted reasons mentioned in Article IX, while the New York Convention allows the refusal of the enforcement of a vacated award whatever the reason.

⁷⁶ Gunter.

⁷⁷ A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, (The Hague: Kluwer, 1981), at 108.

Although various conventions or treaties might have different legal effects, they are not necessarily incompatible. As a matter of fact, they are mainly recognised by each other. For instance, Article X(7) of the European Convention reads: ‘The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by Contracting States.’ Article VII(1) of the New York Convention provides that:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Hence, it has been said that the New York Convention permits “norm shopping”, on the basis of the “most favourable regime” principle.⁷⁸ It is the party seeking enforcement, rather than the losing party, that can enjoy such possibility.⁷⁹ Moreover, norm shopping does not involve combining various regimes of enforcement.⁸⁰ Going for a regime of enforcement that is deemed to be the more favourable one entails choosing it as a package. For instance, if the Panama Convention or US municipal law can be chosen, all of either’s provisions on enforcement of foreign awards apply to the enforcement of the award; it would not be possible to be selective in choosing more favourable provisions of one regime and those of the other. Combining two regimes may be possible, only if they complement each other, as the European Convention considers itself as complementing the New York Convention.

⁷⁸ Jan Paulsson, “Towards Minimum Standards of Enforcement: Feasibility of a Model Law”, in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (The Hague: Kluwer Law International, 1999) at 579.

⁷⁹ D. W. Rivkin, “The Enforcement of Awards Nullified in the Country of Origin: The American Experience”, 14th ICCA Congress, Paris, May 1998, at 10.

⁸⁰ van den Berg, *The New York Arbitration Convention of 1958*, at 85-86.

The possibility of choosing the most favourable regime of enforcement, however, flies in the face of the uniformity in enforcement regimes that is one of the aims of the New York Convention. Nevertheless, it can be argued that the aim of uniformity is outweighed by a more important one, that is, facilitation of enforcement of foreign and international awards.

National Rules

Alongside multilateral conventions and bilateral treaties, national laws play an indispensable role in regulating arbitration and, more importantly, recognition and enforcement of arbitral awards. In particular, domestic rules of the particular state where an award is sought to be enforced should be considered. States usually have some domestic arrangements for the enforcement of awards. Such rules may sometimes facilitate enforcement of foreign awards, while on some occasions, they might work against it. For instance, under Japanese law, an arbitration award is recognised without the need for a court decision. It, nevertheless, needs a court decision in order to be enforced.⁸¹ National rules are important not only because they themselves regulate the arbitration process and particularly enforcement of arbitral awards, but also because in some countries, they are the instruments of implementing international conventions. This has led to the diversification of regimes for enforcing awards even among Contracting States to the New York Convention. While in some countries, such as Switzerland, the New York Convention is directly applicable, in some others, it needs to be implemented through national legislation. For instance, in the United States, the Convention is transposed by the US Federal Arbitration Act, 9 USC. In England and Wales, the

⁸¹ See Yasuhei Taniguchi, "Enforcement in Action: Theoretical and Practical Problems", in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (The Hague: Kluwer Law International, 1999), at 591.

Convention is implemented by Part III (Sections 100-104) of the 1996 Arbitration Act. In the English legal system, written awards covered by the New York Convention can be enforced as if they were court decisions.⁸² In some countries, for recognising and enforcing an award, it is necessary to obtain an *exequatur*, or a judgement by the national court that a decision issued by a foreign tribunal can be executed in the forum state.⁸³ Hence, these domestic rules should be taken into account, when seeking the enforcement of an international arbitration award. What makes national laws and jurisprudences more important is the fact that there is no authorised international body to interpret the New York Convention. Therefore, each national legal system, although it might be influenced by interpretations made in other legal systems, interprets the Convention for itself.⁸⁴

Among provisions of national law, mandatory rules, either procedural or substantive, are of paramount importance. It is said that the observance of the mandatory rules of law at the place of enforcement will strengthen the effectiveness of an arbitral award.⁸⁵ These rules apply to an international contract, and non-compliance with them may lead to the denial of the enforcement of an award. Mandatory rules of law sometimes manifest specific interests or policies of a state, mainly in protecting public interests.⁸⁶ These policies may give rise to mandatory rules in competition regulations, currency exchange, export and import regulations,

⁸² See Leo D'Arcy, *et al*, *Schmitthoff's Export Trade: the Law and Practice of International Trade*, 3rd ed., (London: Sweet & Maxwell, 2000), at 504-505.

⁸³ See Taniguchi, at 591. For instance, both the former and new arbitration laws of Indonesia require *exequatur* in order to enforce a foreign arbitration award (Karen Mills, "Judicial Attitude to Enforcement of Arbitral Awards and other Judicial Involvement in Arbitration in Indonesia", *Arbitration*, vol. 68, no. 2 (2002), at 107-8).

⁸⁴ See Taniguchi, at 589.

⁸⁵ See Nathalie Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", *The American Journal of International Arbitration*, vol. 7, (1996), at 9.

⁸⁶ Voser, at 20.

as well as the imposition of embargo on foreign parties.⁸⁷ Regulations on the exclusive jurisdiction of national courts, exploitation of natural wealth, immovable properties, labour relations and commercial agencies may also be among such mandatory rules. States might require the compliance of international awards with these mandatory rules, though they merely manifest their specific interests and even might not be relevant in international arbitration. On the other hand, some mandatory rules go beyond protecting the interests of a particular country, and are respected by all states. These mandatory rules are enacted in order to protect the environment, the consumer, public safety and health. These purposes give rise to principles acceptable to all states. Human rights, such as the right to property and prohibition of depriving people of their properties without court permission as well as basic principles of the judicial process, good faith, the prohibition of the misuse of rights, and even ban on terrorism and drug trade are mandatory rules accepted by all nations.⁸⁸ To this list can be added: the prevention of illegal activities such arms trafficking, money laundering and counterfeit currency. The difficulty is that although these transnational mandatory rules might provide some international harmonisation, they can be interpreted differently by different legal systems. It should also be mentioned that sometimes supernational authorities may issue mandatory rules. Sanctions imposed by the UN Security Council on some countries are examples of mandatory rules authorised by a supernational entity.

The discussion about the mandatory rules can also be put in terms of public policy, since these rules usually reflect public policy measures in a country. As will be seen later, the incompatibility of an award with public policy may lead to the

⁸⁷ For instance, Jonathan Hill, *The Law Relating to International Commercial Disputes*, (London: Lloyd's of London Press LTD, 1994), at 491.

⁸⁸ Voser, at 8 and 17.

refusal of enforcement or even vacation of the award. Public policy is concerned with public goods that presumably override the interests of private individuals. It intends, in general, to protect the fundamental core of local legislations, laws and the highest morals and principles of the society,⁸⁹ that is, the basic notions of morality and justice. The national court of India defined public policy as concerning ‘(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.’⁹⁰ Under US law, it is contrary to public policy to breach safety regulations, commit sexual harassment frequently, and commit medical negligence persistently.⁹¹ Under English law, if the face of an award points towards or even involves committing a crime or a tort or a breach of law, it would be considered as being contrary to public policy.⁹² Also, acts such as terrorism, drug trafficking, prostitution, paedophilia, corruption and fraud in international business, or whatever is contrary to fundamental principle of justice and morality are regarded as against public policy.⁹³ In *Parsons & Whittemore Overseas Co. Inc. v. Societe General de l’Industrie du Papier (RAKTA)*, the US Court held that an award is against public policy, if its enforcement would breach most basic notions of morality and justice of the forum State.⁹⁴ Treaty obligations of a country are also regarded as part of its public policy.

As with the mandatory rules of law, a distinction should be made between domestic and international public policy. The latter includes requirements such as

⁸⁹ Sharif al Mulla, “Conventions of Enforcement of Foreign Judgments in the Arab World”, at 39.

⁹⁰ Redfern and Hunter, at 473.

⁹¹ David Glanstein, “A Hail Mary Pass: Public Policy Review of Arbitration Awards”, *Ohio State Journal on Dispute Resolution*, vol. 16, (2001), at 297-334.

⁹² A. G. Tweeddale, “Enforcing Arbitration Awards Contrary to Public Policy in England”, *The International Construction Law Review*, vol. 17, (2000), at 160.

⁹³ *Id.*, at 166.

⁹⁴ *Parsons & Whittemore Overseas Co. Inc. v. Societe General de l’Industrie du Papier (RAKTA)*, 508 F 2d 969 (2d Cir. 1974).

respecting diplomatic immunity⁹⁵ and not expropriating foreign-owned property, without just, prompt and adequate compensation.⁹⁶ In considering enforcement or even judicial review of foreign or international awards, more weight should be accorded to international than to domestic public policy. A problem with public policy, in general, is that it lacks a clear definition. Each state might even delimit the scope of public policy measures differently.⁹⁷ Therefore, it has been relatively easy to exploit or abuse the concept of public policy in order to protect the interests of nationals of the forum country.⁹⁸ Consequently, courts of many countries tend to interpret public policy narrowly.⁹⁹ As an example, under English law, it is recommended that the public policy grounds be applied narrowly.¹⁰⁰

Divergence among municipal laws of various countries has appeared as an impediment to facilitation of international arbitration and, particularly, enforcement of international or foreign awards. Thus, there have been some attempts at harmonising such laws. Chief among such attempts was the adoption of the UNCITRAL Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations General Assembly in 1985. The latter recommended ‘that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs

⁹⁵ See Section 4(3)(c), the English law Foreign Judgments (Reciprocal Enforcement) Act of 1933.

⁹⁶ Henry H. Steiner and Deltev F. Vagts, *Transnational Legal Problems: Materials and Text*, 3rd ed. (New York: Foundation Press, 1986), at 479.

⁹⁷ Tweeddale, at 159-160.

⁹⁸ For instance, Lucy Reed claims that Turkish Courts, in some cases, unjustifiably have taken advantage of the issue of public policy to deny enforcement of foreign arbitral awards that were to the disadvantage of Turkish parties (Reed, at 566).

⁹⁹ Redfern and Hunter, at 473-474.

¹⁰⁰ Hill, at 541.

of international commercial arbitration practice'.¹⁰¹ Improvement of national laws has been another purpose of introducing the Model Law, which covers all stages of the arbitral process. Although the UNCITRAL Model Law as such does not have legal force anywhere, many states have adopted it in order to formulate their own national laws of international commercial arbitration.¹⁰²

Provisions dealing with the recognition and enforcement of awards are included in Chapter VIII of the Model Law on International Commercial Arbitration. Following the New York Convention, the Model Law mainly requires that the same rules be applied to awards rendered in international commercial arbitration, whether made in the country of enforcement or abroad. Under Article 35(1), '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.' The intention is to reduce the importance of the place of arbitration in international commercial disputes, since it is usually chosen for reasons of convenience of the parties. Hence, the reciprocity reservation, as seen in the Geneva Convention and the New York Convention, is not included as a condition for the recognition and enforcement of awards under the Model Law.¹⁰³ Despite the aim of overcoming disparity among national law provisions on international arbitration, the Model Law does not establish procedural details of the recognition and enforcement of such

¹⁰¹ Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, para. 1.

¹⁰² See, for instance, K. P. Berger, *International economic arbitration*, (Deventer: Kluwer law and Taxation Publication, 1993), at 1-6; and Pieter Sanders, "Unity and Diversity in the Adoption of the Model Law", *Arbitration International*, vol. 11, no. 1 (1995), at 5-38. In the case of Russia, see Alexander S. Komarov, "Enforcement Experience in the Russian Federation", Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (The Hague: Kluwer Law International, 1999), at 584.

¹⁰³ Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, paras. 45-46 & 48.

awards, 'since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice [in every country].'¹⁰⁴

4 Refusing Enforcement of Arbitral Awards

Probably, the most important issue in arbitration is enforcement of arbitral awards, particularly international and foreign ones. Hence, a crucial role in arbitration practice is played by the courts in the enforcing country, at the point of enforcement. The court in the country where the recognition and enforcement of an award is sought does not usually decide on the merit of an arbitral award on the basis of law or fact.¹⁰⁵ Nevertheless, all legal systems as well as international or regional conventions stipulate the possibility of denying the enforcement of an arbitral award. They usually set out grounds for refusing the recognition and enforcement of awards. These grounds have been proved, however, to be controversial and subject to abuse. It has been the purpose of international conventions as well as the Model Law to provide for a uniform regime of enforcement less susceptible to misinterpretation and accepted by as many countries as possible.

In order to examine grounds for refusing enforcement of awards, the most relevant legal instrument is the New York Convention. Most other international or regional conventions as well as national laws have followed the same pattern provided by the New York Convention. For instance, grounds for the refusal of recognition of arbitral awards provided under the UNCITRAL Model Law on International Commercial Arbitration¹⁰⁶ are similar to those stipulated under the

¹⁰⁴ Id., para. 49.

¹⁰⁵ Redfern and Hunter, at 464.

¹⁰⁶ Article 36, the UNCITRAL Model Law on International Commercial Arbitration.

New York Convention. The same can be said about the Panama Inter-American Convention.¹⁰⁷

Under Article V(1) of the New York Convention, ‘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’ certain grounds, mentioned in Articles V(1)(a) to V(1)(e), apply to the case. The wording of the Article shows that the onus is on the party opposing the recognition or enforcement of an award to prove that one or more grounds apply to the case. Article V(2) provides that ‘Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that’ grounds specified in Articles V(2)(a) and V(2)(b) apply to the case. This indicates that the burden of proof is on the court to prove that an award is unenforceable due to the grounds mentioned under the latter articles. The important point is that the party seeking the enforcement of an award only needs to provide the court with the arbitration agreement and the award, and does not need to prove that the award is enforceable. Moreover, the wording of the above articles and using the term “may” shows that the competent authority is not obliged to refuse the recognition and enforcement of the award, even if there are grounds for doing so. In other words, the court has the discretion to enforce an award, though one or more grounds apply to it. This is where the court considers that the violation is merely of technical, rather than substantial, nature.¹⁰⁸ Probably, it is because of these reasons that the New York Convention is described as having a “pro-enforcement bias”.¹⁰⁹ The Convention

¹⁰⁷ Redfern and Hunter, at 476-477.

¹⁰⁸ Carr, at 638.

¹⁰⁹ Redfern and Hunter, at 472.

expressly restricts grounds for non-enforcement of an award to those specified in Article V. Thus, courts of the enforcing country cannot invoke other ground, including those with a substantive nature, for refusing enforcement of an award covered by the Convention. In the following, we turn to the grounds for denying the recognition and enforcement of an award.

Under Article V(1)(a) of the New York Convention, an arbitral award may be refused enforcement, if ‘The parties to the agreement referred to in article II [that is, the arbitration agreement] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.’ A similar ground is mentioned under Article 36(1)(a)(i) of the Model Law, and Article 5(1)(a) of the Panama Convention. It is important to notice that, under the above articles, it is the applicable law that determines the conditions of the incapacity of the parties or the invalidity of the arbitration agreement. In the absence of provisions with this regard in the applicable law, the national law of the seat of arbitration determines such conditions. A difficulty might arise as to sometimes the applicable law may deliberately be silent about certain conditions leading to the incapacity of a party or invalidity of an arbitration agreement. In such cases, relying on the law at the seat of arbitration would be untenable.

The incapacity of a party was the ground for refusing enforcement of awards issued by the International Chamber of Commerce, in *Fougerolle SA (France) v. Ministry of Defence of the Syrian Arab Republic*. The Administrative Tribunal of Damascus held that the Syrian party did not have the capacity to enter into an arbitration agreement with the French party. According to the Tribunal, ‘the preliminary advice on the referral of the dispute to arbitration ... must be given by

the competent Committee of the [Syrian] Council of the State.’¹¹⁰ The claim on the invalidity of the arbitration agreement was raised in *Bobbie Brooks Inc. (USA) v. Lanificio Walter Banci s.a.a (Italy)*, though it was rejected by the court.¹¹¹

Article V(1)(b) of the Convention provides that a court may refuse recognition and enforcement of an award, if ‘The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.’ An identical ground is stated under Article 36(1)(ii) of the Model Law and Article 5(1)(b) of the Panama Convention. The purpose of setting this condition is to guarantee the fairness and impartiality of an arbitration process, in the sense that both parties to an arbitration agreement must be given notice that the arbitration tribunal is formed and that at which stage the arbitration proceedings are. More importantly, the parties must be treated on an equal standing, and have the opportunity to know the other party's claims and defences and their grounds, to put forward their own claims or defences,¹¹² to be represented or accompanied by a lawyer. The award made by the Iran-United States Claims Tribunal in *Iran Aircraft Ind. v. Avco Corp*, was denied enforcement by the US Court, on the basis of this ground. In the arbitration proceedings, the parties were told that it was not necessary to present detailed invoices to the tribunal, but then the American party unduly lost its claim because it had not produced detailed invoices.¹¹³ Unfairness of arbitration process is a serious claim that must be given enough notice. A grave violation of due process may even be regarded as a violation of public policy. Nevertheless, it may provide a losing

¹¹⁰ International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, XV (1990), (Kluwer: London), at 515.

¹¹¹ International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, IV (1979), at 289.

¹¹² The *audit et alteram partem* principle.

¹¹³ 980 F2d 141(2nd Cir. 1992).

party with an opportunity for avoiding the enforcement of the award. Hence, international treaties or national laws should make circumstances leading to unfairness clear and objective, as done by the drafters of the New York Convention.

Article V(1)(c) of the New York Convention states that an award can be denied enforcement, in case 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

A similar ground is mentioned under Article 36(1)(a)(iii) of the Model Law and Article 5(1)(c) of the Panama Convention, which provides that the execution of an award may be refused if ‘the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration.’ Hence, a court may refuse recognition of an award on the ground that the arbitral tribunal has not had the jurisdiction to resolve the dispute, or a part of it. Examination of the jurisdiction of the tribunal should not, however, be carried out so broadly as to leading to a substantive review of the award.¹¹⁴

Under Article V(1)(d) of the New York Convention, an award can be refused recognition and enforcement, if ‘The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.’ This ground for the non-enforcement of awards is also provided under Article 36(1)(a)(iv) of the Model Law and Article 5(1)(d) of the Panama Convention. Hence, a violation of the arbitration agreement in the

¹¹⁴ van den Berg, *The New York Arbitration Convention*, at 312-13.

constitution of the tribunal or the procedure may trigger the non-enforcement of an award. As can be seen, under the New York Convention and some recently modified municipal laws, such as the French Code of Civil Procedure, the parties' agreement prevails over the law at the seat of arbitration. It can be argued that the local law of the place of arbitration plays a complementary role, under the New York Convention, and does not replace the parties' agreement. If the arbitration agreement is silent on these issues, then the law of the country where arbitration has taken place applies to the issues of arbitration tribunal and procedure; and hence its non-observance may lead to the non-enforcement of the award. It should be added that since there is much difference between various legal systems about these issues, it is important to pay attention to the national law at the seat of arbitration. Despite the prevalence of the parties' agreement, an agreement contrary to the mandatory rules at the seat of arbitration, particularly those on due process, may risk non-enforcement or nullification of the award, when its vacation is considered by the court at the place of arbitration.

In *Rhone Mediterranee Comagnia di Assicurazioni e Riassicuazioni v. Lauro*, it was said that since under the law of Italy, the seat of arbitration, the number of arbitrators must be odd, but in the relevant arbitration agreement the number was two, the consequent award must not be recognised, under Article V(1)(d). However, the US Court of Appeal for the Third Circuit held that it was at the Court's discretion to refuse enforcement of an award, under the New York Convention. It also stated that Italian law generally favoured the enforcement of awards and the issue of

number of arbitrators was at the best of procedural nature. Hence, the request for the non-enforcement of the award was rejected.¹¹⁵

Article V(1)(e) of the New York Convention provides that a court may not recognise an award, if

The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

An identical ground is mentioned under Article 36(1)(a)(v) of the Model Law and Article 5(1)(e) of the Panama Convention. This shows that binding awards, whether final or interim, must be recognised. It has been argued that an award should be considered as binding, ‘unless it is proved that in the country of the seat it would be treated as non-existent, in the sense that it would be ignored in all judicial proceedings, without the need for a judgment setting it aside.’¹¹⁶ In other words, if normal ways of appeal are no longer open to the losing party, the award is binding. Most commentators of the New York Convention do not consider the possibility of challenging the award at the seat of arbitration as a normal way of appeal, and consequently do not regard it as a ground for denying the enforcement of the award.¹¹⁷ With regard to interlocutory awards, which provide an interim relief, Markus Wirth argues that, under the Convention, they can be enforced if two criteria are satisfied. First, ‘the decision must be final in the sense that it cannot be changed by the arbitrators in the further course of the arbitration until the final decision on the merits’; and second, ‘the measure must be one which the arbitrators have been authorized to order by the parties' agreement in the arbitration clause either expressly

¹¹⁵ Monroe Leigh, “Decision: Arbitration – Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Choice of Law – Procedural defect in arbitration clause insufficient to bar enforcement of clause”, *The American Journal International Law*, vol. 78, no. 1 (January 1984).

¹¹⁶ Carr, at 640.

¹¹⁷ van den Berg, *The New York Arbitration Convention*, at 342.

or by reference to a specific arbitration law'.¹¹⁸ If an interim relief is issued in the form of an order rather than an award, there is a disagreement among scholars as to its enforceability. Gunter argues that 'if the interlocutory award or order can be changed by the arbitrator in the course of the procedure it does not qualify as an "award" under the Convention. Indeed, it could not be considered as *binding* under Article V(1)(e) of the Convention since it does not *finally* resolve an issue.'¹¹⁹ In *Publicis Communications & Publicis SA v. True North Communications Inc.*,¹²⁰ the US Federal Court of Appeals for the Seventh Circuit held that the tribunal's order requiring Publicis to furnish True North with the relevant tax records was enforceable, under the New York Convention, despite lacking the label "award". This was because the content of the order determined finality the issue of tax records, though other issues remained to be addressed by the arbitrators. Nevertheless, the court ruling was criticised for doing a disservice to the Convention.¹²¹

Although Article V(1)(e) of the New York Convention allows the court not to recognise an award set aside at the seat of arbitration, there are some cases where an award set aside at the seat of arbitration was enforced in the forum country, because of the discretion granted to the latter court under the New York Convention. For instance, in *Hilmarton Ltd. v. Omnium de traitement et de valorisation*, the French

¹¹⁸ Gunter.

¹¹⁹ Id.

¹²⁰ *Publicis Communications & Publicis SA v. True North Communications Inc.*, 203 F. 3d 725 (7th Cir. 2000).

¹²¹ M. J. Goldstein, "Interpreting the New York Convention: When Should an Interlocutory Arbitral

'Order' be treated as an 'Award'?", *Bulletin Swiss Arbitration Association*, vol. 4 (2000), at 830.

Court recognised an award set aside in Switzerland.¹²² The French legislator has gone as far as omitting setting aside as a ground for non-enforcement of an award, in the 1981 Amendment of the French Code of Procedure. In the US, in *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*, the Federal Court enforced awards set aside in Egypt.¹²³

With regard to such few cases and countries, it may be questioned that a set aside award cannot have an effect outside the country of origin that it lacks inside the country. In response, it can be argued that those legal systems that permit enforcement of a foreign award set aside at the country of origin regards the contractual feature of arbitration as prevailing over its judicial feature. Therefore, an award made through a contractually established procedure of arbitration is considered as still enforceable, although it is vacated at the seat of arbitration. A decision as to vacating the award is a judicial decision legitimised by the sovereignty of the state at the seat of arbitration, but such sovereignty and the judicial decision based on that is not what the court in the enforcing country in a private case is concerned with. According to this theory, international arbitral awards are not subject to any particular national legal system, but are of international nature. Hence, despite being vacated by the court at the seat of arbitration, they may still be valid.¹²⁴ Such a theory, while requiring enforcement of foreign arbitral awards, does not entail recognition and enforcement of foreign judgements. It should be added that countries and authorities that allow enforcement of vacated awards do not regard every set aside award as enforceable. They may employ a municipal or international

¹²² *Hilmarton Ltd. v. Omnium de traitement et de valorisation (OTV)* *Revue de l'arbitrage* 1994, 327, English excerpts in International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, XX (1995), at 663.

¹²³ *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*, 939 F Supp. 907, at 909 (D.D.C. 1996).

¹²⁴ See Jan Paulsson, "The Case for Disregarding LSA (Local Standards Annulments), under the New York Convention", *American Review of International Arbitration*, vol. 7 (1996), at 105-6.

rule to distinguish between vacated awards that can be enforced and those that cannot. For instance, in *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*, the US Federal Court enforced the award, since, unlike the Egyptian law, the US Federal law of arbitration did not consider a proper implementation of the applicable law as a ground for vacation of an award. The court did so, drawing upon Article VII of the New York Convention on the more favourable regime of enforcement.

In general, it can be argued that allowing enforcement of a vacated award may have inappropriate consequences such as conflict with a *res judicata* decision of a foreign court, and disrespect for the rights as well as the agreement of the parties to have judicial control at the seat of arbitration. It gives the vacated award, rather than the decision of the court to annul it, *res judicata* status, blocking any new proceeding, whether litigation or arbitration, on the issues in question. In such circumstances, the winning party to arbitration, despite the vacation of the award, may request its enforcement in whatever country he wishes, but the losing party who succeeded in challenging the award is in an uncertain position in which the award can be enforced at any time. He may not even be able to release his properties attached for the purpose of future enforcement. This may endanger confidence in arbitration in the international arena.

On the other hand, a problem with the New York Convention is that it is silent about the grounds for vacating an award, and leaves to the municipal laws of the place of arbitration. Different grounds may be invoked in different countries for setting aside an award; hence, an award may be set aside in a country, whereas a similar award is approved in another. This, in turn, means that the first award can be enforced, under the New York Convention, but not the second one. In order to avoid such discrepancy, Article IX(2) of the European Convention limits the application of

Article V(1)(e) of the New York Convention ‘solely to the cases of setting aside’ set out under the European Convention. This means that parties to both the New York and European Conventions, are only allowed denying enforcement of awards set aside at the seat of arbitration, if the ground for the setting aside of the award is one of those mentioned in the European Convention. These grounds are identical to the grounds for refusing the enforcement of an award under the New York Convention.

It may be asked whether an award can be refused enforcement, if a decision on the vacation of the award is pending at the seat of arbitration. The case law of various countries points to a negative answer to the above question. The relevant courts held that requesting vacation of an award does not alter the legal status of arbitral awards as binding, final and no subject to appeal. The need for the approval of the award by the court at the seat of arbitration amounts to dual enforcement, a difficulty that the New York Convention is set to overcome.¹²⁵ Nevertheless, under Article VI of the New York Convention, the enforcing court may adjourn the decision on the enforcement of the award, if it considers it proper, when an application is made for the setting aside or suspension of the award before a competent authority. Similarly, under the Washington Convention, when revision or annulment of an award is requested, the Tribunal or the *ad hoc* Committee formed by the ICSID Chairman may stay of enforcement of the award. It must do so provisionally, if a party request the stay of enforcement.¹²⁶ The intention of adjourning the decision on enforcement is to avoid enforcement of an award which later will be set aside in the country of origin. The difficulty is that neither the New

¹²⁵ For instance, see *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, Judgment of July 12, 1984, President of the District Court of Amsterdam, 24 *International Legal Materials (ILM)*, 1985, at 1040-1044; International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, X (1985), at 487.

¹²⁶ Articles 51(4) and 52(5), the Washington Convention.

York Convention nor the Washington Convention does stipulate which circumstances may be considered as proper for the stay of enforcement of the award. Lack of such a clear criteria has led to conflicting decisions by the courts of various countries. One criterion can be employed, and actually has been employed by some courts, is that the likeliness of vacation of an award outweighs that of its non-vacation. Such an assessment, which should be carried out by the enforcing court,¹²⁷ imposes a difficult task on a foreign court, which in some cases has proven not to be reliable in their assessment.¹²⁸

Article V(2)(a) of the New York Convention reads:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

The subject matter of the difference is not capable of settlement by arbitration under the law of that country.

Similarly, Article 36(1)(b)(i) of the Model Law and Article 5(2)(a) of the Panama Convention provide for refusing the enforcement of awards on the ground of non-arbitrability, as does Section 103(3) of the English Arbitration Act of 1996.. For instance, under English law, acts of crime cannot be resolved by arbitration.¹²⁹ Traditionally, disputes falling within the ambit of stock exchange market, bankruptcy, public and particularly anti-trust laws as well as those subject to patent and intellectual property law, family or personal law, and the law protecting the rights of vulnerable parties are excluded from the terms of reference to arbitration. The issue of arbitrability is usually provided for by the mandatory rules of law. In

¹²⁷ van den Berg suggests that the party requesting stay of enforcement should provide the enforcing court with the grounds that are to be invoked at the court considering setting it aside (van den Berg, *The New York Arbitration Convention of 1958*, at 353-4).

¹²⁸ For instance, in *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, the Dutch court refused to adjourn a decision on the enforcement of the award, and enforced it; but the award was later set aside by the French court (24 *International Legal Materials (ILM)*, 1985, at 1040 *et seq.*; X International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, X (1985), at 487 *et seq.*)

¹²⁹ Tweeddale, at 160.

Audi-NSU Auto-Union AG (Germany) v. Adelin Petit & Cie (Belgium), where dispute arose between the German car manufacturer, Audi, and its Belgian distributor, the court in Belgium found an award issued in Switzerland unenforceable. This was because, under Belgian mandatory rules, disputes on exclusive licence for distribution cannot be settled by arbitration.¹³⁰

Under Article V(2)(b) of the New York Convention, the court may refuse the recognition and enforcement of an award, if it can establish that ‘The recognition or enforcement of the award would be contrary to the public policy of that country.’ This ground for the refusal of the enforcement of an award is also recognised under Article 36(1)(b)(ii) of the Model Law and Article 5(2)(b) of the Panama Convention. The only ground for the denial of the recognition of an award, under the Amman Convention, is a breach of public policy.¹³¹ Under Article 35 of the Convention, ‘The Supreme Court of each contracting State must give leave to enforce to awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public order.’ Public policy measures of a state are also usually put in terms of mandatory rules. As said before, the difficulty is that there is no clear definition of public policy, and every country might define it differently. That is why it has been argued that ‘the principal weakness of the New York Convention seems to be its failure to define certain terms such as ... "public policy"’.¹³²

The English Court, in *Soleimany v. Soleimany*, refused the enforcement of the award on the ground of being against British public policy.¹³³ However, the case law of English courts indicates some reluctance to deny enforcement, in cases that the

¹³⁰ *Audi-NSU Auto-Union AG (Germany) v. Adelin Petit & Cie (Belgium)*, International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, V (1980), at 257.

¹³¹ Gunter.

¹³² Id.

¹³³ *Soleimany v. Soleimany* [1998] 3WLR 811.

face of an arbitral award does not show a breach of public policy.¹³⁴ A question might arise as to whether the public policy of another, but related state, must be observed. In *Regazzoni v. Sethia*, the English court held that it would not enforce an award, if it requires 'an act in a foreign friendly State which violates the law of that State.'¹³⁵ Nevertheless, English case law has not been consistent in this regard.¹³⁶ With respect to the public policy ground of refusing enforcement, national courts are less strict when dealing with international arbitral awards.¹³⁷ The English regime is summed up by Waller L Judge argues as follows:

(1) there are some rules of public policy [perhaps, avoiding such universally condemned activities as terrorism, drug trafficking, prostitution, paedophilia and corruption and fraud in international business] which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic; (2) contracts for the purchase of influence are on of the former category; thus (3) contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy; and (4) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English court would not enforce it.¹³⁸

The above statement indicates that a distinction should be made between international and domestic public policy, when considering enforcement of a foreign award. Moreover, a narrow definition of public policy should be relied upon, if arbitration is to be promoted in international business.

As touched upon before, compelling a state to submit to the jurisdiction of another state is considered as being contrary to the sovereignty of states. States enjoy immunity from each other's jurisdiction. However, they may consent to waive such immunity. Under some legal systems, if a state or state agency enters into an

¹³⁴ Tweeddale, at 159.

¹³⁵ *Regazzoni v. Sethia* [1985] AC 301 at 317.

¹³⁶ Tweeddale, at 159 and 163.

¹³⁷ Redfern and Hunter, at 472-473.

¹³⁸ Tweeddale, at 166.

arbitration agreement, it waives its immunity in their territory.¹³⁹ Under English law, “Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.”¹⁴⁰ However, states also enjoy immunity from execution, that is, their properties located in a foreign country are immune from attachment. Hence, on the ground of state immunity, courts, in most legal systems, may not enforce an award against the property of the losing state party. In *Liberian Eastern Timber Company v. Government of Liberia*,¹⁴¹ the US Court did not enforce an ICSID award against the properties of Liberia, due to state immunity. State immunity from execution is, however, limited to those acts and properties that are related to implementing its sovereignty. State immunity from enforcement of arbitral awards does apply to the property of a state, but not to commercial assets of the state, under English law,¹⁴² as well as US laws.¹⁴³ Under French law, only those assets of the state that are related to the dispute in question are not immune from enforcement, as ruled by the French Court of Cassation in *Eurodif Corp v. Islamic Republic of Iran*.¹⁴⁴

In *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania & AB Geonafta*,¹⁴⁵ the English court rejected the request lodged by Svenska to dismiss the application made by the Republic of Lithuania not to enforce an award made in Denmark, on the ground of sovereign immunity. The state objected to the jurisdiction of the tribunal, claiming that it was neither a party to the

¹³⁹ Redfern and Hunter, at 479.

¹⁴⁰ Section 9, English State Immunity Act of 1978.

¹⁴¹ See *Liberian Eastern Timber Company v. Government of Liberia*, 650 F.Supp. 73 (S.D.N.Y. 1986).

¹⁴² Section 13(2)(b), English State Immunity Act of 1978.

¹⁴³ Redfern and Hunter, at 478.

¹⁴⁴ *Eurodif Corp v. Islamic Republic of Iran*, *Revue de l'arbitrage*, 1982, at 209.

¹⁴⁵ *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania & AB Geonafta*, [2005] EWHC 9 (Comm).

arbitration agreement, nor to the main contract. Svenska argued, however, that the state of Lithuania actively participated in the all stages of the arbitration, and did challenge neither the final award, nor the interim award holding that the state was a party to the arbitral agreement. The court, however, ruled that the fact that Lithuania did not challenge the award could not establish the issue estoppel. In other words, the Lithuanian state still could raise the objection to the jurisdiction of the tribunal, on the ground of state immunity. Moreover, it was the head of a state's diplomatic mission in the UK that determines which property is used for commercial purposes.

All national laws and most conventions on arbitration require an arbitration agreement or an award to have certain formal features. In this regard, respectively the rules of applicable multilateral or bilateral treaties, the law of the place where the agreement is made (in the case of the arbitration agreement) or the seat of arbitration (in the case of the award), and that of the enforcing country play a crucial role. Under most legal systems, the agreement and the award must be written and signed. Some laws or treaties might require even more. A court when considering the enforcement of an award usually examines whether some formal requirements are observed, for instance, whether the original or a certified copy of the arbitration award and agreement are available. Under Article IV of the New York Convention,

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (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.

2. 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 or by a diplomatic or consular agent.

Article 35(2) of the UNCITRAL Model Law provides for an identical requirement. It seems that the above rule is considered as mandatory, under the New York Convention. However, the courts have reasonably shown some flexibility in requesting the documents needed for enforcement. With regard to the rule for supplying the official translation of documents, it can be argued that the rule should not to be regarded as mandatory any longer, as under the Geneva Convention of 1927, it was discretionary.¹⁴⁶ This is because nowadays judges in many countries are familiar with some foreign languages, particularly English and French, in which most foreign awards are. Moreover, translation of lengthy awards and agreements to another language incurs enormous expenses. Therefore, it would be better if it were at the discretion of the court to request an official translation of the document.

Going beyond this requirement, Article 32(1) of the Amman Convention on Commercial Arbitration reads: ‘The award must give the reasons on which it is based and it must mention the names of the arbitrators and of the parties, the date and place where it was made, a general summary of the facts, the claims of the parties, the summary of their arguments, the reply of the arbitral tribunal which is given to these and the award must mention which party must pay the expenses in whole or in part.’

Under some national laws, absence of certain formal requirements may lead to refusing the enforcement of an award. The national court of Italy is very strict in observing the formal requirements set by the New York Convention for arbitration agreements and arbitral awards.¹⁴⁷ The issue of formal requirements can be raised not only independently but also with regard to other grounds for refusing

¹⁴⁶ Under Article IV of the New York Convention, the applicant “shall” provide the official translation of the above documents, while, under Article 4 of the Geneva Convention, it “may be demanded”.

¹⁴⁷ Reed, at 565.

enforcement of an award. As an example, for refusing the enforcement of an award set aside or suspended at the seat of arbitration, under Article V(1)(e) of the New York Convention, some countries, like Sweden, require a formal court order, as seen in *AB Götaverken (Sweden) v. General National Maritime Transport Company – GNMIC (Libya)*.¹⁴⁸ At least on one occasion, the Russian court refused the enforcement of an award, because the name of a party to the arbitration agreement was different from his name on the award.¹⁴⁹

An issue that might lead to some formal difficulties and even consequently the non-enforcement of awards is the assignment of the main contract. Some national laws consider the assignment of the main contract as the assignment of the arbitration agreement, while some others are reluctant to do so. The Moscow District Court decided not to enforce an award, since the name of the succeeding party was not on the arbitration agreement. The Court believed that the succession of the main contract does not include the succession of the arbitration agreement.¹⁵⁰ On another occasion, however, the Court considered the general assignment of the main contract as the assignment of the arbitration agreement, and held that the award was valid and enforceable.¹⁵¹

As seen, under the New York Convention, partial enforcement of an arbitral award is permitted, but this applies only when the issue of the jurisdiction of the arbitral tribunal is involved. Article V(1)(c) of the Convention provides that ‘if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to

¹⁴⁸ International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, VI (1981), at 237-242.

¹⁴⁹ Komarov, at 587.

¹⁵⁰ Id., at 587.

¹⁵¹ Id., at 588.

arbitration may be recognised and enforced.’ The Convention does not, however, provides for partial enforcement of awards in other circumstances, for instance, when part of the award is not contrary to public policy, or part of the relevant dispute is arbitrable. In such circumstances, the whole award may be denied enforcement. Nevertheless, it can be argued that, given Article V(1)(c), the New York Convention *implicitly* allows partial enforcement of awards, not only when the issue of the jurisdiction of the tribunal is at stake, but also in other circumstances. On the other hand, some conventions for enforcement of foreign *judgments*, such as the Riyadh Arab Convention on Judicial Co-operation of 1983¹⁵² and the Convention on the Enforcement of Judgments, Disputes and Judicial Summons in the Arab Gulf Co-operative Council States of 1995 contain explicit provisions for partial enforcement of judgments, when issues other than the competence of the adjudicative body is involved.¹⁵³

An important question is whether the winning party himself can request the partial enforcement of the award. Such a query has been raised and answered with regard to the enforcement of foreign *judgments*. Some lawyers argue that the claimant has the right to define the subject of his claim, but when applying for the enforcement of a foreign judgment, such a right is restricted, and the foreign judgment should be treated as a whole.¹⁵⁴ Some others argue that even if enforcement is authorised for the foreign judgment as a whole, the claimant may only execute part of it; and, in practice, this amounts to a request for partial enforcement. They conclude that the foreign judgment can be divided into parts.¹⁵⁵ If

¹⁵² Article 32, the Riyadh Arab Convention on Judicial Co-operation of 1983.

¹⁵³ Articles 2 and 7, the Convention on the Enforcement of Judgments, Disputes and Judicial Summons in the Arab Gulf Co-operative Council States of 1995.

¹⁵⁴ Sharif al Mulla, “Conventions of Enforcement of Foreign Judgments in the Arab World”, at 54.

¹⁵⁵ *Id.*

the above argument is tenable, partial enforcement of foreign arbitral awards should also be permitted.

5 Setting aside Arbitral Awards by a Court

Another critical issue in arbitration that allows the intervention of the court is judicial review of an award at the seat of arbitration. Predictability and confidence, at this stage, is necessary, if international arbitration is to be promoted. If an award is vacated or even suspended by the court at the seat of arbitration, courts in other countries where recognition of the award is sought mostly do not recognise it.¹⁵⁶ As seen above, Article V(1)(e) of the New York Convention as well as Article 36(1)(a)(v) of the Model Law and Article 5(1)(e) of the Panama Convention can be the legal basis for refusing the enforcement of awards in such cases.

The Geneva Convention was even stricter in this regard. Article 3 of the Convention reads:

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

There are some conventions, however, that rule out the possibility of judicial review completely. Article 27 of the Amman Convention provides that ‘Arbitration under the provisions of this Convention shall have the effect to forbid reference of the dispute to the courts of law as well as a recourse against the award before these courts.’ The Convention, nevertheless, provides for the setting aside of arbitral awards issued by the Arab Centre for Arbitration through the Centre itself. Under

¹⁵⁶ Redfern and Hunter, at 468.

Article 34 of the Convention, the Bureau of the Centre appoints a Commission that studies the request and has the authority to set aside the award totally or in part.

Therefore, examining the conditions of enforcement of an arbitral award cannot be complete, without studying the situations that might lead to setting aside such an award. What makes examining the grounds for setting aside an award even more important is that refusing recognition or enforcement of an award by a court is valid and effective only in the forum country; whereas the setting aside of an award at the seat of arbitration may prevent the enforcement of that award in all other countries. More importantly, there are usually more grounds for the judicial review of an award than for the refusal of its enforcement.¹⁵⁷ Hence, it would be easier to seek vacation of an arbitral than to seek its non-enforcement.¹⁵⁸

An arbitral award might be challenged, by the losing party, in the national court of the country in which, or under the law of which, the award is made. Such a court is the sole competent court to set aside or suspend an award, because an award is considered as the product of a legal system according to which it is made. This is provided for by the New York Convention, the Model Law and the Panama Convention. Also, under Article IX(1) of the European Convention, ‘The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made.’ The Supreme Court of Austria, in *Norsolor S.A. v. Pallbalk Ticaret Ltd.*, held that ‘The setting aside of an award is governed by the laws of the state in which it is made, while other states may

¹⁵⁷ Id., at 488.

¹⁵⁸ See Gunther J. Horvath, “The Duty of the Tribunal to Render an Enforceable Award”, *Journal of International Arbitration*, vol. 18, (2001), at 143.

recognise or enforce it".¹⁵⁹ Also, in *Renusagar Power Co. Ltd. v. General Electric Co.*, the Indian national Court held that an international award could only be reviewed at the seat of arbitration.¹⁶⁰

A question may arise as to, if an award is rendered in a country under the law of another country, the court in which country is competent to consider a request for setting it aside. It seems that the New York Convention and most other multilateral treaties provide for the competence of the courts in both countries. Some commentators argue that since the parties have agreed on the law of another country to govern their disputes, the courts of this country can set aside the award. Such view is confirmed in *Hiscox v. Outhwaite*¹⁶¹, where the English House of Lords ruled that English courts were competent to review the award made in Paris, under English law. Similarly, in *Oil & Natural Gas Commission v. Western Company of North America*,¹⁶² the Indian Supreme Court held that only Indian courts can rule on the vacation of the award made in London, since Indian law was applicable to the arbitration.

Determining the competent court on the basis of the contractual agreement of the parties is plausible, if the law of the place of arbitration (country A) allows arbitration in its territory under the law of another country (country B), and if the law of B permits the application of its law outside its territory. This is because, allowing the application of a foreign law on an arbitration procedure within its territory, A cannot consider the outcome as a national award, which is subject to judicial review

¹⁵⁹ *Norsolor S.A. v. Pallbalk Ticaret Ltd.*, Supreme Court (Austria) November 18, 1982, International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, VII (1982), at 312-314.

¹⁶⁰ International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, XX (1995), at 691.

¹⁶¹ M. Prules, "Foreign Awards and New York Convention", *Arbitration International*, vol. 9 (1993), at 63.

¹⁶² *Oil & Natural Gas Commission v. Western Company of North America*, AIR 1987 Supreme Court, at 680.

by its court. However, if one of these conditions is missing, the above conclusion is not tenable. If A does not accept the application of another country's law in its territory, and B does not permit the application of its law outside its jurisdiction, the award made in A under B's law belong to the A's legal system, and must be reviewed by its courts. Also, if A allows application of a foreign law on arbitration in its territory, but B does not permit the application of its law abroad, none may consider their courts competent to rule on a request for the vacation of the award, which none regard as belonging to their legal system. Moreover, if A does not allow the law of another country to be applied to arbitration in its territory, but B accepts its law to be applied outside its jurisdiction, the courts in both states may consider themselves competent to review the award, because both countries see the outcome of arbitration as their own national award.

The New York Convention, as the single important convention on enforcement of arbitral awards, and some other conventions, such as the Panama Convention, do not specify the grounds for vacating arbitral awards, and leave the issue at the discretion of national law of the seat of arbitration. Nevertheless, some other multilateral treaties, such as the European Convention, the Washington Convention, the Amman Convention and the Model Law, go as far as contemplating such grounds. This has led to the diversification of regimes of judicial review of arbitral awards, and to a lack of a harmonised and internationally accepted regime. This is, of course, contrary to the objective of international conventions, and particularly the New York Convention, that aim at the harmonisation of rules governing international arbitration. Nevertheless, it is possible to specify some common grounds for setting aside an arbitral award. These are, to a large extent, similar to the grounds for refusing enforcement of arbitral awards.

It should be mentioned that there is a tendency in most national legal systems to limit the power of the court for the judicial review of international awards. The intention is to reinforce the finality of awards. The finality of arbitral awards has even been seen as more important than the legal accuracy by some judges or commentators interpreting existing laws.¹⁶³ Under some legal systems, although the law allows judicial review of awards, if the parties to an arbitration agreement do not want their relevant awards to be reviewed by the court, they can sign an agreement for excluding them from judicial review. This is the case, for instance, in Switzerland and Tunisia.¹⁶⁴ Also, under the English law Arbitration Act of 1979, international arbitration awards can be excluded from the possibility of judicial review upon the agreement of the parties. This rule does not, however, apply to some contracts, such as maritime and insurance.¹⁶⁵ In some countries, such as Sweden and Belgium, only parties that are not nationals of the seat of arbitration can sign an exclusion agreement for waiving their right to the judicial review of international awards.¹⁶⁶ Under ICC Arbitration Rules, ‘By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any award without delay and to have waived their right to any form of recourse insofar as such waiver can be validly made.’¹⁶⁷

Limitation of municipal laws in challenging an arbitral award is shown in a case governed by the ICC International Court of Arbitration Rules, where the French

¹⁶³ D’Arcy, at 489.

¹⁶⁴ Paulsson, “Towards Minimum Standards of Enforcement: Feasibility of a Model Law”, at 577.

¹⁶⁵ Filip De Ly, “Judicial Review of the Substance of Arbitral Awards”, in K. Boele-Woelki, *et al.* (ed.), *Comparability and Evaluation: Essays on Comparative Law, Private International Law and International Commercial Arbitration*, (Dordrecht: Martinus Nijhoff Publishers, 1994), at 350.

¹⁶⁶ Matthieu De Boisseson, “Enforcement in Action: Harmonization Versus Unification”, in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (The Hague: Kluwer Law International, 1999), at 597, footnote no. 8.

¹⁶⁷ Article 28(6), the ICC Arbitration Rules.

judge stated: ‘Considering ... that the attacked decision was taken in compliance with the Rules of the ICC Court of Arbitration – that the parties accepted by deciding to submit their disputes to ICC arbitration, so that the said Rules form an integral part of their agreements’, it was not necessary for the award to be reasoned. Irrespective of the requirement of the national law, then, the judge argued that there was no ground to vacate the award¹⁶⁸

5-1 Procedural Review of the Award

Procedural grounds for setting aside an arbitral award are raised, for instance, when a party to the dispute has not been given the opportunity to defend its position, when the tribunal lacked the competence to decide upon the dispute, or where there is no valid arbitration agreement. This is also the case, when the dispute is not arbitrable under the applicable law, or the award is against public policy.¹⁶⁹ Such grounds are almost identical to the grounds for refusing the enforcement of a foreign award. Most legal systems provide for a procedural review of awards made in their jurisdiction. In the following, we consider them, in some details.

Incapacity of either party or the invalidity of the arbitration agreement may be a ground for vacating an award. Under Article IX(1)(a) of the 1961 European Convention an international arbitral award can be set aside, if ‘the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’. The Model Law in Article 34(2)(a)(i) provides for a similar ground. Here again, the question may arise as to what would happen if the law at the seat of

¹⁶⁸ Laurence Caric, *et al*, *International Commercial Arbitration: Cases, Materials and Notes on the Resolutions of International Business Disputes*, (New York: The Foundation Press, 1997), at 634-5.

¹⁶⁹ Horvath, at 143.

arbitration set certain conditions for the capacity of the parties and the validity of the agreement, while the applicable law is deliberately silent about such conditions. It can be argued that in such cases, the agreement or the applicable law prevails over the law of the forum state.

Lack of jurisdiction of the tribunal is another ground for vacating an award. Article IX(1)(c) of the 1961 European Convention provides for the setting aside of the award, if it

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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;

An identical ground is provided for by Article 34(2)(a)(i) of the Model Law. Under Article 34 of the Amman Convention, an award can be set aside, if it is obvious that the arbitral tribunal exceeded the scope of its functions. Also, under US, English¹⁷⁰ and Italian¹⁷¹ laws, an excess of the tribunal's jurisdiction may lead to the vacation of an award.

Under most legal systems, participation in the arbitral procedure does not prevent a party from challenging the award on the basis of lack of jurisdiction of the tribunal or lack of a valid arbitration agreement. In the *Pyramids* case,¹⁷² the Paris Court of Appeal annulled an ICC award because of absence of an arbitration agreement, on

¹⁷⁰ Articles 68(2)(b) and 67(1)(a), English Arbitration Act of 1996.

¹⁷¹ Ly, at 348-349.

¹⁷² This was a dispute between the Egyptian General Organisation for Tourism and Hotels and the Hong Kong company, Southern Pacific Properties Ltd., regarding the construction of a tourist complex near the site of the Pyramids. An ICC arbitration clause was contained in a supplemental agreement signed by the Egyptian Minister of Tourism. After the cancellation of the project, the Hong Kong party referred the dispute to arbitration, which was objected by the Egyptian party on the basis of lack of arbitration agreement. The Paris Court of Appeal held that the Minister's agreement did not constitute a contractual commitment, but only the approval of some administrative authorisations within the Minister's competence. See Sigvard Jarvin, "The ICC Court of Arbitration: Recent Development and Experiences Related to Arab Countries", *Arab Quarterly Law*, vol. 1, no. 3 (May 1986), at 296.

the basis of Article 1502(1) of the French Code of Civil Procedure. The decision by the court indicates that although a party objects to the jurisdiction of the tribunal, it may still take part in the process, without being considered as having waived its jurisdictional objection. This is because arbitration tribunals decide on their own jurisdiction, and a party needs to take part in the process in order to protect its interests.¹⁷³

Perhaps the most important ground for setting aside arbitral awards is the unfairness of the arbitration process. Article IX(1)(b) of the 1961 European Convention provides for the possibility of vacating an award, if ‘the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case’. Under Article 18 of the UNCITRAL Model Law, ‘The parties shall be treated with equality, and each party must be given a full opportunity for presenting his case.’ Also, Article 15(1) of UNCITRAL Arbitration Rules provides that, upon the request of either party, the tribunal must hold a hearing. Arbitral process must consist of presenting claims and defence, and there must be communication between the parties and the tribunal. In most countries, the mandatory rules of the law set the rules for a fair hearing and due process.

It should be noted, however, that what is important is that the parties have the *opportunity* to present or defend their cases, or to present witness evidence, though they might not use this opportunity in practice. This is intended to prevent the abuse of the condition for a fair and due process by the parties that might take advantage of it for dilatory purposes or for avoiding justice. As an example, in

¹⁷³ Jarvin, “The ICC Court of Arbitration: Recent Development and Experiences Related to Arab Countries”, at 296.

Mangistaumunaigaz Oil Production (MOP) v. United World Trade, Inc., United World Trade used various tactics to delay or even to prevent the arbitration proceedings from going ahead.¹⁷⁴ Hence, under the UNCITRAL Arbitration Rules if a party, without an acceptable justification, failed to appear at the hearing, or to present his case, there is no reason for the tribunal not to go ahead with the proceedings and to make the award.¹⁷⁵ Article 28(1) of the Amman Convention on Commercial Arbitration also reads: ‘If one of the parties refrains from appearing without valid grounds during any stage of the proceedings, the proceedings shall take place in its absence.’

Under most conventions and law, an award may be set aside by the court, if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.¹⁷⁶ Under Article 34 of the Amman Convention, an award can be set aside, if one of the arbitrators was under undue influence and if this had an effect on the award. Under US federal law, the court may vacate an award, where it was “procured by corruption, fraud, or undue means”, where there was “evident partiality or corruption” in any of the arbitrators, where they engaged in any type of misconduct that prejudice the rights of a party, such as refusing to postpone the hearing, or refusing to hear pertinent evidence, and where they “exceeded their powers, or so imperfectly executed them”.¹⁷⁷ Some of these terms, such as undue means, misconduct and imperfect execution of arbitrators’ powers are criticised for not being sufficiently clear and operational. Under US Uniform Arbitration Act of

¹⁷⁴ Reed, at 568-573.

¹⁷⁵ Article 28, the UNCITRAL Arbitration Rules.

¹⁷⁶ For instance, Article 34(2)(a)(iv), the Model Law on International Commercial Arbitration and Article IX(1)(d), the 1961 European Convention.

¹⁷⁷ Section 10, US Federal Arbitration Act, 9 USC.

2000¹⁷⁸, in domestic arbitration, the arbitrator's failure to disclose "a known, direct, and material interest in the outcome of the arbitration proceedings" or "a known, existing, and substantial relationship with a party" amounts to partiality, and obliges the court to set aside the award.¹⁷⁹ This does not apply to international awards, but as a matter of good practice may do so.¹⁸⁰

Under Article 34(2)(b) of the Model Law, an award may be set aside, if its subject-matter is not capable of being settled through arbitration, under the law at the seat of arbitration, or if it is against the public policy of that state. The European Convention does not stipulate the above grounds, perhaps because they will be considered, when enforcement of the award is sought. Legal provisions on arbitrability and public policy, as stated before, are usually put in terms of mandatory rules. Hence, not only the mandatory rules of the applicable law,¹⁸¹ but also those of the seat of arbitration must be complied with. Under English law, an award contrary to public policy or based on fraud may be challenged in the court.¹⁸² In Switzerland, the compatibility of the award with international public policy of Switzerland can be subject to judicial review.¹⁸³ In *Eco Swiss China Time Ltd v. Benetton International NV*, the European Court of Justice vacated the arbitral award that was contrary to the European Union public policy and, in particular, its competition rules.¹⁸⁴ In US law, a breach of public policy, as reflected in the mandatory rules of US law, is a ground

¹⁷⁸ Approved and recommended for enactment in all the US States by the National Conference of Commissioners on Uniform State Laws at its annual conference meeting in its one-hundred-and-ninth year, in St. Augustine, Florida, July 28 - August 4, 2000.

¹⁷⁹ Section 12(e), 23(a)(2)(A), US Uniform Arbitration Act of 2000.

¹⁸⁰ Robert T. Greig and Inna Reznik, "Current Developments in Enforcement of Arbitration Awards in the United States", *Arbitration*, vol. 68, no. 2 (2002), at 133.

¹⁸¹ Hill, at 491.

¹⁸² D'Arcy, at 489-490.

¹⁸³ Ly, at 345.

¹⁸⁴ C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* ([1997]OJC166/9).

for vacating an award.¹⁸⁵ Consequently, Article 6 of the Internal Rules of the International Court of Arbitration of the ICC of 1998 states that when the Court, under Article 27, scrutinises a draft award before it is issued by arbitrators, it shall consider ‘to the extent practicable, the requirements of mandatory law at the place of arbitration’.¹⁸⁶

In Germany, the parties’ all substantial arguments must be addressed in the arbitration process.¹⁸⁷ Under English law, not responding to the parties’ claims may lead to the vacation of an award.¹⁸⁸ In the Italian legal system, it can be considered whether the tribunal has responded to all claims put forward by the parties, and whether there is any contradiction in the reasoning of the award.¹⁸⁹ It should be added that the non-observance of certain formal requirements, as discussed in previous sections, may also lead to the vacation of an award. Such requirements are normally specified by the applicable convention, the applicable law and the law of the place of concluding the arbitration agreement or that of the seat of arbitration.

A related problem that might lead to the vacation of awards is the assignment of the main contract. The question is, when a company succeeds another that has a contract, whether the succeeding company is considered as a party to the arbitration agreement to which the succeeded company was a party or not. This is because the name of the new company is not on the arbitration agreement. If the succession of the main contract is not automatically considered as tantamount to the succession of the arbitration clause, an award based on the arbitration clause is void.¹⁹⁰ However, there is no reason not to consider the succession of the main contract as the

¹⁸⁵ Ly, at 352-353.

¹⁸⁶ Horvath, at 150.

¹⁸⁷ Ly, at 347.

¹⁸⁸ D’Arcy, at 489-490, and Sections 68(2)(d), the English law Arbitration Act of 1996.

¹⁸⁹ Ly, at 348-349.

¹⁹⁰ For instance, see Reed, at 565-566.

succession of the arbitration agreement, even though the name of the succeeding company is not on the arbitration agreement. Assignment means the transfer of all rights and obligations contained in the main contract, including those mentioned in the arbitration agreement. Autonomy of arbitration agreements cannot be invoked as denoting that, unless signed by the succeeding party as such, these agreements are invalid. As seen before, the rationale for the autonomy of arbitration agreements is that they can be referred to, even if the validity of the main contract is in question. More importantly, since the interests of a third party who is not a party to the succession agreement, but has legitimate rights as a party to the main contract and its arbitration agreement, is at stake, the arbitration clause remains valid.

5-2 Reviewing Substantive Accuracy of the Award

Substantive review of arbitral awards covers a review of the substantive law applicable to the dispute, conflict of laws rules as well as facts of the dispute. Under most legal systems, the court has a more limited power to review the substantive accuracy of international awards than to assess their compliance with procedural rules. The English legal system, in principle, does not interfere with substantive mistakes in an award. The English court, in *K/S A/S Bill Biakh and K/S A/S Bill Biali v. Hyundai Corporation*, held that an error of law or fact could not by itself amount to misconduct.¹⁹¹ Hence, such an error may not be a ground for judicial review. However, in the case of finding new evidence, the court can ask the tribunal to reconsider the award.¹⁹² Also, under French and Dutch laws, substantive review of awards is very difficult. In Switzerland, substantive review covers only issues such as good faith of the arbitrators or the binding force of the contract. There are some

¹⁹¹ *K/S A/S Bill Biakh and K/S A/S Bill Biali v. Hyundai Corporation*, International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, XV (1990), at 521.

¹⁹² Ly, at 351.

minimum standards that all awards made in Germany must meet. Absence of proper reasoning or the existence of any contradiction in the award may make arbitral awards prone to vacation. Nevertheless, according to a decision made by the Supreme Court of Germany, error in the application of the substantive law or the conflict of laws rules does not subject awards to judicial review. In Italy, however, domestic arbitral awards may be set aside when the arbitrators did not decide on the basis of the law, while no explicit ground for a substantive review of international arbitral awards is provided for.¹⁹³

Under some municipal laws, only on the narrow ground of “manifest disregard of the law” an award can be vacated. While not being mentioned in the US Federal Arbitration Act, most federal courts have recognised such a ground for setting aside an award, as it is invoked in two recent cases, namely, *Halligan v. Piper Jaffray, Inc.*,¹⁹⁴ and in *Montes v. Shearson Lehman Brothers, Inc.*¹⁹⁵ In order to set aside an award on the ground of manifest disregard for the law, two conditions needs to be met: that the arbitrators knowingly refused to apply or ignored the law, and that the law is well defined, explicit, and clearly applicable to the case. The rate of success in such cases is, however, rare. Such a ground is also relevant to international awards.¹⁹⁶

¹⁹³ *Id.*, at 345-349.

¹⁹⁴ *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

¹⁹⁵ *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997). In these two cases, *Halligan and Montes*, the arbitrators’ failure to explain the award, combined with manifest disregard of the law and the facts, was invoked to vacate the award, though US law does not require an explanation for the award. The absence of an explanation, actually, reinforced the court’s confidence of manifest disregard of the law and the facts. So, it can be recommended that arbitrators include their explanation in an award that may be prone to the suspicion of manifest disregard of the law and the facts.

¹⁹⁶ Greig and Reznik, at 127 and 129.

An interesting question arose in two other recent US cases, *Gateway Technologies, Inc. v. MCI Telecommunications Corp*¹⁹⁷ and *Lapine Technology Corp v. Kyocera Corp*¹⁹⁸, as to whether the court should honour the parties' agreement to expand, beyond the scope of the municipal law, the basis of judicial review. In the two cases, the parties agreed that judicial review to cover matters of law and fact. The US federal appellate courts' responses to the question, in the above cases, were positive. They ruled that the court must enforce every term of the contractual agreement of the parties. These include their agreement to deviate from those provisions of the Federal Arbitration Act that limit the scope of judicial review. In *Gateway*, a review of legal conclusions, and in *Lapine*, a review of findings of fact were agreed upon by the parties. The courts' rulings, however, were drawn both admirations and criticisms. Those in favour of the decisions argued that such a possibility provides the potential users of arbitration with peace of mind that they can opt for substantive judicial review, if they are concerned with the arbitrators' mistake. Critics argued, on the other hand, that litigants cannot interfere with the judicial process, and dictate how a court must review arbitral awards. Moreover, a review of law and fact flies in the face of the very purposes of arbitration, that is, finality, informality, simplicity and speed. It was for similar reasons that the Drafting Committee for Uniform Arbitration Act decided to exclude a provision allowing the parties to "opt in" to review awards beyond what is provided for under the Federal Arbitration Act.¹⁹⁹ Contractual feature of arbitration stops short of the parties' power to change the judicial process.²⁰⁰ Later on, in *Bowen*

¹⁹⁷ *Gateway Technologies, Inc. v. MCI Telecommunications Corp*, 64 F.3d 993 (5th Cir. 1995).

¹⁹⁸ *Lapine Technology Corp v. Kyocera Corp*, 130 F.3d 884 (9th Cir. 1997).

¹⁹⁹ Greig and Inna Reznik, at 133.

²⁰⁰ For debates for and against these court decisions, see *id.*, at 122-126.

v. Amoco Pipeline Co.,²⁰¹ another federal appeal court held a view opposite to the above rulings. The second view is more congruent with the very rationale of arbitration, which is to avoid the complexities of litigation. While the contractual agreement of the parties to arbitration is of paramount importance, it cannot go as far as altering the logic of arbitration and the entire adjudication system supporting it. If the parties are concerned about the substantive accuracy of the award, they can go for institutional arbitration with an internal mechanism to appeal or substantive review of the award.

Some arbitration institutions allow a limited substantive review of awards. Under Article 34(1)(e) of the Amman Convention, for instance, within sixty days of the issuance of an award or the discovery of new facts, a party may request the Chairman of the Arab Centre for Arbitration to set aside the award, ‘if a judgment established a new fact which could substantially influence the award, provided, however, that the ignorance of these facts was not due to the lack of diligence of the party which requests the setting aside.’

An important question is whether non-compliance with the substantive mandatory rules at the seat of arbitration may lead to the vacation of an award. Here, the distinction between domestic and transnational mandatory rules is important. Some argue that unless there is a close link between the dispute and the country where arbitration is taking place, only international mandatory rules must be observed.²⁰² It is more obvious that the mandatory rules of other states, other than the seat of arbitration, that have some connections to the dispute are less relevant. In *Northrop Corp. v. Triad International Marketing S.A.*, Northrop Corp and a Saudi

²⁰¹ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

²⁰² Hill, at 492

party made a marketing agreement whereby the Saudi party would receive commissions from Northrop Corp, if it could help sale of arms to Saudi Arabia. However, after the issuance of a decree by Saudi government banning exchange of commissions, Northrop Corp discontinued payment of commissions. Consequently, the Saudi party referred the dispute to arbitration, and the tribunal decided not to consider the Saudi decree, although it was in the form of a mandatory rule.²⁰³ The US Court of Appeal approved the arbitration tribunal's decision, because of the parties' choice-of-law and choice-of-forum.²⁰⁴

Along the same line, an award may be set aside, if it is against the public policy of the forum country. As touched upon before, public policy issues can be interpreted widely or narrowly. Legal systems favouring arbitration try to restrict such a ground for *vacatur* of awards. US courts tend to interpret the public policy ground very narrowly.²⁰⁵ Public policy was the ground for vacating two US cases, namely, *Warburg LLC v. Auerbach, Pollak & Richardson*²⁰⁶ and *Cavalier Manufacturing, Inc. v. Jackson*.²⁰⁷ Nevertheless, the Drafting Committee for the US Uniform Arbitration Act of 2000 decided not to include a provision for vacating awards for the public policy ground, as well as for the manifest disregard of the law, since it was difficult to create a test for them.²⁰⁸

In general, an important difficulty with the transnational mandatory rules is that there is no consensus about them. For instance, the prohibition of bribery and corruption is not considered by all as a transnational mandatory rule. Nevertheless, in the ICC Case No. 3916, the arbitrator made his award on the basis of the

²⁰³ Voser, at 2.

²⁰⁴ *Northrop Corp. v. Triad International Marketing S.A.*, F.2d 1265 (9th Cir. 1987), at 1270.

²⁰⁵ Gerig and Reznik, at 129.

²⁰⁶ *Warburg LLC v. Auerbach, Pollak & Richardson*, N.Y. Sup. Ct. Oct. 2001.

²⁰⁷ *Cavalier Manufacturing, Inc. v. Jackson*, No. 1000391, 2001 WL 1177028 (Ala. Oct. 5, 2001).

²⁰⁸ Greig and Reznik, at 133.

prohibition of bribery and corruption as a transnational principle. In the dispute that arose between a Greek company and an Iranian party, the Iranian party complained that the Greek party did not pay 2% of the value of the contract between the company and Iran, despite the agreement between him and the Greek party that he would be entitled to this amount, if he facilitates a contract between the company and Iran.²⁰⁹

Finally, it should be mentioned that although most countries follow a restrictive policy in the judicial review of the substantive accuracy of awards, a type of substantive review can be possible, when the court considers procedural issues. This is because the border between procedural and substantive issues in some areas, such as public policy, is blurred.²¹⁰

Appealing Against an Award

Most legal systems do not allow an appeal against an arbitral award to the arbitration tribunal itself. The Panama Convention, for instance, under Article 4, states that an arbitral decision or award is not appealable. Very few conventions or national laws, however, recognise the possibility of appealing against an award. Under Greek law, it is possible to appeal against an arbitral award.²¹¹ Moreover, it is possible to contemplate the lodging of an appeal in *ad hoc* arbitration.

What most legal systems permit is the correction of an award in a limited scope of typographical mistakes or miscalculations, which must be requested within a time limit.²¹² Some arbitration institutions, such as the Stockholm Chamber of Commerce and the Chinese International Economic and Trade Arbitration Commission, allow the parties to request consideration of a necessary issue about which the tribunal

²⁰⁹ ICC Case No. 3916.

²¹⁰ Ly at 353.

²¹¹ Horvath, at 150.

²¹² Id., at 149.

wrongfully did not make a decision.²¹³ The Amman Convention allows the correction of material errors in an award. Under Article 33 of the Convention,

1. If there is a material error in the award, the arbitral tribunal, either by its own motion or upon written request of one of the parties, may correct this error after having notified this request to the other party and provided that this request is made within fifteen days following the date at which the written award was received.

2. The decision to correct a material error is made on the award itself and is deemed to be an integral part thereof. Both parties must be notified of the decision to correct.

As mentioned before, the Convention also, under Article 34, provides for setting aside arbitral awards issued by the Arab Centre for Arbitration through the Centre itself.

In general, while the practice of not providing for an appeal against arbitral awards, under most municipal laws and international conventions, is justifiable, it may be reasonable that arbitration institutions allow some types of appeal, as many of them actually do, if the parties opt for it.

6 Conclusion

As seen, international conventions and multilateral treaties are the main instruments of recognition and enforcement of international arbitral awards, and in this regard, the New York Convention is of paramount importance. Therefore, examining the regime of enforcement of awards in Oman requires finding out to which international conventions and multilateral treaties the country is a party. In particular, it is important to consider which grounds for the refusal of recognition and enforcement of foreign awards are provided for by these conventions and treaties.

It is also crucial to examine the Omani law of arbitration, since, as seen, most international conventions, including the New York Convention, provide the forum

²¹³ Id.

country with some discretion for recognition and enforcement of awards. For instance, it is the national law of the forum country that determines who has the capacity to enter into an arbitration agreement, and set the rules for the composition of the arbitral tribunal, the arbitration process, the due process, arbitrability and public policy. In these aspects, the non-observance of the national law of the country where enforcement of the award is sought may lead to the denial of the enforcement of the award. Also, national laws are usually the instruments of implementing and interpreting international conventions, including the New York Convention. Therefore, special attentions should be paid to the provisions of Omani law regarding arbitration. Most of the relevant provisions should be found in the mandatory rules of law in Oman. We should assess how Omani law measure up to the standards set by the international practice of arbitration, which is itself not free of deficiencies, as seen is in this chapter. It cannot be ruled out, however, that Omani law might even be more than multilateral treaties facilitative of the enforcement of international arbitral awards. Under Article VII(1) of the New York Convention, the courts in the Contracting States can apply the most favourable law or convention when enforcing a foreign award. As seen, the Convention provides for the “most favourable regime” principle that allows “norm shopping”.²¹⁴

Also, as seen, the grounds for setting aside arbitral awards are determined by the national law at the seat of arbitration or the applicable law. Therefore, it is important to consider grounds for vacating an international award made in Oman. Vacation of such an award in Oman may lead to its non-enforcement in the country as well as in other countries. Here again, the mandatory rules of the law in Oman are of importance. The Omani arbitration law is essential not only when Oman is the place

²¹⁴ Paulsson, “Towards Minimum Standards of Enforcement: Feasibility of a Model Law”, at 579.

of arbitration, or when enforcement of an award is sought in the country, but also when Omani law is chosen by the parties to govern their disputes, or when there is a close link between Oman and the dispute. This is because it is suggested that sometimes even the mandatory laws of those states that have a special connection with the dispute might be relevant.²¹⁵

²¹⁵ Voser, at 20.

Chapter Two: The Background to the Arbitration Law in Oman: The Development of the Omani Legal System

1 Introduction

Arbitration law in every country is, or at least should be, an integrated part of its legal system, as it is dependant on various other pieces of legislation for its proper functioning. Hence, the law cannot be examined thoroughly, unless the legal context within which it has developed is explored sufficiently. The legal context in Oman, as in most other Arab and Muslim states, has been influenced by at least two strands of legal tradition. The first is the *Shari'a*, or the classic Islamic law, which is the historical background to Omani law, and still dominates many of its parts. In all Arab countries where there has been statutory vacuum regarding arbitration, it is usually filled by Islamic law.¹ The prevalent version of the *Shari'a* in Oman is the Ibadi doctrine, which despite some disparities, is not much different from Sunni versions of *Shari'a* law regarding arbitration, save arbitration on the issue of political leadership, which is a completely different issue, according to the Ibadis.

¹ Samir Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", *Arab Quarterly Law*, vol. 1, no. 1 (1985), at 19.

The second is the Western legal tradition, which has now received international recognition through international conventions and model laws, and has influenced Omani law through the process of modernisation. Modernisation of the Omani legal system began as late as 1970, but ever since it has been forcefully underway, particularly in business law.

Regarding the interplay of the two strands of legal tradition, in most Muslim countries, two conflicting trends can be identified: a move away from the *Shari'a* and towards modernisation of the legal system, which has started at least since the nineteenth century, and a trend towards reassertion of the *Shari'a*, which has started since the late twentieth century. The present legal framework in each Islamic state is the result of the balance between the two trends in that state.

In this chapter, the interplay between the two strands within the context of Omani legal system, as the background to the Omani arbitration law, is studied. It begins with a review of modernisation process of the legal system in the country, stressing business legislation. An examination of adjudicative bodies in Oman is followed. Then, a few words are said about *Shari'a* law according to the Ibadi doctrine, which to some extent has influenced Omani law; and particularly the issue of arbitration, under the Ibadi doctrine, is focused on. A section in this chapter is allocated to the legal requirements of foreign companies' operating in Oman, and entering into partnership relations with Omani parties. Entering into such partnerships may make it necessary to stipulate recourse to arbitration as a method dispute resolution.

2 Modernisation of Omani Law

Modernisation of Omani law, particularly business law, began in 1970, when Sultan Qaboos came to power.² Oman was left far behind many Arab countries in terms of legal development, partly because oil and gas resources, which have been the engine of economic, and consequently social and legal, development in the Gulf region, were less abundant in that country, and exploited later than those of other Gulf states. Also, since Oman kept its formal independence throughout the colonial era, it was less exposed to bodies of Western law. Since 1970, however, a significant body of written law in various legal areas has been introduced.

Sultani Decree 3/1973 on the Interpretation of Certain Terms and General Provisions was one of the earliest foundational laws with general application in Oman. The law contained technical provisions necessary for managing the body of legislation in various legal areas. It contained the definition of legal terms, and provided for the legal effects of repealing existing laws, the supremacy of the rule of law and its authority over the government and citizens and their relationships, the promulgation of new laws through the Official Gazette, the consistency of subordinate laws with the original enabling laws, and the like. The Sultani Decree 26/1975 on the Law Regulating the Administrative Apparatus of the State, amended by Sultani Decree 13/1976, provided for the structure and powers of various governmental executive bodies, the judicial functions of some of these bodies and the legislative power, whose sole source is the king. Sultani Decree 101/1996 on the Omani Basic Law of the Sultanate of Oman, which is regarded as the constitution of

² Before Sultan Qaboos, his father, Said bin Taimur, ruled Oman since 1932. His authoritarian rule and isolationist policy was against any tendency towards modernisation and social and economic improvement. For some details, see Morsy M. Abdullah, "Changes in the Economy and Political Attitudes and the Development of Culture on the Coast of Oman Between 1900 and 1940", *Arabian Studies*, University of Cambridge, vol. 11 (1975), at 167-178; and R. G. Landen, *Oman Since 1956*, (Princeton: 1967).

the country, was promulgated in 1996. Adopting a written constitution was a significant step in the development of the Omani legal system.³

By 1973, a body of law was in force, regarding economic issues such as currency control, foreign investment, income tax, customs, and concomitant economic exploitation.⁴ In 1974, some other pieces of legislation in various areas of business were passed, including Sultani Decree 3/1974 on the Commercial Register Law, Sultani Decree 4/1974 on the Commercial Companies Law,⁵ Sultani Decree 4/1974 on Foreign Business and Investment Law Sultani Decree 6/1974 on the Law for the Protection of Developing Industries, and Sultani Decree 7/1974 on the Banking Law.⁶ In the subsequent years, some more sectoral business legislation was put in place, such as Sultani Decree 26/1977 promulgating the Commercial Agencies Law, Sultani Decree 35/1978 on the Customs Management Law, Sultani Decree 12/1979 promulgating the Insurance Companies Law,⁷ Sultani Decrees 5/1980 and 88/1982 on the Land Law,⁸ Sultani Decree 35/1981 on the Maritime Law,⁹ Sultani Decree 68/1987 on the Law of Trade Marks and Commercial Indications, and finally the Muscat Securities Market Law. These laws mainly regulate the relationship between government bodies and individuals or companies, while occasionally and as a subordinate part they also deal with private rights, such as the relationship of

³ Oman is a monarchy, or Sultanate in Arabic, where the supreme political and legal authority is vested in the monarch, or Sultan. The Sultan rules by issuing decrees. As seen, until very recently, Oman lacked a written constitution. Tribal agreements and treaties played the role of the constitutional framework in the country (Sayed Hassan Amin, *Middle East Legal Systems*, (Glasgow: Royston Limited, 1985), at 284 and 294).

⁴ Alastair Hirst, "Contemporary Mercantile Jurisdiction in Oman", *Arab Law Quarterly*, vol.7, no.1 (May 1992), at 4.

⁵ This law was amended by Sultani Decrees 74/75, 53/1982, 13/1989, 83/1994, 16/96 and 39/1998.

⁶ It set up, among others, the Omani Central Bank.

⁷ Under the law, insurance companies have to obtain a license from the Ministry of Commerce and Industry, keep details of their accounts, provide technical reserves, and annually file returns and audited financial statements with the Commissioner of Insurance.

⁸ It required registration of immovable property with the Ministry of Land Affairs and Municipalities, and prohibited foreigners from holding freehold on land.

⁹ It includes rules for the registration of ships, navigation within Omani territorial waters, marine insurance, carriage of goods and persons by the sea, and the employment of the merchant navy.

company members with each other and third parties, ostensible authority regarding commercial registration, the transfer of rights and obligations regarding negotiable instruments, the abusive exercise of contractual rights regarding the termination of commercial agency agreements, and carrier's liability regarding bills of lading.¹⁰

A general commercial code was introduced through Sultani Decree 55/1990 on the Commercial Law, which was inspired by the Kuwaiti Commercial Code of 1981.¹¹ The process of codification of commercial rules was a direct result of an increase in economic activities in the country in the 1970s. Conducting business in various areas of economic activities such as petroleum and construction industries required an environment regulated by laws favourable to business and, particularly, investment. Also, it was the purpose of such legislation to help creation of a modern institutionalised government, and to open up the economy to international trade.¹²

Adjudicative Bodies

The traditional *Shari'a* courts form the bulk of judicial bodies in Oman. The law applied by the courts is the Islamic *Shari'a* according to the Ibadi doctrine. The *Shari'a* has not yet been codified in modern written law.¹³ The administrative base of the courts has been expanded in recent decades, as courts of first instance as well

¹⁰ Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 5-6.

¹¹ *Id.*, at 6.

¹² Amin, at 287.

¹³ Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 8. The need for the codification of the *Shari'a* has recently been raised by some religious scholars (see, for instance, Sheikh Abdul Mohsen Al Obeikan (a member of Saudi Arabia's Shura Council and a judiciary consultant for the Saudi Ministry of Justice), "The Codification of Islamic Shari'a", in *Al-Sharq Al-Awsat* (28/04/2006); and Paul Robinson, Adnan Zulfiqar *et al*, "Codifying Shari'a: International Norms, Legality & the Freedom to Invent New Forms", *University of Pennsylvania Law School, NELCO* (2006); and Aminu Adamu Bello, "Between Allan Christelow, Paul H. Robinson and Adnan Zulfiqar; Abdullahi A. An Na'Im, Sanusi L. Sanusi and Asifa Quraishi: Rationalizing the Concept of Inventing New Forms in Islamic (*Shari'a*) Law in Nigeria", *Islamic Law and Law of the Muslim World Paper*, no. 08-38 (June 29, 2008)). It should be mentioned that there have been many attempts at national levels to codify the *Shari'a* into modern law, beginning with the Ottoman Empire in the early 19th century. The issue is yet, however, far from being completed or accepted by all or even most Muslim schools and scholars. The most important difficulty with lack of a standard and codified version of the *Shari'a* is that it can be interpreted and applied in different ways.

as appeal courts have been established all over the country. While so far there has not been an independent judiciary in Oman, the Ministry of Justice was established in 1970, and was amalgamated by the Interior Ministry, forming the Ministry of Interior and Justice, in 1972.¹⁴ Under Decree 26/75 on Law Regulating the Administrative Apparatus of the State, the *Shari'a* courts are administered by the Ministry of Justice, which later once again was merged with another ministry, this time the Ministry of Endowments and Islamic Affairs.¹⁵ Alongside the *Shari'a* courts, which play the central role in the Omani judicial system, specialised, and mainly secular, judicial bodies were gradually established. These judicial bodies did not have, at least at the beginning, full features of a court. For instance, the power to resolve criminal matters was conferred upon the local governors or the police; the Police Court was established to consider traffic offences, among others, and to enforce the judgements of other judicial bodies; labour disputes were referred to the offices of the Ministry of Social Affairs and Labour; courts martial for the members of security and armed forces and a Taxation Committee for reviewing appeals regarding tax judgments were set up; the Ministry of Housing was the competent authority to hear real property and lease disputes, without prejudice to the right of the parties to bring the dispute before the *Shari'a* court.¹⁶

In 1972, by the Sultani Decree of 21 May 1972 Establishing the Committee for the Settlement of Commercial Disputes, the Committee (CSCD) was established,¹⁷ for implementing the commercial law, hearing commercial claims, whether of civil

¹⁴ Amin, at 294.

¹⁵ Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 8.

¹⁶ *Id.*, at 8-9.

¹⁷ Alastair Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987), at 136.

or criminal nature, and interpreting commercial contracts. The Committee was regulated by Sultani Decree 4/1974 on the Commercial Companies Law, Part VIII, Articles 173 to 189, as amended by Sultani Decree 84/1975 of 3 December 1975, Article 5. While the Committee had some features of a statutory arbitral body, it was mainly functioning as a court,¹⁸ in which a panel followed a specific procedure.¹⁹ If members of the panel had direct interest in the dispute, they must disclose the relevant information, and must not take part in the arbitration process, otherwise any deliberation or decision taken by the panel was regarded as void.²⁰ The Committee had the competence to consider all commercial disputes, defined as purchase for resell for a profit, such as exchange of goods, banking, manufacturing, exploitation of natural resources and management.²¹ The Committee's proceedings were relatively informal, and its decisions were not subject to appeal.²² It decided on cases on the basis of Omani statutes, the parties' contract, custom and practice prevalent in Oman and the principles of justice and fairness.²³ It was due to the lack of legal precedents and insufficiency of laws that the Committee was allowed to decide on the basis of equity and fairness, that is, what is reasonable in certain circumstances.²⁴ There is no time limit for making such a decision. While the hearings were held in public, deliberations were confidential.²⁵ The CSCD had the power to summon witnesses, require evidences and original documents, and appoint experts.²⁶ Such a

¹⁸ For instance, the members of the Committee were not judges and were not obliged to decide only on the basis of the statute, but they were not appointed by the parties either; so it had a combination of both litigation and arbitration features, with the former outweighing the latter.

¹⁹ Articles 181-183, the Commercial Companies Law No. 4/1974.

²⁰ Article 178, the Commercial Companies Law No. 4/1974.

²¹ Article 175, the Commercial Companies Law No. 4/1974; and Article 5, the Commercial Register Law No. 3/74.

²² Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 10.

²³ Article 178, the Commercial Companies Law No. 4/1974.

²⁴ Amin, *Middle East Legal Systems*, at 295.

²⁵ Article 177, the Commercial Companies Law No. 4/1974.

²⁶ Articles 185 and 187, the Commercial Companies Law No. 4/1974.

request could be made to the third parties not involved in the dispute.²⁷ The CSCD's Chairman even had the power to seize records, registers and bank accounts, or to prevent a person from leaving the country.²⁸ A third party could take part in arbitration as a defendant or claimant, if his claim is accepted by the CSCD, and without the consent of the original parties.²⁹ These later powers gave the Committee features of a judicial body, rather than an arbitral one.

The Committee's decisions were final, binding and not subject to appeal,³⁰ unless the CSCD's decision was made *in absentia* and the defendant had not taken part in the hearings or submitted a defence, under Article 183 of the Commercial Companies Law No. 4/1974. As the CSCD had certain judicial features and since arbitration awards are binding in the Ibadi *fiqh*, CSCD decisions were enforceable, without the need for obtaining leave to enforce from another judicial body, that is, a court.³¹ They were enforced in the same way as court decisions were enforced, by enforcement judges appointed for this purpose, with the assistance of the police. The Committee consisted of three government officials, *ex officio*, from the Ministry of Commerce and Industry, namely, the Under-Secretary, who acted as the chairman of the Committee, the Director-General of the Commerce Department and the Director of the Companies Department of the Ministry, the Chairman of the Chamber of Commerce and Industry, and five local people 'experienced in commercial matters and in business management', all appointed by the government.³² Some legal advisors also assisted the body in performing its duties. The Committee had the

²⁷ Article 186, the Commercial Companies Law No. 4/1974.

²⁸ Article 180, the Commercial Companies Law No. 4/1974.

²⁹ Article 184, the Commercial Companies Law No. 4/1974.

³⁰ Article 189(b), the Commercial Companies Law No. 4/1974.

³¹ Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Sharī'a and Statute Law*, (London: Graham & Trotman, 1984), at 375.

³² Article 173, the Commercial Companies Law No. 4/1974. Also, see Julian D. M. Lew, "the Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East", *Arbitration International*, vol. 1 (1985), the section on Oman.

power to decide upon commercial disputes, any matter referred to it by the Ministry of Commerce and Industry as well as appeals by commercial practitioners against the decision of their regulators.

On the basis of the Law of the Constitution of the Omani Chamber of Commerce and Industry of 15 May 1973, the Chamber was set up in 1973. Under the Law of the Oman Chamber of Commerce and Industry of 1979, the Chamber is provided with some conciliation and arbitration powers.³³ Its competence in the area of dispute resolution through arbitration is restricted to a kind of informal conciliation, which the Chamber has a limited power to enforce its awards. When a foreign party is involved, the competence of the Chamber to impose a solution is much more limited, if it has such competence at all. The Chamber has adopted the Conciliation and Arbitration Regulations for conducting its dispute settlement functions.

Under Sultani Decree 79/1981³⁴ on the Establishment of the Board for the Settlement of Commercial Disputes, the Board (BSCD) replaced the CSCD, in 1984. The new Body, though being institutionally affiliated to the Ministry of Commerce and Industry, had a separate legal personality, and financially and administratively was to a large extent independent from the Ministry. The Board had jurisdiction over business disputes.³⁵ By Sultani Decree 98/1982, three professional judges were appointed to the Board, alongside four other members from the old Committee. Members of the Board, except the Chairman, were appointed by the Sultan of Oman. Compared to its predecessor, the Board was more like a judicial authority. Sultani Decree 32/1984 on the Rules for the Hearing of Law Suits and Arbitration of 12

³³ Article 8, Law of the Oman Chamber of Commerce and Industry of 1979.

³⁴ *Oman Official Gazette* no. 226 (1 October 1981)

³⁵ Nevertheless, since the border between the jurisdictions of the BSCD and *Shari'a* courts was not clearly drawn, the latter were sometime regarded as having jurisdiction over business disputes (Abdul Hamid El-Ahdab, *Arbitration in Arab Countries*, 2nd ed., (London and Boston: Kluwer Law International, 1998), at 478).

April 1984 (hereinafter Decree 32/84) introduced a set of procedural rules for the Board. After allowing requests for appeal against its own decisions, the BSCD acquired more and more features of a judicial body.³⁶ Its judgments were required to be reasoned.³⁷ The BSCD judgments and arbitration decisions are published selectively by BSCD since 1984, under the title, *Majmou'at al-Qawa'id al-Qanuniyya* (the Collection of Legal Rules, hereinafter, *Majmou'a*). While initially the right of appeal was limited to the cases of serious flaws in the procedure, evidence or judgment, it was later expanded. Under Decree 38/1987, the BSCD was restructured; an Appellate Division and three Primary Division benches were established. The Minister of Commerce was obliged to choose the lay members of the Board from the Chamber of Commerce nominees. Sultani Decrees 73/1990 and 71/1991 made some more amendments to the rules promulgated by Decree 32/84. In 1997, Sultani Decree 13/1997 on the Establishment of the Commercial Court replaced the BSCD by the Commercial Court, whereby a fully-fledged specialised judicial institution was created, having jurisdiction to hear commercial disputes.³⁸

It was through Sultani Decree 32/1984 on the Rules for the Hearing of Law Suits and Arbitration that the first attempt at codifying arbitration in Oman was made.³⁹ Before this, arbitration was mainly regulated according to *Shari'a* law. There were, however, some isolated and scattered provisions relating to arbitration in some modern statutes.⁴⁰ Under Chapter III of Decree 32/1984, The BSCD had jurisdiction over requests for arbitration, though only where *Shari'a* courts did not have

³⁶ Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", at 139.

³⁷ Article 63, Decree 32/84.

³⁸ Since June 2001, the judicial system in Oman consists of three layers: courts of first instances, courts of appeal, and the Supreme Court. Each layer is comprised of five divisions or types of court: *Shari'a* courts, which rule over family cases, civil courts, which are also governed by the *Shari'a*, labour courts, criminal courts and commercial courts. Within the commercial division, alongside courts of first instance, there are summary courts settling claims up to 15,000 Omani Riyals.

³⁹ El-Ahdab, *Arbitration in Arab Countries*, at 478.

⁴⁰ Saleh, *Commercial Arbitration in the Arab Middle East*, at 370.

jurisdiction over the dispute. The most important feature of Decree 32/84 was that it recognised arbitration agreements as valid,⁴¹ but stopped short of considering them expressly as binding. In other words, the parties were allowed to submit to arbitration the disputes arising from their contractual relations, but there was no provision preventing the court from considering such disputes, or compelling the parties to recourse to arbitration. The Decree also regarded arbitral awards as binding on the parties.⁴² Although this was a step forward in recognition of arbitration in Oman, the Decree lacked a vital provision for arbitration, that is, recognition of arbitration agreements as binding.

By allocating a separate section to arbitration, that is, Articles 59 to 68, Decree 32/84 made a rough distinction between the functions of the Board as an arbitral body and as a court.⁴³ Decree 32/84 provided that the BSCD oversaw arbitration, and one of its judges who was nominated by the parties and affirmed by the Board was the chairman of the arbitral tribunal appointed by the parties. If the parties could not agree on the other arbitrators, they would be appointed by the Chairman of the Board. Because of the important role of the Board in any arbitral process, it can be said that Omani arbitration law, under Decree 32/84, tilted towards judicialisation.⁴⁴ Alongside arbitration by the Board, private arbitration was allowed, where there were no mandatory rules and procedures.⁴⁵

In 1997, a new arbitration law was adopted by the Sultanate of Oman. Sultani Decree 47/1997 on the Law of Arbitration in Civil and Commercial Disputes replaced previous arbitration laws that were contrary to its provisions. After ten

⁴¹ Article 59, Decree 32/84.

⁴² Article 64, Decree 32/84.

⁴³ Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", at 139.

⁴⁴ El-Ahdab, *Arbitration in Arab Countries*, at 479.

⁴⁵ Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", at 140.

years, some of its provision were revoked by Sultani Decree 3/2007 Amending Some Provisions of the Law of Arbitration in Civil and Commercial Disputes. As said before, new Omani law of arbitration is very similar to the Egyptian Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters, which is, in turn, based on the UNCITRAL Model Law on International Commercial Arbitration, with some modifications.⁴⁶

Another document relevant to arbitration in Oman is Sultani Decree 13/1997 on the Establishment of the Commercial Court. The more recent Omani piece of legislation affecting arbitration is Sultani Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes that, among others, regulates the procedure for enforcing domestic as well as foreign court sentences and orders and arbitral awards. In recent years, arbitration as a method of dispute resolution has been accepted in various areas of economic relationships in Oman. For instance, arbitration has been introduced as a dispute settlement mechanism in Muscat Stock Exchanges.

3 Legal Requirements of Foreign Companies' Operation in Oman: the Need for Stipulating Resort to International Arbitration

Arbitration always takes place in the context of contractual relationships. In other words, when there is already a legal relationship of contractual type between two parties, an agreement to refer trade disputes to arbitration is made by them. In this section, it is considered what legal requirements may oblige or persuade a non-Omani party to enter into a particular type of contract, that is, partnership, with Omani parties, rather than doing the business on its own. Moreover, the legal forms of a partnership between foreign and Omani parties, under Omani law, are examined.

⁴⁶ Hani Salah Sarie-Eldin, "Financial Disputes in the Arab Middle East, with Special Reference to Egypt", in Norbert Horn and Joseph Jude Norton, *Non-Judicial Dispute Settlement in International Financial Transactions*, (London and Boston: Kluwer Law International, 2000), at 168-9. Also, El-Ahdab, *Arbitration in Arab Countries*, at 479.

Various pieces of business legislation, particularly investment and company laws in Oman put some restrictions on foreign companies in such a way that, for operating in Oman, they need Omani partners. Such legal requirements may make stipulating arbitration as a method of resolving disputes arising from a partnership a necessity. Our discussion of such legislation in this section is not exhaustive, but points to important legal requirements.

Sultani Decree 102/94 relating to the Regulation of Foreign Capital Investment, which repealed Decree 4/74 on the Foreign Business and Investment Law, provides that non-Omani natural or legal persons may not engage in business in Oman or participate in an Omani Company, unless they apply for a licence from “Foreign Capital Investment Committee” at the Ministry of Commerce and Industry.⁴⁷ Such an authorisation can be granted, if it involves the incorporation of an Omani company whose share capital is not less than 150,000 Omani Riyals. Foreign share must not exceed 49 percent of the shares, but may be increased up to 65 percents, if recommended by the Foreign Capital Investment Committee and approved by the Minister of Commerce and Industry. It may even be increased up to 100 percent of the company’s capital for the projects contributing to the development of the national economy, following a special procedure. In such a case, the company’s capital shall not be less than 500,000 Omani Riyals.⁴⁸ This type of partnership would usually be in the form of a limited liability company.

⁴⁷ Article 1, Decree 102/94 on the Regulation of Foreign Capital Investment.

⁴⁸ Article 2, Decree 102/94 on the Regulation of Foreign Capital Investment. Under Article 3(b), Decree 4/74 on the Foreign Business and Investment Law, the Omani share must have been at least 35 percent. However, the Investment Committee usually required an Omani share of 52 percent (John McHugo, “Joint Ventures in Oman”, in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987)). The above requirement means that non-Omani individuals cannot do business in the country as a sole proprietor or sole trader. They can only do so by opening a branch in the country (Amin, at 287). The branch, however, can operate in Oman, if it has an Omani incorporated

Foreign companies having a direct and special contract with the government, being established by virtue of a Sultani Decree, or being engaged in a business that is declared by the Cabinet as necessary for the country are exempted from obtaining a license.⁴⁹ Under the previous law, Decree 4/74 on the Foreign Business and Investment Law, these necessary projects were “economic development project”, such as those in the oil industry. Foreign companies bringing professional skills of which there was a shortage in Oman, or being granted exemption by the Sultan, were also excluded from the scope of this law.⁵⁰

Also, if a foreign company wishes to bid in an international tender at the Government Tender Board, it must have an Omani “sponsor” or “commercial agent”.⁵¹ Under Sultani Decree 26/1977 on the Commercial Agencies Law, only Omani companies or merchants are authorised to distribute goods and services in Oman. Therefore, any foreign producer, in order to distribute its products, must sell them to a local commercial agent, which resells them for a profit or commission, and carries out the business of the agency on its own account.⁵² Only companies with at least 51 percent Omani share may be appointed as commercial agents. An agency agreement must be registered at the Commercial Agencies Register at the Ministry of Commerce and Industry. The commercial agent is protected by Omani law, especially in the case of termination. Termination of an unlimited term commercial

company as its partner. Under Sultani Decree 3/1974 on the Commercial Register Law, non-Omanis involved in business in Oman must register with the Commercial Register.

⁴⁹ Article 3, Decree 102/94 on the Regulation of Foreign Capital Investment.

⁵⁰ Article 6(c) to 6(e), Decree 4/74 on the Foreign Business and Investment Law. According to the Investment Committee, foreign application for general trade or services are not accepted, while investment in industrial projects are encouraged, under the Law for the Organisation and Encouragement of Industry (McHugo, “Joint Ventures in Oman”,).

⁵¹ Sultani Decree 26/1977 on the Commercial Agencies Law, amended by Sultani Decree 82/84 and Sultani Decree 73/96.

⁵² Article 1, Decree 26/77 on the Commercial Agencies Law.

agency without a justifiable reason, or any abuse of the right to terminate may bring about a suit leading to compensating the agent.⁵³

Five types of companies may be incorporated in Oman, which are available to both Omani and non-Omani parties. The first is a general partnership, or Al-Tadhamon Company in Arabic legal term, consisting of two or more legal or natural persons, who consensually or according to their agreement decide about the distribution of the profit made by the partnership, and are jointly and separately liable for its performance. Death, insanity, bankruptcy, or withdrawal of a partner brings about the insolvency of the partnership, unless otherwise decided by the rest of the partners. The second type is a limited partnership comprising of one or more main partners and some other limited partners. The names of the limited partners are not included in the partnership's name, and they cannot participate in the management of the partnership, or act in its name; if they lose their eligibility for being a partner, the partnership would not be dissolved, unless otherwise is agreed by the parties; their liability for any debt incurred by the partnership is proportionate to their share in the partnership's capital, while main partners are jointly and separately responsible for such debt.

The third is a limited liability company established by a number of natural or legal persons of two to thirty, with the minimum capital of 10,000 Omani Riyals, or 150,000 Omani Riyals, in the case of non-Omani involvement. The liability of each partner is proportionate to his contribution to the capital. A limited liability company is a private company, whose shares is not available to the public, and can be assigned to non-members only after being offered to members. Limited liability companies

⁵³ Ali & Partners, "Doing Business in Oman", http://www.mideastlaw.com/middle_eastern_laws_oman.html, (available on 10/01/2008).

may not engage in banking, financial guarantees, or commercial aviation activities.⁵⁴ Foreign businesses and investors prefer this type of company. The fourth type is a joint stock company comprising three or more persons, who would be liable for loss of the company according to their contribution to the capital. Two types of such companies are allowed in Oman, namely, closed joint stock companies whose shares are not open to the public with a minimum capital of 50,000 Omani Riyals, and public ones that are open to the public with a minimum capital of 150,000 Omani Riyals. In case of foreign partnership, the minimum capital in both types cannot be less than 150,000 Omani Riyals; and shares owned by Omanis cannot be transferred to foreigners. Such a company can only be formed by the authorisation of the Ministry of Commerce and Industry, and on the basis of the Articles of Association agreed upon by the partners.⁵⁵

Various types of joint venture, or *sharikat al-muhāssa*, as they are called in Omani law, form the last type of partnership legally allowed in the country. Contracts of a joint venture can be concluded between two or more Omani or foreign parties. Unlike the other types of partnership, a joint venture is not considered as a legal person,⁵⁶ but as a private arrangement. Hence, it does not need a name or registration with the Commercial Register.⁵⁷ A type of joint venture is a consortium, where two or more companies come together to carry out a project, though they do not form a limited liability company or any other incorporated commercial company to perform the project on their behalf. The companies agree between themselves on how to perform the project; and they are jointly and individually liable for the

⁵⁴ *Id.*

⁵⁵ Amin, at 288-290; and Ali & Partners, "Doing Business in Oman", http://www.mideastlaw.com/middle_eastern_laws_oman.html, (available on 10/01/2008).

⁵⁶ Articles 3 and 52, Decree 4/74 on Commercial Companies Law.

⁵⁷ Articles 6 and 52, Decree 4/74 on Commercial Companies Law.

contract, although the employer may contract directly with the consortium or with one or more of its members.⁵⁸ In a joint venture, the Omani partner must hold at least 51 percent of the capital.⁵⁹

Management agreements or offshore technical support or service agreements that are supplemental agreements of joint ventures should not give a foreign partner a permanent presence in Oman, and the services to be delivered by them should be provided from overseas.⁶⁰

On the other hand, the issue of taxation may encourage foreign companies to enter into various types of joint venture and partnership with Omani parties. While personal income is not subject to tax in Oman, all corporate entities are so, under Sultani Decree 47/1981 on the Corporate Income Tax Law. Tax rates vary according to the proportionate Omani and foreign shares as well as the activities of the company, and apply on a sliding scale. Commercial companies that are wholly owned by non-Omanis are taxed on a progressive scale culminating at 50 percent on the net profit of 500,000 Omani Riyals. Companies with foreign participation of 91 percent or more are taxed up to 50 percent, while corporate entities with foreign share of 9 percent or less are taxed up to 25 percent. Companies with Omani share of 51 to 35 percent are taxed between 15 to 20 percent after the net profit of 20,000 Omani Riyals. Wholly owned Omani companies and mixed public joint stock companies are taxed between 0 to 7.5 percent. Companies that are wholly owned by Omanis are granted various types of tax exemption or concessions.⁶¹

⁵⁸ McHugo, "Joint Ventures in Oman".

⁵⁹ Article 7, Decree 4/74 on Commercial Companies Law.

⁶⁰ McHugo, "Joint Ventures in Oman".

⁶¹ Schedule II, Sultani Decree 47/1981 on the Law of Income Tax on Companies; and Sultani Decree 65/1977 affecting reduction in Income Tax on Mixed Ownership Companies. Sultani Decree 1/1979

Companies involved in manufacturing, agriculture, fishery, tourism, export, public utility projects and infrastructure projects are entitled to a five year tax holiday. The same is with regard to corporations whose activities are considered as essential for economic development. If such companies have some losses during these five years, they may carry forward the losses into the following years, until they are set off against taxable income. Under Decree 1/1979 on the Law for the Organisation and Encouragement of Industry, local industrial projects are provided with some other incentives, such as exemptions from export and import taxes and reduced prices for utilities. Also, local products are preferred in public procurements.⁶²

Moreover, under Decrees 5/1980 and 88/1982 on the Land Law, only Omani natural persons or state may hold freehold title to land. Corporate bodies incorporated in Oman, if complied with the rules on the required percentage of Omani shares, may conclude long term lease contracts, normally for a 49 year period. Under such contracts, after 15 years, the land becomes the property of the Omani partner, while the foreign party has the right to use the land for the rest of the period. Under certain circumstances and for the economic development of Oman, the Ministry of Land Affairs and Municipalities may confer a usufructuary right to a property on a corporate body or non-Omani nationals. When the period for utilising the right is ended, any improvement to the property is compensated for; and if the

on the Law for the Organisation and Encouragement of Industry provides for tax holidays for industrial companies. Similar concessions are also provided for some other companies by the Foreign Business and Investment Law at the discretion of the Ministry of Commerce (see McHugo, "Joint Ventures in Oman").

⁶² Ali & Partners, "Doing Business in Oman", accessed through http://www.mideastlaw.com/middle_eastern_laws_oman.html, on (10/01/2008).

beneficiary dies before the expiry of the term, the right ceases to exist. Companies must provide rented accommodation for their foreign staff. They can build such accommodation with special permission from Omani authorities, on the condition that upon the completion of the project assigned to the company, the built accommodation becomes the property of the land owner.⁶³

At least with regard to one type of dispute, Omani law specifically stipulates recourse to arbitration in disputes between Omanis and foreign parties. Article 14 of the Sultani Decree 102/1994 on the Foreign Capital Investment Law provides that it may be agreed to refer any dispute between foreign investment projects and third parties to a local or international arbitration tribunal.

4 *Shari'a* Law in Oman

The legal system in Oman, as in most other Muslim countries, is based on Islamic law or the *Shari'a*. In principle, *Shari'a* law applies to all aspects of a dispute between Muslims.⁶⁴ However, in practice, each Muslim country has its own national law that is influenced not only by various external sources of law, such as common law or French law, but also by its own interpretation of Islam. What is important is that the *Shari'a* works as a legal background in most Muslim countries, to a greater or lesser extent. In some jurisdictions, such background is ignored, whereas in some others it is heavily relied upon.

In Oman, in particular, the Ibadi doctrine is the dominant version of Islam, which has had a crucial role in shaping the society and government in that country. Nevertheless, it is not the case that the doctrine is strictly followed in various social

⁶³ Amin, at 292.

⁶⁴ *Surah Al Nisa'*, verse 59 reads "O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end."

domains of the society.⁶⁵ Omani economy and legal system are as much influenced by the Ibadi interpretation of the *Shari'a*, as they are influenced by modern requirements of life.⁶⁶ Regarding legal bodies, while *Shari'a* courts implement Ibadi law and are neither qualified nor willing to administer secular laws enacted through governmental decrees, state courts normally apply the latter laws.⁶⁷ In general, it can be said that there is not much difference between the Ibadi version of the *Shari'a* and other versions belonging to other denominations in Islam, particularly the Sunnis.⁶⁸ This is because various schools of thought and their relevant legal theories were developed in the first two centuries of the Islamic era, when different Islamic denominations were in close contact with each other.⁶⁹

Under the Ibadi doctrine, the Imam, or the religious leader, has absolute political and religious authority. He enforces the *Shari'a*. Such an Imam should be elected by the Islamic society, and need not be from Prophet Mohammad's family or tribe, *pace* the Shi'a and Sunnis. In certain circumstances, when there is a serious rift within the society about the political leadership, an Imam might not be necessary. Such a belief has, however, remained at the theoretical level. The '*ulama*, or religious scholars, act

⁶⁵ For instance, interest, or *riba*, is strictly prohibited in Islam, but in some ways it is practiced in Oman, as in many other Muslim countries.

⁶⁶ For instance, interest on banker's loan or advance has been recognised by Omani Commercial Law 55/90 (Article 80) and Omani civil courts implement it, even if there has not been an agreement between the parties for charging interest (Case 365/86, judgment issued on 18 March 1990, *Majmou'a*, vol. VI, at 283), despite being contrary to *Shari'a* law. Annual interest is now also applicable to commercial outstanding as well as postponed and compensatory damages (Article 80 of the Commercial Law, and Case 37/1990, Court of Appeal, *Majmou'a*, vol. VI, at 194).

⁶⁷ Amin, at 294.

⁶⁸ See, for instance, Zahran ibn Khamis Al-Mas'oodi, *Al-Imam ibn Baraka al-Bahlawi wa Dawroho fi al-Madrasa al-Ibadiyya men Khilafat Kitabe (al-Jamie)*, (Sultanate of Oman: Ministry of Awqaf, 2000), at 7-8. This similarity can be seen by comparing Ibadi books of *fiqh*, such as 'Abd al-'Aziz ibn Ibrahim al-Mus'abi, *Kitab al-Nil*, (Cairo: 1305 H), or a commentary on it by Muhammad ibn Yusuf Atfiyyash, *Sharh al-Nil wa Shifā al-'Alil*, 10 vols., (Cairo: 1343 H.), and those of the Sunni schools such as Abi Bakr Muhammad bin Ahmed al-Sarakhsi, *Kitab al-Mabsut*, (Cairo: al-Sa'ada, 1331 H) (the Hanafi School), Abu al-Qasim ibn Hossein al-Khiraqi, *Al-Mukhtasar*, (Damascus: 1964) (the Hanbali School), Mohiuddin Yahya Ibn Sharaf al-Nawawi, *Minhaj al-Talibin*, (Beirut: Dar al-Ma'rafa) (the Shafi'i School), Abu al-Walid al-Baji, *Ihkam al-Fusul fi Ahkam al-Usul*, (Dar al-Gharb al-Islami, 1981) (the Maliki School).

⁶⁹ Amin, at 293.

as judges, or *qadis*, who hear disputes under the Islamic law and administer the *Shari'a*.⁷⁰

Shari'a law is based on *fiqh*, or Islamic jurisprudence. The Ibadis regard 1) the Quran and b) *Sunna*, which means Prophet Mohammed's practice and remarks, 3) *qiyās*, or analogy, and 4) *ijma'*, or the consensus of scholars, as the only sources of jurisprudence, or *fiqh*.⁷¹ Some authors have argued that the Ibadis either deny or are extremely cautious in resorting to *qiyas and Ijma'*.⁷² This is, however, not true, although, for the Ibadis, the Quran and *Sunna* are the main sources of law, as they are for other Muslim sects. Like other Islamic denominations, the Ibadis think that any problem in human life, whether in individual or social dimensions, can be resolved by recourse to Islamic sources. Hence, they are very strict in implementing Islamic law or the *Shari'a*,⁷³ and oppose *bida'*, or any innovation in the religion.⁷⁴

Arbitration and the Ibadi Doctrine of Islam

The origin of the Ibadi doctrine goes back to the rejection of arbitration over the issue of Caliphate.⁷⁵ This happened when Muawiya, the governor of Syria, rebelled against Ali Ibn Abi Talib, the fourth Caliph or successor the Prophet Mohammad, and challenged him over who should rule the Islamic society after the third Caliph, Othman. At the battle of Siffin in year 657 AD, when the rebellion was about to be defeated by Ali's army, Muawiya proposed to settle the dispute by referring to arbitration (*tahkeem*, in Arabic). A large part of Ali's troops insisted that he should accept the proposal, thinking that the outcome of the arbitration would naturally be

⁷⁰ Saleh, *Commercial Arbitration in the Arab Middle East*, at 373.

⁷¹ Noro-Din Abdullah Bin Homaïd Al-Salemi, *Tal'at Ash-shams*, (Ministry of National Heritage and Culture: Muscat, 1981), at 1, and Khalfan Bin Jomail Al-Siyabi, *Fosul Al-Osul*, (Muscat: Ministry of National Heritage and Culture, 1982), at 23.

⁷² See, for instance, Saleh, *Commercial Arbitration in the Arab Middle East*, at 372 and Amin, at 294.

⁷³ El-Ahdab, *Arbitration in Arab Countries*, at 476.

⁷⁴ Saleh, *Commercial Arbitration in the Arab Middle East*, at 372.

⁷⁵ See, for instance, Nasser Suliman Al-Sabe'i, *Al-Khawarij wa Al-Haqiqah Al-Gha'eba*, (Muscat: Maktabat Al-Jeel Al-Va'd, 1999).

to their favour. When Muawiya's arbitrator ('Amr al-'Aas)⁷⁶ deceptively turned the decision of the arbitration to the favour of his own side, a group of Ali's army challenged him and the other side, believing that the issue should have never been referred to arbitration. The arbitration at Siffin and the disagreement over its interpretation is most important difference between the Ibadi doctrine, adhered by the protesting group, and other doctrines in the Islamic world, and the starting point of the development of an interpretation of Islam that ended up in the formation of the Ibadi doctrine as different from other Muslim denominations. The name, Ibadi, is derived from 'Abdullah ibn Ibada, the name of a later leader of the group, which established pockets of protestation against the ruling dynasties throughout the Islamic Empire, and finally settled in the remote parts of the then Islamic world, such as in Oman and North Africa, particularly Algeria.

It might seem paradoxical to try to work out the rules of arbitration under a doctrine that its formative point has been a rejection of arbitration. However, the truth is that the Ibadis rejected arbitration on that particular dispute within Muslim society in that particular time; they do not rule out arbitration totally. Arbitration as method of dispute resolution is accepted by the Ibadi doctrine. While the controversial arbitration between Ali and Muawiya is extensively discussed in *Shari'a* sources, the issue of arbitration in commercial disputes is addressed briefly, under *Shari'a* law, whether in its Ibadi or other versions in the Islamic world.⁷⁷

As a matter of fact, arbitration predates Islam, and was used before it among the Arabs.⁷⁸ It was, however, accepted by the new religion as a method of dispute

⁷⁶ Ali's side chose Abu Musa Ash'ari as their arbitrator. Ali, however, was not happy with the arbitrator, and unwillingly accepted him.

⁷⁷ Saleh, *Commercial Arbitration in the Arab Middle East*, at 371.

⁷⁸ See, for instance, Ahmad ibn Ya'qub, *Tarikh Yaqubi*, vol. 1, (Hootsema Publication) at 299; Hassan Ibraheem Hassan and Ali Ibraheem Hassan, *An-Nodhom al-Islamiya*, 3rd ed. (Cairo: Maktaba an-

resolution, and regulated. The importance of arbitration as a method of dispute settlement in the pre-Islamic Arabian Peninsula can be attributed to a fact that makes arbitration vital for our time, that is, lack of a central government. Two types of Quranic verses can be found as affirming arbitration as a method of dispute settlement: first, those enjoining people to fulfil their contractual undertakings, and second, those directly recommending arbitration as a way of resolving disputes. In the first category, people are called upon to respect their contracts and promises, in general. Such a recommendation also applies to an agreement to arbitrate. Verse 1 of *Sura Al Ma'ida* reads: 'Oh ye who believe, respect your undertakings.' Verse 34 of *Sura Al Asrā'* states: '... and fulfil (every) engagement, for (every) engagement will be enquired into [in the day of reckoning].' There is also a *hadith* from the Prophet Mohammad stating: 'believers should stand by their engagements.'

As to the second category, in the *Shari'a*, arbitration is mainly recognised as a dispute resolution method in family matters. Verse 35 of the *Sura Al Nisa'* states that, in disputes between husbands and wives, 'If you 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 conciliation.' This account of arbitration has, however, a strong judicial nature, since not the couple but a third party who fears that the couple separate appoints the arbitrators. Nevertheless, since there is a kind of delegation on behalf of the husband and the wife and it is assumed that they are looking for a settlement, it has features of arbitration. The above Quranic verse indicates that certain subjects of personal law can be settled through arbitration. However, it is not confined to these subjects. The *Shari'a* provides that some

Nehdha al-Messriyya, 1962), at 273; Ibn Hisham, *Kitab Sirat Rasul Allah*, edited by Ferdinand Wüstenfeld, vol. 1, (Frankfurt-am-Main: Minerva, 1961), Part 1, at 77; and Isfahani Abu al-Faraj, *Kitab al-Aghani*, vol. 15 (Cairo: Dar al-Kotob al-Messriyya 1963 AD (1383 H.)), at 57. Majid Khadduri. *War and Peace in the Law of Islam*. (Baltimore: Johns Hopkins University Press, 1955).

subjects of civil law can also be decided upon by an arbitration judge, or in Islamic terminology, *qadi tahkeem*, to whom the parties agree to refer their dispute. Unlike judges, arbitration judges are not appointed by the state. This is in line with the doctrine of *sulh*, or compromise settlement, as a dispute resolution mechanism ordained by the *Shari'a*.⁷⁹ The mechanism of *sulh*, or conciliation, allows avoiding the strict application of the *Shari'a* and deciding by *amiable composition*.⁸⁰ In *sulh*, the settlement may be reached by the exchange of property for property, or the right to use a property. This settlement method is allowed, when in the right claimed there is an element of ownership (*mielkiyyat*), that is, tangible assets which can be given monetary value.⁸¹

In the early history of Islam, there was, at least one example of resolving disputes between Muslims and non-Muslims through arbitration. In a dispute between the Islamic society under the leadership of the Prophet and the Jewish community of Bani Qoraiza, who violated their non-aggression agreement with the Muslims, both parties agreed to settle their dispute through arbitration.⁸² The arbitrator chosen by both parties was Sa'd Ibn Ma'adh, the Muslim chief of the tribe Ows and an ally of the Jews in the pre-Islamic era, who ruled on the dispute by reference to Muslim as well as Jewish laws on treason. In general, under Islamic law, in a dispute between Muslims and non-Muslims, the Islamic court would be competent. However, if both agree, instead of referring to an Islamic court, the dispute can be referred to arbitration. In the above mentioned arbitration between Ali and Muawiya, the parties

⁷⁹ For the link between arbitration and *sulh* in *fiqh*, see Ibn 'Abidin, Mohammad ibn 'Omar, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, 5 vols, vol 4 (Cairo: 1299 H), at 483.

⁸⁰ Salim Baz, *Sharh Ahkam al-Majalla*, 3rd ed. (Beirut: 1923), Article 1850.

⁸¹ For the Ibadi view on the issue of *sulh*, which is very much similar to those of other Muslim schools, see 'Abd al-'Aziz ibn Ibrahim al-Mus'abi, *Kitab al-Nil*, at 268-9.

⁸² See Mohammad ibn 'Omar Waqedi, *Kitab al-Maqazi Waqedi*, edited by Mercedan Jones, vol. 2, (Oxford: Oxford University Press, 1966) at 501 and Ibn Hisham, *Kitab Sirat Rasul Allah*, edited by Ferdinand Wüstenfeld, vol. 2, (Frankfurt-am-Main: Minerva, 1961), at 240.

signed an arbitration agreement, providing for the names of arbitrators, the law of arbitration which was the Quran and then, Prophet Mohammad's *sunna*, the period and place of arbitration. They also affirmed their mutual commitment to abide by the award. The difficulty was that the subject of the dispute to be settled through arbitration was not mentioned in the agreement,⁸³ and this proved to be fatal to the arbitration. While the original dispute was over determining the killers of the third Caliph, Othman, the arbitrators debated on the issue of Caliphate. Moreover, the final award was based on deception, to the effect that the arbitrators agreed to depose both contenders for the office of Caliphate, but Muawiya's arbitrator in his announcement stressed the appointment of his party as the Caliph. This announcement was consequently objected to by Ali's arbitrator.

The concept of *qadi tahkim*, or arbitration judge, in the traditional *Shari'a*, points to a legal situation in which the parties to a private law dispute may refer their dispute to a third party appointed by them, who are not judges and do not possess some requirements of a judge, but whose decision is binding. This method may particularly be used, if one of the parties is not Muslim, and do not wishes to submit the dispute to Islamic *Shari'a* courts. Thus, it can be concluded that Islam recognises arbitration as a binding method of dispute settlement.

General Features of Arbitration under the Ibadi Doctrine

General requirements of contracts apply to arbitration agreements and their validity too. Banning *gharar*, that is, aleatory or uncertain obligations and risks, is a general condition of contracts under the *Shari'a*. That is why, for instance, gambling

⁸³ See Ibn Athir, *Tarikh al-Kamel*, (Beirut: Dar al-Kotob al-Ilmiyyah, 1987), vol 3, at 149-50; al-Tabari, vol. 3, part 6; and Abdul Hamid El-Ahdab, "The Moslem Arbitration Law", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987), at 338.

and, according to some Islamic scholars, insurance contracts are prohibited. The rationale is that, when concluding a contract, the parties must be fully aware of their obligations. Any uncertainty as to the price, goods, and the like may lead to the invalidity of a contract. Again, the Hanbali and Zaydi schools strictly adhere to this principle,⁸⁴ which is particularly stressed in the Ibadi school.⁸⁵ More specifically about arbitration agreements, it has been argued that some versions of the *Shari'a* do accept submission agreements, but not arbitration clauses. In other words, agreements to refer *future* disputes to arbitration are invalid, whereas it is permitted to undertake to refer *existing* disputes to arbitration.⁸⁶ This is a corollary of the general requirements of contracts that they must not involve *gharar*. Nevertheless, from an Ibadi point of view on the *Shari'a*, both submission agreements and arbitration clause are valid, as they reflect the principle of freedom of contract, and there is nothing inherently against the *Shari'a* or any unacceptable risk in them.

It has also been argued that, under the *Shari'a*, an arbitration clause is revocable by the parties right up to the time of issuing the award.⁸⁷ This does not seem to be true. According to the Ibadis, if one party does not accept an arbitrator, but participate in the process of arbitration, for instance, if he answers the arbitrators' questions, that is, after the submission of a defence statement to the arbitrator, revocation of the arbitrator is not permitted.⁸⁸ Such a view is shared by the Malikis,⁸⁹

⁸⁴ Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", at 28.

⁸⁵ Saleh, *Commercial Arbitration in the Arab Middle East*, at 380-81.

⁸⁶ Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", *Essays and Addresses on Arab Laws*, (Richmond: RoutledgeCurzon, 2000), at 46; also Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed., London: Sweet & Maxwell, 1999), at 111.

⁸⁷ Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", at 46. Also, El-Ahdab argues that, under the Ibadi doctrine, arbitration agreements are valid, though they are not binding (El-Ahdab, *Arbitration in Arab Countries*, at 478).

⁸⁸ Atfiyyash, at 523-4.

but not the other three Sunni schools, namely, the Hanafi,⁹⁰ the Shafi'i,⁹¹ and the Hanbali.⁹² The latter group considers arbitrator as a kind of *wakil* (or agent), whose mandate can be revoked any time. However, under certain circumstances, the mandate of an agent cannot be revoked, for instance, when the interests of a third party is involved. Such a third party can be the agent, or in arbitration, the arbitrator himself, whose fee can be at stake. So the concept of a third party can be extended to include the arbitrator. Moreover, the *Shari'a* principle of respecting contractual agreements can be a ground for the irrevocability of the arbitrators' mandate. It can be concluded that if the parties agree to refer their disputes to arbitration, and they have chosen the arbitrators, they cannot withdraw from arbitration. However, if there is no agreement between the parties about the arbitrators, it is possible to withdraw from arbitration.⁹³

As a general condition for the validity of contracts, under the *Shari'a*, arbitration agreements must be in writing. Under the *Shari'a*, minors, the insane, bankrupts, and, in some versions, the disabled and terminally ill are precluded from entering into any contracts, including arbitration agreements.⁹⁴ Non-Muslims can subject their disputes to arbitration conducted according *Shari'a* rules.⁹⁵

⁸⁹ Al-Zurqani, 'Abd al-Baqi. *Sharh 'ala Mukhtasar Khalil*, 8 vols, vol 7, (Cairo: 1303 H), nos. 130-133.

⁹⁰ Ibn 'Abidin, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, at 483.

⁹¹ Rmli, Shams al-Din Mohammad ib Abu Abbas, *Nihayat al-Mohtaj*, vol 8 (Cairo: 1356 H), at 231.

⁹² Al-Bahuti, Mansur ibn Yunus, *Kashshaf al-Qina' 'an Matn al-Iqna'*, 6 vols, vol 6 (Riyadh: 1368 H), at 309.

⁹³ The role of arbitrators is of paramount importance to the validity of the whole arbitration process. Such an importance is reflected in statutes heavily influenced by the *Shari'a*. For instance, under the Egyptian Code of Civil and Commercial Procedures 13/1968, if the arbitrator dies, is disqualified, or his mandate is revoked, arbitration process would halt, unless the parties agree upon a new arbitrator.

⁹⁴ Amir ibn 'Ali al-Shamakhi, *Kitāb al-Idāh*, 4 vols., (Beirut: 1971), at 107-113.

⁹⁵ al-Hārithi, at 53.

Arbitrators should have the same general characteristics that judges have. They must be adult, sane, Muslim, male and freeman.⁹⁶ The quality of reliability, *'adāla* and *amāna* in Arabic, for an arbitrator, is also stressed by the Ibadis.⁹⁷ Although it would be better that arbitrators are learned in the *Shari'a*, they need not be a *faqih*, or an expert in Islamic jurisprudence. The arbitrators even in disputes in which one of the parties is a non-Muslim, must be Muslim. This is because the Quran states: 'Never will Allah grant to the unbelievers a way (to dominate) over the believers.'⁹⁸ Another *sura* mentions: 'their (real) wish is to resort for the judgement (in their disputes) to *taghoot* [that is, a false god and illegitimate anti-Islamic ruler], though they are ordered to reject him.'⁹⁹ Some *'ulama*, however, believe that non-Muslims can be appointed as arbitrators by Muslims.¹⁰⁰ The Hanafis even believe that a non-Muslim can be a judge, and consequently an arbitrator, in disputes within Islamic society.¹⁰¹ It seems that the above Quranic verses prohibit referring to a non-Muslim ruler who symbolises non-Muslim sovereignty, rather than non-Muslim individuals. Hence, if Muslims consent to refer a dispute to non-Muslim private individuals, it may be permitted. Some legal experts restrict the mandatory rule that, in a dispute involving a Muslim party, the arbitrator must be a Muslim to *dar al-Islam*, that is, the Muslim territory. In other words, outside the Islamic society, such a rule is not mandatory.¹⁰² The *Shari'a* is silent about the number of the arbitrators, or the number

⁹⁶ See Mohammad Bin Ja'far, *Al-Jame'*, (Ministry of National Heritage and Culture: Muscat, 1987), at 56-57.

⁹⁷ 'Abdullāh ibn Humyad al-Sālimī, *Jawhar al-Nizām fī 'Ilm al-Adyān wal-Ahkām*, 2 vols., (Cairo: 1344 H.), at 609-10.

⁹⁸ *Surah Al Nisa'*, Verse 141.

⁹⁹ *Surah Al Nisa'*, Verse 60.

¹⁰⁰ Mohammad ibn Hassan al-Sheybani, *Al-Sair Al-Kabir*, vol. 1, (Cairo), at 363-364.

¹⁰¹ Majalla, which is a modern restatement of the Hanbali *fiqh* on financial and civil law, does not require a judge and, hence, an arbitrator to be a Muslim. See Salim Baz, *Sharh Ahkam al-Majalla*, 3rd ed. (Beirut: 1923), Article 1797.

¹⁰² Saleh, *Commercial Arbitration in the Arab Middle East*, at 436.

being odd or even, but generally *fiqh* texts talk about one arbitrator.¹⁰³ Nevertheless, as seen above, a *sura* in the Quran stipulates the possibility of more than one and even an even number of arbitrators.¹⁰⁴

Under the *Shari'a* of various versions, in arbitration, several procedural rules must be followed: both parties must be treated equally; their claims and defences must be heard; they have the right to substantiate their claims with evidence; evidence must be consistent; the plaintiff is obliged to prove his allegations,¹⁰⁵ the principle of substantive truth must be adhered to, and outweigh judicial technicalities.¹⁰⁶ Like all Sunni schools, the Ibadis adhere to the principle that written evidence is valid, only if substantiated by admission or oral testimony.¹⁰⁷ It should, however, be said that the Ibadis attach more credence to written evidence, than the others Muslim Schools of *fiqh* do.¹⁰⁸ The *Shari'a* classifies various types of witnesses, and, for instance, gives priority to some categories. The testimony of an Ibadī individual is considered as having priority over those given by other Muslims, non-Muslims of Judo-Christian religions and finally other non-Muslims respectively.¹⁰⁹ Male witnesses have priority over women, and the solvent over the insolvent. Singers, musicians, poets and tax collectors are considered as not fully reliable. If there has already been enmity between two persons, they cannot testify against each other. A father cannot testify for his son, though a son can testify against his father. Neither can an agent testify for his principal, nor can an employee

¹⁰³ Id., at 385.

¹⁰⁴ *Surah Al Nisa'*, Verse 35.

¹⁰⁵ Atfiyyash, vol 6, at 536.

¹⁰⁶ Saleh, *Commercial Arbitration in the Arab Middle East*, at 383.

¹⁰⁷ Id., at 387.

¹⁰⁸ See, for instance, 'Abduallh ibn Humayd al-Sālimī, *Jawhar al-Nizam fi 'Ilm al-Adyan wal-Ahkam*, 2 vols, (Cairo: 1344 H), at 617.

¹⁰⁹ Id., at 626-7.

testify for his employer.¹¹⁰ In financial disputes, women can testify, on the condition that there is also a man witness. In such disputes, non-Ibadi Muslims can also act as witnesses.¹¹¹

As to the choice of the place, language and the time-schedule for arbitration, the *Shari'a* does not impose any restriction.¹¹² Seat of arbitration can be relevant, only if it implies the applicable law. The roots of the controversy over the non-Muslim arbitrators, too, go back to the issue of the applicable law. It has been said that the *Shari'a* does not allow non-Islamic law to govern arbitration over disputes in which a party is a Muslim, the location being irrelevant.¹¹³ Samir Saleh argues that this view is rooted in the fundamental Islamic belief in the division of the world into two parts: *dar al-Islam*, or the land of Muslims, and *dar al-harb*, the land of hostility, that is, non-Muslims' territory with which Muslims are, in principle, in the state of constant war. Such an account of international relations implies that awards rendered outside *dar al-Islam* lack any validity, whether it is on a dispute to which a Muslim is a party or is between two non-Muslims. Consequently, there is no question of recognition and enforcement of such awards.¹¹⁴ The dispute must be retried. *Pace* Saleh, however, the significance of this view should not be exaggerated as different views are purported by various versions of the *Shari'a* regarding the applicable law. With the exception of the Hanafis,¹¹⁵ other Muslim schools believe that if the non-Muslim party does not agree that his differences with a Muslim be governed by

¹¹⁰ Saleh, *Commercial Arbitration in the Arab Middle East*, at 387.

¹¹¹ al-Sālimī, *Jawhar al-Nizām fī 'Ilm al-Adyān wal-Ahkām*, at 616-621.

¹¹² Saleh, *Commercial Arbitration in the Arab Middle East*, at 386.

¹¹³ Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", at 46.

¹¹⁴ Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", at 22.

¹¹⁵ al-Sarakhsi, *Kitab al-Mabsut*, vol. 23, at 120-23.

Islamic law, the applicable law is the law that both party agree upon.¹¹⁶ Also, the Ibadis believe that the *Shari'a* must be exclusively applied within the Islamic society, but a contract made outside the Islamic society between a Muslim and a non-Muslim, under a foreign law, is also valid.¹¹⁷

According to Islamic jurisprudence, arbitrators must strictly follow the applicable law. There is nothing in the *Shari'a* to allow arbitrators to decide *ex aequo et bono*. They can only avoid the strict application of the law and make a decision on the basis of equity, if they are appointed as conciliators. In such a case, they should persuade either party to relinquish a portion of his rights to reach a conciliatory solution. The point is that, in Arab legal thinking, the concept of equity is not linked to adjudication but to mutual concessions.¹¹⁸

Under Islamic law, only those disputes are arbitrable that can be subject to compromise, or *sulh*, as it is called in Islamic legal terminology. In these cases, which in principle are over property, a party may relinquish part of his rights.¹¹⁹ Such disputes do not involve what in Islamic terminology are called divine rights (*haq Allah*), in contrast with private rights (*haq al-nās*). The concept of divine right is very close to the concept of public right, or at least the latter is the main component of the former. Among divine rights are subjects of Islamic criminal law, which are punished by *hodoood* (punishment for adultery, theft, drinking alcohol and so on), *ta'zīrāt* (judicially determined offences) and *qisās* (punishment for inflicting bodily injuries or committing murder). The arbitrability of disputes subject to *qisās* is contested among Muslim jurists. Alongside divine rights, whenever the rights of a

¹¹⁶ 'Abd al-Karim Zaydan, *Ahkam al-Dhimmiyyan wal Musta'minin fi Dar al-Islam* (Baghdad: 1963), at 560-63.

¹¹⁷ Atfiyyash, at 401.

¹¹⁸ Saleh, *Commercial Arbitration in the Arab Middle East*, at 435-6.

¹¹⁹ See, for instance, Article 552, the Kuwaiti Civil and Commercial Procedures Code of 1980.

third party are involved, the dispute cannot be resolved through arbitration between the two parties. Hence, certain personal status disputes are considered as non-arbitrable, the scope of which varies from one Islamic legal school to another.¹²⁰ These include disputes on issues such as marriage and divorce, affiliation and guardianship of minors. However, the financial compensation in some disputes that are not arbitrable may be subject to arbitration.¹²¹

Moreover, a dispute is not arbitrable, if its subject-matter is an illegal item, or what is called *harām* in Islamic terminology, such as pork, wine or gambling.¹²² This implies what can be called Islamic public policy.¹²³ An agreement must not involve paying interest, or *riba* in Islamic terminology, on lent money. The rationale of this injunction is prevention of the exploitation of the borrower by the lender leading to the former's financial ruin. While the Zaydi and Hanbali schools strictly prohibit usury, and the latter does not consider it valid even outside Muslim territories, the Hanafi school's rules are more flexible in this regard.¹²⁴

As touched upon before, it has been said that the Ibadis believe that the issue of the political leadership of the Islamic society, or the Caliphate, cannot be subject to arbitration, as they regard the controversial arbitration between Ali and Muawiya invalid.¹²⁵ However, this is not true. The Ibadis denounce the above-mentioned arbitration, because Muawiya was a *baghi*, according to the Quran, that is, he rebelled against the legitimate Muslim government. Therefore, he could not involve

¹²⁰ Saleh, *Commercial Arbitration in the Arab Middle East*, at 46-7.

¹²¹ Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", at 28.

¹²² Saleh, *Commercial Arbitration in the Arab Middle East*, at 437.

¹²³ Some jurists argue that a part of Islam's public policy can be inferred from *sura al-Nahl*, where the fundamental laws on the rise and fall of a society are stated (see Saleh, *Commercial Arbitration in the Arab Middle East*, at 473, footnote no. 6).

¹²⁴ Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", at 27.

¹²⁵ Saleh, *Commercial Arbitration in the Arab Middle East*, at 373.

in arbitration. Otherwise, the Ibadis do not have any objection to arbitration in this issue too.

The arbitrators must issue the award, independent of the parties' wishes. Under the Ibadī doctrine, in particular, the award is binding, and must be enforced, even if it is based on the weakest opinion.¹²⁶ This points to the importance attached to arbitration, under the Ibadī doctrine. The binding and enforceable effects of the award are restricted to the parties.¹²⁷ Awards are generally considered to have the same effects as a court judgment has.¹²⁸ Although arbitration is primarily a contractual solution, it is not considered a diplomatic dispute settlement mechanism whose final outcome is optional. An award is enforced by *qadis*, because only they have the power of enforcement.¹²⁹ They can use government power to imprison a debtor and employ any other method, such as attaching his assets or selling his property, to recover the debt. Regarding recognition and enforcement of foreign arbitration, there are various views among Islamic scholars. Under the *Shari'a*, an award is considered as foreign, if it is not rendered under the *Shari'a*,¹³⁰ the place being irrelevant. Accordingly, the arbitrators may also not have the qualifications needed under the Islamic law.

Arbitration is particularly recommended when the *qadi*, the Islamic judge, is a party to the dispute, or is the relative of one of the parties, or when the parties are relatives. This is also the case, when no *qadi* is available, probably because of lack

¹²⁶ Id., at 390.

¹²⁷ Dhia-a-Din Abdul-Aziz Bin Ibrahim Al-Thamini, *Al-Ward Al-Bassam fi Riyadh Al-Ahkam*, (Muscat: Ministry of National Heritage and Culture, 1985), at 25 and 39. And Muhammad ibn Yusuf Atfiyyash, *Kitab Sharh al-Nil wa Shifā al-'Alīl*, (Jeddeh: Maktabata Al-Irshad), Part 13, at 11.

¹²⁸ Al-Zurqani, nos. 129 (the Maliki School), Al-Bahuti, at 294 (the Hanbali School), Baz, articles 1842, 1848-9, and Ibn 'Abidin, at 484 (the Hanafi School; Ibn 'Abidin believes that only after confirmation by a judge, the award becomes binding); al-Nawawi, at 367 (the Shafi'i School).

¹²⁹ Saleh, *Commercial Arbitration in the Arab Middle East*, at 391.

¹³⁰ Id., at 392.

of political leadership, or Imam.¹³¹ As to the court intervention in the arbitration process, a *qadi* may be requested to confirm the appointment of the arbitrators, in order to ensure that such appointment cannot be revoked, though the intervention of a *qadi* is not stipulated by the *Shari'a* in either arbitration proceedings or the confirmation of the arbitral award.¹³² On the other hand, an award may be reviewed and set aside by the *qadi*, if contradicting the *Shari'a*. Also, if the award is based on injustice, it must not be enforced.¹³³ Errors of fact do not have a similar effect.¹³⁴

5 Conclusion

The Omani legal system, including its business and arbitration laws, has gone through rapid developments in recent decades. While modernisation has been the dominant trend, the codification of *Shari'a* law has also been followed. Since 1970, a significant body of written law on business and commercial relationships has been introduced, and several institutions for settling disputes arising from these relationships have been established.¹³⁵ The country now has a firm legal structure potentially capable of responding to the requirements of modern life and business. As to arbitration, the *Shari'a*, according to the Ibadi school, provides some legal concepts and institutions that can work as the basis for modern arbitration. At the least is that the traditional Islamic law, in general, does not create any obstacle to expanding recourse to this method of dispute resolution. Foreign arbitration is more controversial, however. Nevertheless, as we will see more clearly later in this thesis, the role of the *Shari'a* in Omani law of arbitration is gradually diluting. As an example, up to the time of his writing, points out Hirst, in no reported case, the

¹³¹ Id., at 373-4.

¹³² al-Sālimī, *Jawhar al-Nizām fī 'Ilm al-Adyān wal-Ahkām*, at 43 and 72-3.

¹³³ Mohammad Bin Ibrahim Al-Kindi, *Bayan Al-Shar'*, (Muscat: Ministry of National Heritage and Culture, 1988), Part 28, at 56.

¹³⁴ Saleh, *Commercial Arbitration in the Arab Middle East*, at 391.

¹³⁵ Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", at 136.

losing party in an arbitration has sought vacation of the award before the BSCD, on the ground of non-compliance with the *Shari'a*.¹³⁶ Since then, there has been no report to the contrary. Samir Saleh goes as far as saying, Omani arbitration law 'do[es] not bear any trace of *Shari'a* influence', as the two sources of arbitration law in the country, that is, the *Shari'a* and statute, 'are kept in fairly watertight compartments'.¹³⁷ Nonetheless, the approach taken by the Omani legislator with respect to the *Shari'a* may change in future, particularly regarding those rules of the *Shari'a* that are considered as part of Omani public policy.

¹³⁶ Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 30.

¹³⁷ Saleh, *Commercial Arbitration in the Arab Middle East*, at 374-5.

Chapter Three: Arbitration under Omani Law

1 Introduction

Current Omani arbitration law, Sultani Decree 47/1997 on Law of Arbitration in Civil and Commercial Disputes (hereafter Decree 47/97),¹ came into force in 1997. Article 1 of the Decree provides that ‘Without prejudice to the provisions of international conventions in force in the Sultanate, the provisions of this law shall have effect in relation to any arbitration between parties being persons of public or private law, whatever the nature of the legal relationship around which the dispute revolves, if such arbitration takes place in the Sultanate, or is an international commercial arbitration taking place abroad which the parties thereto have agreed to make subject to the provisions of this law.’ The existing Omani law of arbitration deserves a detailed examination, firstly because the analysis of the enforcement of international and foreign awards in Oman is not possible without a comprehensive

¹ Published in the Omani Official Gazette, No. 602 (1 July 1997). In this thesis, the unofficial English version of the law is referred to, as it appears in two sources with slight differences, first a translation by Alastair Hirst in *International Handbook on Commercial Arbitration* (December 1998), Supplement 27, and second, on the official website of GCC Arbitration Centre, <http://www.gccarbitration.com/english/rules/oman-1.htm>, (available on 24/04/2002). In 2007, Decree 47/97 was amended by Sultani Decree 3/2007 Amending Some Provisions of the Law of Arbitration in Civil and Commercial Disputes.

understanding of Omani law of arbitration in general. Secondly, Decree 47/97 applies not only to domestic arbitration, but also to international arbitration taking place outside Oman, provided that the Decree is chosen as the applicable law by the parties. There are some other acts of Omani law, such as Sultani Decree 13/1997 on the Establishment of the Commercial Court,² which are relevant to arbitration and particularly to international arbitration. The latter law is also discussed, when appropriate. Sultani Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes governs the enforcement of foreign court sentences and orders and arbitration awards as well as the procedure of executing enforcement orders of domestic as well as foreign sentences and awards. It is discussed in the chapters on the enforcement of arbitral awards in Oman.

This chapter is an extensive analytical examination of the present Omani law of arbitration. It attempts to follow a comparative approach, emphasising the similarities and differences between the Omani law of arbitration and the UNCITRAL Model Law on International Commercial Arbitration of 1985. This is not only because the Model Law can be regarded as a yardstick for assessing various national laws of arbitration, but also because Omani law itself is mainly inspired by it. Since such inspiration has been made possible through the Egyptian legal system, comparison has also been made with the Egyptian law of arbitration as well as with the arbitration laws of some other Arab and GCC states, whose legal systems have developed in close contact with each other. Provisions of Omani law regarding various types of arbitration, arbitration agreements, arbitration tribunals as well as procedural and substantive laws of arbitration, and arbitral awards, among other, are discussed in this chapter. The powers of the court concerning arbitration in various

² Published in Gazette no. 596.

stages, including vacation and enforcement, are mainly dealt with in the next chapter.

2 Arbitration in Oman: General Features

It can be said that the thrust of Decree 47/97 is to encourage and facilitate arbitration. It introduces arbitration as a reliable method of dispute resolution, with binding and enforceable outcomes. It is presented as a regulated procedure that cannot be obstructed with dilatory tactics. For example, a challenge to the appointment of an arbitrator cannot stop the proceedings, unless it is granted either by the arbitration tribunal or the court. The Decree also intends to limit court intervention in arbitration procedures. For instance, an arbitration tribunal decides about its own jurisdiction, without the possibility of court intervention, until the end of the arbitration proceedings.

Institutional and *ad hoc* Arbitration

Institutional or *ad hoc* arbitration are both recognised by Omani law. For instance, Article 4 of Decree 47/97 stipulates the possibility of the parties agreeing on various bodies, such as organisations or permanent centres or otherwise, taking charge of the arbitration proceedings. Also, Article 5 of the Decree reads:

In the circumstances under which this law permits the parties to the arbitration to choose the procedure to be adopted in a specific issue, either party may authorise a third party to choose such procedure. In this regard, the third party may be any arbitration organisation or centre based either in the Sultanate of Oman or abroad.

This is inspired by the UNCITRAL Model Law. The difference is that Omani law specifies that the “procedure” can be determined by a third party, if the law allows the disputants to authorise a third party to do so. However, the Model Law does not restrict the issues to be determined by a third party to procedures.³ The reason for the

³ Article 2(d), the UNCITRAL Model Law on International Commercial Arbitration.

specification made by Omani law is that the Model Law has affected Omani law through the Egyptian legal system which does contain a similar limitation. The above provision of the Omani law should not be interpreted as limiting the role of the third party, that is, an arbitration centre, to choosing the arbitration procedure. As it is clear from Article 4 of Decree 47/97, all aspects of arbitration proceedings may be carried out under the auspices of a permanent arbitration centre. The Muscat Stock Exchanges and Omani Chamber of Commerce work as domestic arbitration institutions competent to resolve disputes falling within their jurisdiction. The Arbitration Committee of the Chamber, among other things, decides on the disputes arising between members of the Chamber or between them and non-members.⁴

Coverage

Decree 47/97 has a broad coverage, and applies to all kinds of arbitration in Oman. As we have already seen, Article 1 of the Decree provides that this law is applicable to any arbitration between persons of public or private law, irrespective of the nature of their legal relationship, provided the arbitration takes place in the Sultanate. In case of international commercial arbitration taking place abroad, the law would be applicable, if the parties have agreed to make their arbitration subject to the jurisdiction of the law. While the UNCITRAL Model Law applies only to international arbitration, Decree 47/97, following the Egyptian Arbitration Law No. 27 of 1994,⁵ covers not only international arbitration, but also domestic arbitration.

The main focus of Decree 47/97 is commercial arbitration. Hence, it is important to see how commercial arbitration is defined, under Omani law. The term

⁴ The Official Portal of Oman Chamber of Commerce and Industry, http://www.chamberoman.com/service_occi_specialized_Committe_arbitration.asp, (available on 23/08/2007).

⁵ Article 1, Egyptian Arbitration Law No. 27 of 1994.

commercial is defined very broadly as any kind of economic activity. Article 2 of the Decree reads:

The arbitration shall be considered as commercial, in the context of this law, provided the dispute is based on the legal relationship arising out of an economic activity, irrespective of whether it is in the form of a contractual agreement or not. This shall include, as a matter of example, supply of goods or services or commercial agencies, construction contracts, contracts relating to engineering or technical expertise, grant of industrial and tourism licenses, etc., transfer of technology, investment, development contracts, bank operations, insurance, transport, exploration and extraction of natural wealth, power supply, laying of gas and petroleum pipe lines, building of roads and tunnels, reclamation of agricultural lands, environmental protection and establishment of nuclear reactors.

This article is inspired by the definition of “commercial” given by Article 1(1) of the UNCITRAL Model Law, while emphasising issues particular to Oman, such as developing oil resources. While the Model Law provides for the definition of the term “commercial” in a footnote for Article 1; Omani law, following Egyptian legal system that is alien to the above drafting technique,⁶ defines the term extensively in a separate article. The list of activities mentioned is not exhaustive, but only contains the most important examples. This can help the development of a doctrine of the accessory commercial acts, that is, acts that are not commercial *per se*, but meet business needs. Such a doctrine has already been pointed to by some Omani judges, as acts like private landlords’ obligations with regard to leased staff accommodation or personal guarantees given for bankers’ advances are considered as commercial. The definition of the term commercial in both Omani law and the Model Law is very wide, and includes projects of general interest and the exploitation of natural resources, or what in many jurisdiction falls within the scope of the term ‘public works’.

⁶ M. I. M. Aboul-Enein, “Reflections on the New Egyptian Law on Arbitration”, *Arbitration International*, vol.11, no. 1 (1995), at 77.

Article 2 of Decree 47/97 prevails over Article 8 of the Commercial Law 55/90, which states: 'Commercial activities are those undertaken by any person with the intention of taking risk for a profit, even if such a person is not a merchant.'⁷ The latter provision is grounded on the traditional sense of the term, commercial, as to purchase for the purpose of resale. Under this provision, many economic activities are excluded from the scope of commercial activities. For instance, Article 14 of the Commercial Law provides that the following activities shall not be deemed as commercial: 1. the production of a work of art by an artist himself or by his use of the services of his workers and the sale thereof; 2. the printing and sale by an author of his work. More importantly, under Article 15, the sale by a farmer of crops produced in his own land or in a land which he cultivates, even if such land has been transformed by the methods available to him for the purposes of agricultural exploitation, shall not be deemed a commercial activity. Similarly, the Egyptian legal system, adhering to the traditional definition, before the adoption of Arbitration Law No. 27 of 1994, did not consider agriculture, extraction operations and even purchase of real estates for resale as commercial activities.⁸

It seems that, in the past, both the Egyptian and Omani legislators differentiated between commercial and other economic activities. What distinguished commercial

⁷ On the other hand, Article 175 of the Commercial Companies Law No. 4/1974 in conjunction with Article 5 of the Commercial Register Law No. 3/74 considered as commercial activities such as purchase of movable or immovable property, whether for resale in order to make a profit or otherwise, banking or currency exchange, manufacturing, transportation, warehouse services, commission and brokerage, exploitation of natural resources including oil and gas, real estate construction and development, and commercial agency services. Moreover, the CSCD considered disputes between partners or shareholders, directors, managers, auditors, liquidators and companies as commercial (Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law*, (London: Graham & Trotman, 1984), at 378).

⁸ Article 2, the Egyptian Commercial Law of 1883.

activities from otherwise was the criterion of *risk for a profit*.⁹ Under present Egyptian as well as Omani laws, however, such a distinction has not been made, and it is the concept of *enterprise* that distinguishes commercial activities from otherwise. In other words, commercial activities entail the existence and exploitation of a business establishment, meaning conducting a number of transactions under a certain structure and forming an economic unit.¹⁰ Adhering to the concept of enterprise, current Egyptian and Omani laws overcome difficulties faced by their predecessors; and the prevailing definition of commercial activities covers all kinds of transactions specified under the laws.

International Arbitration under Omani Law

It is an important feature of Decree 47/97 that it makes a distinction between domestic and international arbitration. Overlooking such a distinction has been a shortcoming of most legal systems in the region, leading to a uniform treatment of both types of arbitration.¹¹ The parties to an international commercial arbitration are permitted, under Article 1 of Decree of 47/97, to make the arbitration process subject to the Decree. International arbitration is defined by the law as cases of arbitration where the subject-matter of the dispute is related to international trade, in one of the following ways: i) the principal business centre of the parties are located in two different countries. While the wording of the UNCITRAL Model Law revolves around the parties' "places of business",¹² Omani law emphasises their "principal business centre", in order to distinguish between marginal and central business

⁹ See Article 8 of Omani Commercial Law 55/90. With regard to Egyptian law, see Mahmoud Samir El-Sharkawy, "New Trends in Egyptian Arbitration Law", *Journal of International Arbitration*, vol. 16, no. 1 (1999), at 7.

¹⁰ *Id.*, at 7.

¹¹ See, for instance, Samir Saleh, "the Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law", *Arab Quarterly Law*, vol. 1, no. 2 (Feb 1986).

¹² See Article 1(3), the UNCITRAL Model Law on International Commercial Arbitration.

activities. If a party has several business centres, the centre that is more relevant to the dispute is regarded as his business centre. If a party does not have a business centre, his place of domicile is considered as his business centre. ii) Arbitration is considered as international, if both parties have opted to have recourse to a permanent arbitration organisation or arbitration centre either in, or outside, Oman. iii) It is also international, when the subject-matter of the dispute is linked to more than one country. iv) Further, arbitration is international, if the place of arbitration, as designated in the agreement or referred to in the mode of its choosing, or the place where the substantial part of the obligations arising from the commercial relationships between the parties is carried out, or the place very much relevant to the dispute, is in another country. This is so, despite the fact that the main business centres of both parties may be in one country.¹³

As can be seen, following the Model Law, Omani law uses two criteria for determining whether an arbitration is international or not: first, whether or not the interest of international trade is involved, and second, the geographical criteria of whether the relevant places in the arbitration case are situated in one or more countries. A difference between Omani law and the Model Law is that while the former states that recourse to permanent arbitration organisations or centres in and outside Oman is regarded as international arbitration, there is no such provision in the latter. The rationale for such a provision, however, is not clear. Omani law, in this regard, follows Egyptian Arbitration Law, which contains an identical provision,¹⁴ at which El-Ahdab expresses his surprise.¹⁵ On the other hand, under the Model Law, the parties must expressly agree that the subject-matter of the dispute is

¹³ Article 3, Decree 47/97.

¹⁴ Article 3(2), the Egyptian Arbitration Law No. 27 of 1994

¹⁵ See Abdul Hamid El-Ahdab, "The New Egyptian Arbitration Act in Civil and Commercial Matters", *Journal of International Arbitration*, vol. 12, no. 2 (1995), at 66.

related to more than one country, if the arbitration is to be considered as international. However, Omani law does not provide for a criterion to determine that the subject-matter of a dispute is related to more than one country.

If definitions of “commercial” and “international” are combined, it can be seen that Omani law provides for a wide definition of international commercial arbitration which covers arbitration in disputes concerning imports, foreign investment and contracts for construction, development or technology transfer, as well as Omani investment abroad, and the like. The wide definition of international commercial arbitration indicates the intention of the Omani legislator to encourage foreign investment and international trade through facilitating arbitration.

Omani law treats international arbitration, to a limited extent, differently from domestic arbitration. For instance, when a court involvement is necessary, domestic arbitration cases are dealt with by the court that has original jurisdiction, under Decree 90/99 on the Judicial System Law, while the cases of international arbitration, regardless of whether the arbitration proceedings take place in Oman or outside it, are considered by the Muscat Court of Appeal.¹⁶

Waiver of the Right to Object

Under Article 8 of Decree 47/97, if a party to a dispute that is under consideration by an arbitral tribunal knowingly continues to proceed with the arbitration, despite the breach of any condition stipulated in the arbitration agreement or provided for in Omani law where non-compliance is permitted by agreement, and fails to raise an objection, it shall be deemed to have waived his right to objection. The objection must be raised within the period agreed upon or, if there

¹⁶ Article 9, Decree 47/97, as amended by Decree 3/2007.

is no such agreement, within sixty days from the date that he becomes aware of it.¹⁷ This means that no such objection may be raised in later stages of arbitration or in setting aside or enforcement proceedings. This is a reflection of a principle of good faith or the bona fides principle.¹⁸ The legislator by devising this provision has intended to protect the arbitration from abuse, and to consolidate the arbitral award, while providing the parties with the right to object to any breach of the arbitration agreement or the law.

This is, however, a contested issue, particularly when a right guaranteed by the law is breached. An Egyptian lawyer, with regard to the identical provision in the Egyptian arbitration law argues that it unduly widens the possibility of a waiver, contrary to the provisions of general rules.¹⁹ The question is whether a party's silence regarding a violation of the law results in the waiver of his right of objection, no matter how gross is the violation. The above provision of Omani law, however, specifies that the right to object can only be waived with regard to the rules from which the parties may derogate, if they agree so. In other words, such a waiver does not cover a violation of mandatory rules of law.²⁰ Moreover, it can be argued that if the delay in raising an objection was justified, the party maintains his right to object. Also, if an objection has been raised, but not accepted by the tribunal, or if a party has not taken part in the arbitration proceedings, or could not do so, he may raise an objection in later stages, such as in vacation or enforcement proceedings.²¹

¹⁷ This is similar to Article 4, the UNCITRAL Model Law on International Commercial Arbitration.

¹⁸ See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (London: Sweet and Maxwell, 1999), at 223-224.

¹⁹ Abdul Hamid El-Ahdab, "The New Omani Act in Civil and Commercial Matters", *Journal of International Arbitration*, vol. 14, no. 4 (1997), at 11-12.

²⁰ Abdul Hamid El-Ahdab, *Arbitration in Arab Countries*, 2nd ed., (London and Boston: Kluwer Law International, 1998), at 492-493.

²¹ M. I. M. Aboul-Enein makes these points about Egyptian Arbitration Law, which inspired Omani law (M. I. M. Aboul-Enein, "Egypt", in J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, Supplement 36 (The Hague: Kluwer, November 2002)).

3 Arbitration Agreement

Under Decree 32/84, arbitration agreements were valid,²² though there was not express provision as to their being binding. As mentioned before, this meant that the parties could refer to arbitration the disputes about which there was an arbitration agreement, but the Decree did not contain any article preventing the court from considering such disputes; although the BSCD, in practice, referred to arbitration such disputes.²³ An important feature of Decree 47/97, however, is that it recognises arbitration agreements as binding. Under Article 13(1) of Decree 47/97, ‘A court before which is brought a dispute in respect of which an agreement to arbitrate subsists shall rule the action inadmissible if the defendant takes such a plea prior to his seeking of any relief or remedy or presenting any defence in the action.’ It is evident from various provisions of the Decree that it applies to voluntary arbitrations, that is, where there is an agreement as to referring any occurring dispute to arbitration, rather than compulsory arbitration which is provided for under some other statutes.

Decree 32/84 as well as Decree 47/97 recognise both arbitration clauses and submission agreements as the legal basis for referring to arbitration disputes that may arise between two parties in respect of their legal relationships, whether contractual or not.²⁴ Article 10(2) of Decree 47/97 provides that

It shall be permissible for the arbitration [agreement] to be in the form of an arbitration clause appearing in a given contract prior to the arising of the dispute, or in the form of a separate agreement made after the dispute is arisen, even if an action has already been brought in relation thereto before a judicial instance, and in such [a] case the agreement shall

²² Article 59, Decree 32/84.

²³ This is in line with the traditional account of the *Shari'a*, according to which arbitration awards are valid or permissible, but can be revoked by either party before submission of a defence (see chapter two of this thesis).

²⁴ Article 10(1), Decree 47/97. This is the equivalent of Article 7(1) of the UNCITRAL Model Law on International Commercial Arbitration.

specify the matters within the scope of the arbitration, failing which the agreement shall be a nullity.

It is obvious that when a dispute concerns non-contractual relationships, referral to arbitration can only be authorised in form of a submission agreement, as such an agreement cannot precede the dispute.

A serious problem in most Arab countries that their arbitration law has been inspired by the French legal system or *Shari'a* law is that French law and some versions of *Shari'a* law require the disputes referred to arbitration be specified in the arbitration agreement, otherwise the agreement is void. Such a requirement rules out the possibility of having an arbitration clause. In the French legal system, court proceedings are considered as a better protection of the rights of the parties, and arbitration is viewed with suspicion. Therefore, the parties should not sign away their right to a court trial before they are fully aware of the dispute. An arbitration clause would give away the 'right to a trial' beforehand, and was therefore long deemed illegal. Nevertheless, this has changed, and the amendment to the French law of arbitration in 1981²⁵ now authorises arbitration clauses in commercial disputes.

On the other hand, as touched upon in chapter two of this thesis, it has been argued that arbitration clauses are not recognised, under the *Shari'a*.²⁶ The truth is that the *Shari'a* does not prohibit arbitration clauses expressly, but is simply silent about them. Hence, arbitration clauses are not sanctioned by Islam; but are they prohibited? Two arguments can be put forward against the acceptability of

²⁵ French Decree No. 81-500 of 12 May 1981, Official Journal of 14 May 1981, amendment JORF of 21 May 1981. this is contained in French Code of Civil Procedure.

²⁶ See for instance, Saleh, *Commercial Arbitration in the Arab Middle East*, at 25 and 48-9; Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", *Essays and Addresses on Arab Laws*, (Richmond: RoutledgeCurzon, 2000), at 46; also Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed., London: Sweet & Maxwell, 1999), at 111.

arbitration clauses, according to the *Shari'a*. First, aleatory contracts, that is, those involving any type of alea, bet, game of chance, risk, hazard or speculation, are prohibited in Islam. The uncertainty entailed in such contracts is the reason for their invalidity. Similarly, it may be argued that arbitration clauses are invalid, since the parties cannot appreciate to what they have exposed themselves. Second, it is said that Prophet Mohammad has prohibited two transactions or contracts within one simple contract, because the second transaction might involve a hidden profit for one party, without compensation for the other party. Hence, any condition in a contract amounting to a second transaction, such an arbitration clause, is not permitted.²⁷

Some Muslim jurists argue that arbitration clauses do not involve any alea, chance, speculation or hidden interest for one party, but are aimed at the restitution of justice.²⁸ Thus, such clauses are permitted. It can also be added that the uncertainty involved in arbitration is not “unreasonable” or unnecessary uncertainty, that is, such uncertainty is usually inhered in any contract. Therefore, arbitration clauses should be allowed, as such uncertainties are permitted in legal, and particularly commercial, contracts. Moreover, the *Shari'a* principle of respecting one's agreements can be a ground for recognition of arbitration clauses. As to the second argument, Muslim jurists are far from unanimous on the illegitimacy of two contracts within one. Double transactions is prohibited according to the Shafi'i school, restricted by the Hanafi school, but permitted by the Maliki²⁹ and particularly

²⁷ Abdul Hamid El-Ahdab, “The Moslem Arbitration Law”, in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987), at 353-8.

²⁸ *Id.*, at 359.

²⁹ See Al-Dasuqi, Shams al-Din Mohammad 'Arafa, *Hashiya Al-Sharh al-Kabir*, 4 vols., (Cairo: 1295 H), vol. 3, at 65.

the Hanbali school.³⁰ Hence, the last two schools fully respect the parties' freedom of contract, and allow any condition in a contract, unless it is against the purpose of the contract, or is against the *Shari'a*. Given the position taken by these two schools, arbitration clauses are permissible. Moreover, an arbitration clause does not amount to a second transaction within a contract. It merely delimits the contract, and stipulates a way out of a dispute arisen within the contract. Hence, the second argument against arbitration clauses, too, is not tenable.

In practice, the legal systems in most Arab states have modified the requirement that the subject-matter of the dispute must be specified in the arbitration agreement. They provide that submission agreements must specify the dispute to be referred to arbitration, while accepting arbitration clauses as valid, or requiring the dispute be specified when referred to arbitration.³¹ For instance, in Egypt, the dispute subject to arbitration must be indicated in the arbitration submission; and, in the case of arbitration clauses, it must be indicated in the *request* for arbitration.³² As mentioned before, some other versions of the *Shari'a*, including the Ibadi doctrine, do not contain such a requirement. Therefore, Oman that adheres to the latter version, while following the Egyptian model, does not face the same difficulty.³³ Consequently, Article 10(2) of the Egyptian Law No. 27/94 specifies that in case of arbitration clauses, 'the subject matter of the dispute must be determined in the statement of claims', whereas its equivalent in the Omani law, that is, Article 10(2) of the Omani Decree 47/97 lacks such a requirement.

³⁰ See ibn Taymiyyah, *Majmu' al-Fatawa*, 6 Vols., (Beirut: Dar Ibn Hazm), vol. 3, at 327 and 389-90.

³¹ See El-Ahdab, *Arbitration in Arab Countries*, at 42.

³² Article 10(2), Egyptian Arbitration Law no. 27 of 1994. As a matter of fact, the new Egyptian law of arbitration, that is, Law no. 27 of 1994, was intended to counter claims that arbitration clauses are contrary to Egyptian mandatory rules of law (Ahmed S. El-Kosheri, "Egypt": Supplement 11, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, (The Hague: Kluwer, 1990)).

³³ Compare Article 10(2) of Omani Decree 47/97 with Article 10(2) of Egyptian Law no. 27/94.

In Saudi Arabia, where the *Shari'a* is strictly adhered to, the Arbitration Regulations Law recognises both a prior agreement to arbitrate in arisen disputes or an agreement to submit a particular dispute to arbitration.³⁴ The parties to an arbitration clause must deposit the agreement with the competent authority in the Kingdom. Given that arbitration agreements laid down according to the Regulations are recognised in Saudi, relevant disputes cannot be heard by the court, and a party cannot withdraw from arbitration in case of any dispute.

Under Article 10(3) of Decree 47/97, it is regarded as a valid agreement to refer to arbitration, if a reference is made in a contract to another document that contains an arbitration clause, on the condition that the reference is clear that the clause is considered as an integral part of the first contract. This follows Case No. 90/451,³⁵ where the previous arbitration authority in Oman, the BSCD, ruled that the arbitration clause in the main agreement does not apply to an internal agreement, unless there is a reference to the main contract with regard to arbitration.

Regarding the interpretation of the applicability of an arbitration agreement in Oman, it can be argued that, following the Egyptian legal system, such interpretation is usually made on the basis of general rules. The first of such rules is that any interpretation should not divert from the expressed will of the parties, and that

³⁴ Article 7 of the Saudi Royal Decree No. M/46 of 1403 H [1983] on Arbitration Law provides that, in such a case, the dispute 'may only be heard in accordance with the provisions of this law'. Turning towards a friendly approach regarding arbitration, in Saudi Arabia can be attributed to the legal requirements of ever expanding economic relations with the West, and particularly the pressure of western petroleum companies (Saleh, *Commercial Arbitration in the Arab Middle East*, at 85-6). This move is, in turn, justified by arbitration-friendly interpretations of the *Shari'a* that emphasise the significance of contractual arrangements in such relationships. Regulation No. 32 of 1350 H on the Statutes of the Saudi Commercial Board and some other statutes have already paved the way for such a departure from the traditional account of the *Shari'a* on arbitration by accommodating arbitration clauses and restricting the revocability of arbitrators' mandate, after such a mandate is confirmed by the authorities, that is, the Saudi Commercial Board.

³⁵ Case No. 90/451 (12/5/1991), BSCD Judgement.

preference should be given to declaration rather than indication.³⁶ The second rule requires finding out the common intent of the parties, when it is not expressly mentioned, taking into account the nature of the transaction alongside the customary practice and the principles of trust and faith.³⁷ The third rule is that when doubt arises as to whether or not disputes, or a certain dispute, are to be referred to arbitration, the arbitration agreement should be interpreted as not referring those disputes to arbitration. In other words, interpretation of arbitration agreements should be made on a strictly narrow basis.³⁸ This rule is based on the general rule that any ambiguity should be interpreted to the advantage of the debtor.³⁹ Referring to arbitration is, however, a procedural agreement for resolving disputes, and as such does not involve a debtor or creditor. Nevertheless, since recourse to arbitration is considered as an exceptional dispute settlement method, any doubt as to the applicability of an arbitration agreement should be interpreted as resolving the dispute through litigation.⁴⁰

Conditions of the Validity of an Arbitration Agreement

Although both Decree 47/97 and Decree 32/84 are silent about the wording of an arbitration agreement,⁴¹ under Article 12 of Decree 47/97, arbitration agreements

³⁶ Article 150(1), the Egyptian Civil Code No. 131 of 1948. A similar rule is stated in Article 265(1), the UAE Federal Civil Transactions Law No. 5 of 1985, and Article 239(1), the Jordanian Civil Code No. 43 of 1976.

³⁷ Article 151(1), Egyptian Civil Code No. 131 of 1948. A similar rule is stated in Article 265(2), the UAE Federal Civil Transactions Law No. 5 of 1985, and Article 239(2), the Jordanian Civil Code of 1976.

³⁸ See Egyptian cases: *Civil Review*, Appeal Case No. 1029 dd. 6/11/1994, *Tech Bureau*, Year 45, at 1337; Case No. 345 dd. 11/12/1997, *Tech Bureau*, Year 48, at 1457; and Case No. 8547 dd. 22/5/1997, *Tech Bureau*, Year 48, at 870.

³⁹ Article 151(1), the Egyptian Civil Code No. 131 of 1948; and Article 266(1), the UAE Federal Civil Transactions Law No. 5 of 1985.

⁴⁰ Hamza Ahmad Haddad, "Written Form and Interpretation of the Arbitration Agreement in the Arab Law: Egypt, Jordan and United Arab Emirates", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 26.

⁴¹ In construction arbitration, the parties usually adopt the Omani government 'FIDIC-inspired model conditions, with the distinctive two-tier dispute and arbitration clause' (Alastair Hirst, "Contemporary Mercantile Jurisdiction in Oman", *Arab Law Quarterly*, vol.7, no.1 (May 1992), at 30).

must be in writing, otherwise, they are not valid. It adds, following the Egyptian Arbitration Law No. 27 of 1994, that the arbitration agreement is treated as written, provided it is included in a written instrument duly signed by the parties, or if it is included in correspondence between the parties by way of exchange of letters, telegraphs or other written forms of communication. This opens the way for broadening the concept of written form to cover modern means of communication such as fax, telex and e-mail, whose use is growing with the expansion of electronic commerce.⁴² A very recent means of written communication is sending messages by mobile phones; there is no reason to regard an arbitration agreement exchanged through such messages as invalid. Regarding the electronic exchange of written agreements, the exchanged written documents must be capable of being retrieved from the machine.

It can be argued that, in the Omani legal system, a written agreement is required for the valid *conclusion* of an arbitration agreement, and is not merely the *evidence* of the existence of such an agreement.⁴³ Probably that is why unlike the UNCITRAL Model Law that considers ‘an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another’ as a written arbitration agreement,⁴⁴ Decree 47/97 does not contain such a provision. Nevertheless, it can be argued that the Omani legislator has not had any objection to conceive of statements made by the plaintiff and the defendant to qualify as an arbitration agreement. Moreover, it may be argued that, following the legal practice in Egypt, if the parties during court proceedings agree to refer their dispute to

⁴² As a general rule, it is not necessary to accept an offer for arbitration by the same communication means through which the offer has been made. Thus, an offer made by e-mail can be accepted by ordinary mail.

⁴³ It can be concluded that voice recorded arbitration agreements cannot be considered as valid, even if, later on, they appear in a printed form. This includes tape recording as well as voce mail.

⁴⁴ Article 7(2), the UNCITRAL Model Law on International Commercial Arbitration.

arbitration, their agreement may be incorporated in a court decision, which without needing the signature of the parties can be considered as a written valid arbitration agreement.⁴⁵

It should be mentioned that although an arbitration agreement, whether as an arbitration clause or a submission agreement, must be in writing, the main agreement need not to be written, if there is no such requirement under the law.⁴⁶

An agreement to refer to arbitration is valid, only if it is concluded between natural or legal people who are legally competent to exercise their rights.⁴⁷ Since Decree 47/97 does not specify who is competent to exercise his or her rights, and to enter into an arbitration agreement, the question needs to be answered by reference to other pieces of Omani legislation. As touched upon before, for instance, *Shari'a* law precludes minors and those under guardianship (unless through their legal representative or guardian), the insane, bankrupts, and, in some versions, the disabled and terminally ill to enter into any arbitration agreement.⁴⁸ In some other Arab states, too, *Shari'a* governs the issue of capacity to enter an arbitration agreement, as, for instance, the Dubai Court of Appeal has ruled.⁴⁹ A difficulty with Omani law is that, regarding foreigners, it does not indicate who has the capacity to enter into any arbitration agreement, nor does it make clear which law applies in order to determine who is competent to conclude such agreements.⁵⁰ Here again, it can be said that the *Shari'a* indicates the conditions to be met, if a foreigner is

⁴⁵ Regarding the situation in Egypt, see Haddad, "Written Form and Interpretation of the Arbitration Agreement in the Arab Law: Egypt, Jordan and United Arab Emirates", at 22.

⁴⁶ Nevertheless, as a general rule, most types of commercial contracts must be in writing. For instance, a commercial sale contract cannot be concluded verbally, under articles 62 and 91 of Omani Commercial Law 55/90.

⁴⁷ Article 11, Decree 47/97.

⁴⁸ El-Ahdab, "The New Omani Act in Civil and Commercial Matters", at 62.

⁴⁹ Richard H. Kreindler, "Arbitration under the GCC Commercial Arbitration Centre Rules in the Context of Banking and Finance Disputes", *the Lebanese Revue of Arbitration*, No. 8, at 17.

⁵⁰ El-Ahdab, *Arbitration in Arab Countries*, at 483.

competent to be party to an arbitration agreement. Foreigners are competent to make an arbitration agreement on the basis of Omani law, under the same circumstances that Omanis can.

Although there is no specific rule for multi-party arbitration, such arbitration is allowed, under Omani law, as Article 4(3) of Decree 47/97 reads, ‘The term “Parties to the arbitration” shall mean, in the context of this law, the parties to the arbitration even if they are multiple in number.’ Similarly, there are neither doctrinal views by lawyers nor a provision in Omani law on the issues of succession or assignment of the main contract, merger or acquisition of a party, non-limited partnerships, *de facto* companies, non-incorporated business associations, consortia, contractual joint ventures, integrated groups of companies controlled by a mother company. The same can be said about consolidation of arbitral proceedings.⁵¹ As pointed out in the first chapter of this thesis, the assignment of a main contract amounts to the assignment of its arbitration clause. In other words, through the succession of the main contract, all rights and obligations contained in it, including those created by the arbitration clause, are transferred to the succeeding company. Such a view is consistent with the general rules of Omani law. On the other hand, multi-party arbitration, whether they involve one contract with multiple parties or multiple contracts as well as multiple parties, has complexities that need to be attended to. General rules of Omani private or company laws provide tools necessary for making a legal decision, when such issues are involved.

⁵¹ All GCC states lack statutory provisions for consolidation in their arbitration rules and procedures, as do the great majority of states worldwide (Charles L. Brown, “Multi-Party Arbitration in Engineering Contracts – the Problems and the Solutions”, *GCC Commercial Arbitration Centre Bulletin*, issue 22/23 (June 2002), at 9). Also, the UNCITRAL Model Law on International Commercial Arbitration does not contain any provision to this effect. Rarity of consolidated arbitration may be regarded as a disadvantage of this method of dispute resolution (see Andrew Bandkura, “Use of Arbitration in Insurance and Banking”, *GCC Commercial Arbitration Centre Bulletin*, issue 9 (August 1998), at 3).

Allowing all legal persons of public and private law to enter into an arbitration agreement⁵² means that Decree 47/97 does not prohibit public bodies to conclude such agreements. However, the question may arise as to whether public bodies can enter into an arbitration agreement, without obtaining state authorisation. In other words, who is a competent public body to enter into an arbitration agreement? As a matter of fact, referring to arbitration disputes to which a public body is a party has sometimes been in question in the Arab world. The objection to the competence of public bodies to enter into arbitration agreements was grounded on a concern for the prejudice that it might have on the sovereignty of the State. For instance, after adopting Arbitration Law No. 27 of 1994, the question of whether arbitration law applies to administrative disputes was raised in Egypt. Despite the clear wording of Article 1 of the latter law, and the explanatory memorandum of the Minister of Justice accompanying the draft of the law, strong opposition was raised by the Conseil d'Etat as to the capacity of public law entities to enter into agreement to arbitrate.⁵³ Such objection, however, were dismissed by the Cairo Court of Appeal.⁵⁴ Consequently, on 13 May 1997, Law No. 9 of 1997 was passed adding the following provision to Article 1 of the Arbitration Law No. 27 of 1994, 'With regard to disputes relating to administrative contracts agreement on arbitration shall be reached with the approval of the competent minister or the official assuming his powers with respect to public law entities. No delegation of powers shall be authorised therefore.'

Regarding the competent public body to enter arbitration agreements in Oman, the following observations are of importance. Under Sultani Decree 48/1976, as

⁵² Articles 1 and 11, Decree 48/76.

⁵³ Aboul-Enein, "Egypt".

⁵⁴ Commercial Case No. 64 of the 113th Judicial Year (19 March 1997), Cairo Court of Appeal.

amended by Sultani Decree 12/1980, any contract binding the Sultan or the government must be signed by him or a person empowered by him.⁵⁵ Contracts for the supply of goods or services that worth less than 50,000 Omani Riyals must be signed by the relevant Minister or his delegate;⁵⁶ contracts with the value between 50,000 and 250,000 Omani Riyals must be signed by the aforementioned official as well as the Under-Secretary of Finance;⁵⁷ and agreements for more than 250,000 Omani Riyals must be concluded by the two officials and the Vice-President of the Board of Finance.⁵⁸ Other contracts involving financial obligations must also be concluded by the Vice-President of the Board of Finance and the Under-Secretary of Finance; and if its value is more than 500,000 Omani Riyals, the consent of the Department of Legislation is also required.⁵⁹ Article 6 of Decree 48/76 is interpreted as requiring arbitration agreements devised for resolving state commercial contracts to be signed by relevant authorities.⁶⁰ Decree 32/84 permitted the government and its administrative bodies to request arbitration under the auspices of the BSCD, but only after the occurrence of the dispute.⁶¹ In Dubai, the government or any governmental department cannot enter into any agreement for foreign arbitration, unless a special consent is given by the government authorising the relevant department to enter into such an agreement.⁶²

An arbitration agreement is invalid, if it is about disputes that are not arbitrable under Omani law. Article 1 of Decree 47/97 implies that almost any dispute arising from legal relationships between persons can be resolved by arbitration. It does not

⁵⁵ Article 1, Decree 48/76.

⁵⁶ Article 3(c), Decree 48/76.

⁵⁷ Article 3(b), Decree 48/76.

⁵⁸ Article 3(a), Decree 48/76.

⁵⁹ Articles 4 and 5, Decree 48/76.

⁶⁰ Saleh, *Commercial Arbitration in the Arab Middle East*, at 380.

⁶¹ Article 59, Decree 32/84.

⁶² Essam Al Tamimi, "The Status of Arbitration in the UAE", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 47.

matter what the nature of the legal relationship is. Both private and public entities can resort to arbitration. This is much wider than the scope of arbitrability under Decree 32/84. In other words, ‘one may refer to arbitration any dispute whether it is contractual or non-contractual, public or private, civil or commercial ..., unless the question is of public order.’⁶³

As seen, in the question of arbitrability, issues of public policy and particularly public order, or al-nizām al-‘āmm in Arabic, are involved. Matters related to public order cannot be subject to arbitration. For instance, in a judgment, the BSCD held that matters subject to the statutory rules about expropriation of private property, foreign businesses or foreign investment cannot be referred to arbitration.⁶⁴ Under Omani law, this restriction is primarily expressed in terms of prohibition of referring to arbitration those disputes that cannot be subject to reconciliation or compromise.⁶⁵ This is rooted in the *Shari’a*. The Omani rule is comparable to the previous Egyptian law, according to which issues related to public policy as well as personal status could not be subject to compromise, and hence could not be referred to arbitration.⁶⁶ In Egypt, certain family matters as well as patents, trademarks and antitrust issues, save compensation regarding such disputes, are not arbitrable, so are bankruptcy issues and any criminal responsibility resulting from aforementioned matters.⁶⁷ In Dubai and Sharjah, not only must a dispute be subject to compromise, but also it must be of pecuniary nature, that is, it must involve the payment of some amount of money, in order to be arbitrable.⁶⁸

⁶³ El-Ahdab, *Arbitration in Arab Countries*, at 481.

⁶⁴ Case No. 465/1984, BSCD Judgment (30/10/1985), *Majmou’a*, vol. II, at 47.

⁶⁵ Article 11, Decree 47/97.

⁶⁶ Article 551, Egyptian Law No. 13 of 1968 on the Code of Civil and Commercial Procedures.

⁶⁷ Aboul-Enein, “Egypt”.

⁶⁸ Saleh, *Commercial Arbitration in the Arab Middle East*, at 437.

Excluding from arbitration issues that cannot be subject to compromise has given rise to some difficulties, since ‘there is not a total identity between matters which can be subject to compromise, and arbitral matters.’⁶⁹ For instance, it has been argued that disputes in administrative contracts cannot be subject to compromise, while Decree 47/97 permits referring them to arbitration.⁷⁰

The thrust of Omani law of arbitration is the autonomy of arbitration clauses, in the sense that even if the main contract proved to be invalid, the arbitration clause can still be valid. The autonomy of arbitration clauses is a fundamental principle without which referral to arbitration will be unreliable. Article 23 of Decree 47/97 reads: ‘An arbitration clause shall be deemed to be an agreement independent from the other stipulations of the contract. The nullity, revocation resiliation or termination of the contract shall not cause the arbitration clause incorporated in it to be affected, if such a clause is in itself valid.’ This is similar to Article 16(1) of UNCITRAL Model Law and Article 23 of the Egyptian Arbitration Law No. 27 of 1994. The latter provision was the basis of the Cairo Court of Appeal’s decision in Case No. 62 of the 113th Judicial Year (31 December 1997), where the Court ruled that the nullity of a contract does not affect the validity of its arbitration clause.

4 Arbitration Tribunal

Article 15 of Decree 47/97 provides that the arbitration tribunal must be constituted according to the arbitration agreement. Following Article 10 of the UNCITRAL Model Law, the number of arbitrators can be determined by the parties, but if they fail to do so, the number will be three. It would have been better if the law, rather than mentioning number three, would have mentioned odd number, in

⁶⁹ El-Ahdab, *Arbitration in Arab Countries*, at 481.

⁷⁰ *Id.*, at 418.

order to cover disputes in which there are more than two parties.⁷¹ In other words, the law should have left open the possibility of appointing a tribunal consisting of more than three persons, in multiple party disputes, where there is no agreement as to the number of the arbitrators. The Omani law of arbitration, however, goes beyond the Model Law, and requires that the number of arbitrators must not be even.⁷² Decree 47/97 revoked the provision of the old Omani law that required the chairman of the tribunal to be one of the judges of the BSCD nominated by the parties and affirmed by the Board.⁷³ For instance, the arbitration procedure followed at the Muscat Stock Exchanges provides that all members of the arbitral panel are to be appointed by the parties.⁷⁴

4-1 Appointment Procedure

Under Article 17(1) of Decree 47/97, the procedure for selecting the arbitrators is agreed on by the parties. However, if there is no agreement on such a procedure, where only one arbitrator must be appointed, upon the request of one party, the president of the competent court of appeal will appoint the arbitrator.⁷⁵ Where three arbitrators must be appointed, each party will select one arbitrator, and the third arbitrator who will act as the chairman of the tribunal will be selected by the first two arbitrators. In this case, if a party fails to appoint his arbitrator, within thirty days of a request made by the other party, or if the first two arbitrators fail to select the third one, within thirty days of their appointment, the appointment will be made

⁷¹ Hamza Haddad, "Al-Tahkim al-Tejari al-'Arabi ad-Dowali", Fojeira Conference on Arbitration in GCC Countries: Present and Prospects (31 January to 1 February 1999) at 10.

⁷² Article 15(2), Decree 47/97.

⁷³ Article 60, Decree 32/84.

⁷⁴ Hamza Al-Zubair, "Major Characteristics of Securities Industries Dispute Resolution Mechanisms", *Seminar on Dispute Resolution in Stock Exchange and Investment*, (Muscat, Oman: 30-31 January 2000), at 2.

⁷⁵ Article 17(1) Decree 47/97, as amended by Decree 3/2007.

by the president of the competent court of appeal.⁷⁶ This is exactly what is prescribed by Article 11(3) of the UNCITRAL Model Law. In Arbitration Case No. 10/99 (5/3/2000), one of the parties, Amin, chose his arbitrator, but the other party, the Omani National Bank, did not do so. After the expiry of thirty days, Amin requested the Acting President of the Commercial Court to select the other arbitrator. The request was accepted.⁷⁷

Following Article 11(4) of the Model Law, Omani law provides that if the procedure agreed upon for the appointment of the arbitrators is not observed by a party, or if both parties cannot reach an agreement expected of them on the procedure, or if the two appointed arbitrators cannot agree on a necessary issue, or even if a third party fails to carry out a responsibility assigned to it, the president of the competent court of appeal, upon the request of a party, initiate the required procedure or take the action, unless the arbitration agreement provides another way of doing so.⁷⁸ The president of the competent court of appeal in his intervention shall take into consideration the law and the parties' agreement; and his decision is not subject to appeal.⁷⁹

Article 17(2) of Decree 47/97 implicitly allows the parties to confer the right to appoint an arbitrator on a third party. Some legal systems do not allow such a possibility. For instance, Article 502(3) of the previous Egyptian Code of Civil and Commercial Procedures reads, 'Without prejudice to the provisions of special laws, the arbitrators must be appointed by name in the agreement to arbitrate or in a separate agreement.' This means that the parties themselves must explicitly and

⁷⁶ Article 17(1)(b), Decree 47/97, as amended by Decree 3/2007.

⁷⁷ Case No. 10/99 (5/3/2000), [*Amin ben Baqer ben Habib v. Omani National Bank*], Commercial Court.

⁷⁸ Article 17(2), Decree 47/97, as amended by Decree 3/2007.

⁷⁹ Article 17(3), Decree 47/97, as amended by Decree 3/2007.

directly name and agree upon the arbitrators. Hence, the appointment of arbitrators by a third party, even if the two parties failed to appoint their arbitrators, or if the two arbitrators failed to appoint the third one, was contrary to Egyptian law, despite there being an agreement between the two parties as to the appointment by a third party. Egyptian courts, in some cases, suspended the arbitration procedure, on the basis of the above Article.⁸⁰ There was no remedy under Egyptian law for the failure of the parties to agree on the arbitrators. Thus, a reluctant party could get away with his non-compliance with the obligation to appoint an arbitrator, since no third party, including the court, was authorised to appoint an arbitrator.⁸¹ Such a provision was regarded as a hindrance for commercial arbitration, and particularly could dissuade resort to arbitration in international trade. Nevertheless, some commentators argued that the provision covered only domestic, rather than international, arbitration.⁸² The Egyptian Court of Cassation, on two occasions ruled that Article 502(3), though being a mandatory rule, was not concerned with public policy, that is, social, political, economic or moral bases relating to the supreme interests of Egyptian society.⁸³ The present Egyptian arbitration law, Law No. 27/94, intending to end controversies, lifted the above-mentioned restriction.⁸⁴

⁸⁰ For instance, *The Mohafazat of the Port Said and the Suez Canal Company v. Rolaco Holdings* (December 1984, by the Court of Port Said, and *MITOB v. SNTP* (November 1983 by the Court of Cairo).

⁸¹ Ahmed S. El-Kosheri, "Public Policy under Egyptian Law", *ICCA Congress Series no. 3* (New York: 1986), at 323.

⁸² See Sigvard Jarvin, "The ICC Court of Arbitration Recent Developments and Experience Related to Arab Countries", *Arab Quarterly Law*, vol. 1, no. 3 (May 1986), at 297-8.

⁸³ See Ahmed Hosni, *The Case-Law of the Cour de Cassation in Maritime Problems* (in Arabic), 2nd ed., (Alexandria: 1982), at 75-76, and Samiya Rashid, *Arbitration under the Afro-Asian Regional Centre in Cairo, and its Submission to the Egyptian Legal System* (in Arabic), (Cairo: 1985), at 82. Also see Case No. 714, Judicial Year 47, 26/4/1982, Egyptian Court of Cassation; Case No. 1259, Judicial Year 49, 13/5/1983, Egyptian Court of Cassation; Case No. 245, Judicial Year 50, 21/1/1985, Egyptian Court of Cassation; and Case No. 326, Judicial Year 51, 13/1/1986, Egyptian Court of Cassation. For the development of Egyptian lawyers' point of view on this issue, see El-Kosheri, "Egypt": Supplement 11.

⁸⁴ Ahmed S. El-Kosheri, "Egypt", in A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XV (London: Kluwer, 1990) at 306.

Articles 16(1) and 16(2) of Decree 47/97 set the criteria for being appointed as an arbitrator. It provides that minors and those who are under guardianship or debarred from exercising their civil rights because of criminal conviction or misdemeanour considered as a breach of honour or trust, or those who are declared bankrupt cannot serve on an arbitration tribunal, unless rehabilitated. Although no specific qualification is legally required for being an arbitrator, legal training and experience, as well as professional expertise, may be regarded as a plus in being appointed as an arbitrator.

More importantly, sex or nationality cannot be a reason for precluding somebody from serving on a tribunal, unless the parties have agreed so, or it is required by law.⁸⁵ In other words, while the parties to an arbitration agreement can agree on precluding the appointment of arbitrators on the basis of nationality and gender, the law does not stipulate such a restriction. For instance, in Arbitration Case No. 10/99 (5/3/2000), Amin chose a woman as his arbitrator.⁸⁶ Allowing women and particularly foreigners to act as arbitrators significantly facilitate international arbitration in Oman, because foreign parties may prefer to appoint non-Omanis as arbitrators. It should, however, be noted that Article 16(2) of Decree 47/97 implicitly recognises restricting the appointment of women and foreigners as arbitrators, if both parties agree upon such a restriction. In this respect, Omani law significantly diverges from the UNCITRAL Model Law. The only limitation that can be regarded as legitimate by the Model Law is nationality.⁸⁷

The legal restrictions stipulated in Article 16(1) and the power of the parties to restrict the membership of a tribunal to a particular sex can be attributed to the origin

⁸⁵ Article 16(2), Decree 47/97.

⁸⁶ Case No. 10/99 (5/3/2000), [*Amin ben Baqer ben Habib v. Omani National Bank*], Commercial Court.

⁸⁷ Article 11(1), The UNCITRAL Model Law on International Commercial Arbitration.

of Omani law and, in particular, the *Shari'a*. Under *Shari'a* law, in almost its all versions, arbitrators should have the same characteristics as judges have.⁸⁸ This means, they have to be 'male, of age, wise, free, Muslim and fair.' Nevertheless, there is no consensus as to whether "people of the book", that is, Jews and Christian,⁸⁹ can be appointed as arbitrators.⁹⁰ Some countries, such as Saudi Arabia, which follows the *Shari'a* more strictly, require that the arbitrator must be a Muslim. Article 3 of the Saudi Implementation Rules for the Arbitration Law provides that, 'the arbitrator must be a Saudi national or a Muslim expatriate.'⁹¹ It should be mentioned that all Saudi citizens are Muslims.

Under Omani law, when appointed to conduct the arbitration procedure, the arbitrator(s) must express their acceptance of their position in writing.⁹² However, neither does the Model Law, nor Egyptian law, of which Omani law of arbitration is a close copy, contain any provision about the acceptance of a position as an arbitrator in writing.⁹³ More importantly, Article 16(3) of Decree 47/97 provides that, when accepting the position, an arbitrator must reveal any circumstances which may 'give rise to doubts as to his independence or impartiality.' If such circumstances arise after the appointment or during the arbitration proceedings, the arbitrator must 'take the initiative in notifying the same to the parties to the

⁸⁸ For the Ibadis' view see, Muhammad ibn Yusuf Atfiyyash, *Sharh al-Nīl wa Shifā al-'Alīl*, 10 vols., vol. 6, (Cairo: 1343 H.) at 528-34. For the Hanafi School, see Ibn 'Abidin, Mohammad ibn 'Omar, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, 5 vols, vol 4 (Cairo: 1299 H), at 492; For the Shafe'i School, see Rmli, Shams al-Din Mohammad ib Abu Abbas, *Nihayat al-Mohtaj*, vol 8 (Cairo: 1356 H), at 226-30; For the Hanbali School, see Al-Bahuti, Mansur ibn Yunus, *Kashshaf al-Qina' 'an Matn al-Iqna'*, 6 vols, vol 6 (Riyadh: 1368 H), at 294-301; For the Maliki School, see Ibn Farhun, *Tabisrat al-Hukkam fi Usul al-'Aqida*, (Cairo: 1301 H), at no. 19-21.

⁸⁹ The concept of "people of the book" does not cover Buddhists, Hindus, atheists, etc. In the light of the expansion of trade with Russia and Far East, particularly China and India, Muslim jurists need to reconsider the concept, or find some way to resolve the problem.

⁹⁰ El-Ahdab, *Arbitration in Arab Countries*, at 488.

⁹¹ See Regulations reprinted in *Yearbook Commercial Arbitration*, A. J. van den Berg (ed.), Vol. XI (Kluwer: London, 1986), pp. 370-377.

⁹² Article 16(3), Decree 47/97.

⁹³ El-Ahdab, "The New Omani Act in Civil and Commercial Matters", at 66.

arbitration and other arbitrators.’⁹⁴ The need for revealing circumstances that prejudice the impartiality of the arbitrators is also stipulated in the UNCITRAL Model Law⁹⁵ and Egyptian law.⁹⁶ In Egyptian Case No. 42 of the 115th Judicial Year (25 December 1998), the arbitrator appointed by one the parties did not disclose that he was a partner in the law firm defending the appointing party, and this was revealed only after the issuance of the award. Thus, the Cairo Court of Appeal ruled that the award was null and void.

It may be considered as a shortcoming of the Omani law of arbitration that it does not specify different types of facts that may be regarded as affecting the impartiality of an arbitrator. This can be compared, for instance, with US Uniform Arbitration Act, which provides some examples of such facts, that is, a financial or personal interest in the outcome of the proceedings, an existing or past relationship with a party, counsel, witness, or another arbitrator.⁹⁷ Such a shortcoming, however, can be attributed to the fact that Oman has very recently joined the club of the most arbitration friendly jurisdictions, and may be dealt with in near future, as the US has adopted the above provisions as late as the year 2000.

It can also be concluded that after the issuance of an award, and even before the completion of challenging or enforcement of the award, establishing any relationship between an arbitrator and a party would not affect the validity of the award.

⁹⁴ Article 178 of the Omani Commercial Companies Law No. 4/1974 that governed the old CSCD also required that the members of the Committee must not have direct or indirect interest in the dispute brought before them. They must reveal any such interest. If there was such interests, they were barred from participation in the proceedings, otherwise any deliberation or decision would be null.

⁹⁵ Article 12(1), The UNCITRAL Model Law on International Commercial Arbitration.

⁹⁶ Article 16(3), Egyptian Arbitration Law No. 27 of 1994.

⁹⁷ Section 12(a)(1)-(2), US Uniform Arbitration Act of 2000.

4-2 Challenging the Appointment of an Arbitrator

The appointment of an arbitrator cannot be objected, ‘unless there appear circumstances giving rise to serious doubt and suspicion concerning his impartiality or independent functioning.’⁹⁸ Moreover, under Article 18(2) of Decree 47/97, a party that has appointed an arbitrator, or participated in his appointment cannot challenge his appointment, unless the reasons for having serious doubt about his impartiality and independence have been known after his appointment.⁹⁹ One difference between the UNCITRAL Model Law and Omani law is that the former, but not the latter, specifies an arbitrator’s lack of qualifications agreed by the parties as a ground for challenging him.¹⁰⁰ It can be argued, nevertheless, that the ground may be a basis for challenging an arbitrator, under the Omani law too, although not being provided for expressly.

Article 19 of Decree 47/97 provides that a challenge to the appointment of an arbitrator must be made in writing to the arbitration tribunal, within fifteen days from the date that the applicant has become aware of the reasons for challenging the arbitrator. If the concerned arbitrator does not accept to withdraw from the tribunal, the tribunal itself will decide about the application. In the case *Sultan Centre L.L.C. v. Zaher ben Hamad al-Harethi*,¹⁰¹ one of the parties to the arbitration agreement challenged the appointment of both arbitrators on the ground that they worked for the same company. The tribunal rejected this challenge, because the request was made more than fifteen days after the party became aware that the two arbitrators work for the same law company. The arbitrators had sent a letter to the parties

⁹⁸ Article 18(1), Decree 47/97.

⁹⁹ The Decree, in this regard, follows Article 12(2), The UNCITRAL Model Law on International Commercial Arbitration.

¹⁰⁰ Article 12(2), the UNCITRAL Model Law on International Commercial Arbitration.

¹⁰¹ Case No. 147/99, the Muscat Court of First Instance (25/9/1999) [*Sultan Centre L.L.C. v. Zaher ben Hamad al-Harethi*].

informing them of their work relationship on 3/6/1999, while the objection to the appointment of the arbitrators was made on 13/7/1999. The claimant took the case to the court. However the court upheld the tribunal's decision. Such a time limit provides for the arbitrators' peace of mind, and prevent any abuse of the right to challenge the arbitrators by the parties, during the proceedings.

Under Article 19(2) of the Decree, 'An application by way of challenge from a person who has previously submitted an application by way of challenge of the same arbitrator in the same arbitration shall be inadmissible.' This means that there cannot be an appeal to the tribunal against a decision as to rejecting a challenge to the appointment of an arbitrator. Nevertheless, the implications of this provision, which is not foreseen in the Model Law, are more. This provision implies that an arbitrator cannot be challenged more than once, even if new evidence is found questioning his independence and impartiality; and this is not fair. Following the Model Law, the Omani law permits making a request for challenging an arbitrator to the competent court, according to Decree 90/99, in domestic arbitration, or to the Muscat Court of Appeal, in case of international trade, within thirty days of the notification of the rejection. The court's decision cannot be appealed against.¹⁰² Kuwaiti law, however, allows an appeal by a party in actions for the removal of an arbitrator.

Some commentators have mistakenly thought that it is possible to submit a request to the court for the removal of an arbitrator, without first submitting a challenge to the tribunal.¹⁰³ However, under Omani law, the request to the court can only be made after a challenge to the appointment of an arbitrator has been refused by the arbitration tribunal. Under Article 19(3) of Decree 47/97, 'An applicant by

¹⁰² Articles 19(2) and 19(3), Decree 47/97. This is similar to Article 13 of the UNCITRAL Model Law on International Commercial Arbitration.

¹⁰³ El-Ahdab, *Arbitration in Arab Countries*, at 489.

way of challenge may appeal against a ruling dismissing his application ... to the court.’ Such a mistake may be rooted in confusing the legal situation in Oman with that in Egypt. Inspired by the UNCITRAL Model Law, the Egyptian Arbitration Law No. 27 of 1994 contained provisions similar to those stipulated in the Omani law of arbitration. However, in Case No. 84 of the 19th Judicial Year,¹⁰⁴ the Supreme Constitutional Court of Egypt decided that the provision that “the arbitral panel shall issue a decision on the application for challenging the arbitrators” is unconstitutional, and held that if the challenged arbitrator did not withdraw or the challenge was not accepted by the other party, the matter would directly be referred to the state court. In the above case, a party to an arbitration agreement whose challenge to the arbitral tribunal was rejected by the tribunal claimed that authorising the tribunal to decide upon the challenges to its members is contrary to the principles of neutrality and equality secured by the Egyptian Constitution of 1980. The Constitutional Court, stressing the judicial nature of arbitration as a voluntary act of waiving the right of the judiciary to decide upon certain disputes, stated that the authority that dispenses justice must be impartial and independent. Referring to Article 69 of the Egyptian Constitution that considers the right of defence as the cornerstone of the rule of law, the Court stated that state legislation may not violate the rights that are considered as the basis of the rule of law in a democratic state. The Supreme Constitutional Court finally held that Article 19 of the Egyptian Arbitration Law No. 27 of 1994, which allows the tribunal to decide upon challenges to its own members contravened Articles 40, 65, 67 and 79 of the Constitution, which secure judicial impartiality and the right of defence. The decision as to automatic referral to the court of challenges not accepted by the concerned arbitrator or the other party

¹⁰⁴ Case No. 84 of the 19th Judicial Year, Egyptian Supreme Constitutional Court.

was made into a legal provision by Law No. 8 of 2000. The decision made by the Egyptian court and enacted in the law is not tenable, as it removes the most relevant authority, that is, the tribunal, for considering a challenge to an arbitrator. The previous legal regime rightly postponed a court action challenging an arbitrator, but it did not take away any basic right. We should be pleased that the Omani legislator did not to follow the Egyptian model in this regard.

Article 19(4) of Decree 47/97 provides that the arbitration proceedings do not stop, if there is a submission, whether to the tribunal or to the court, challenging an arbitrator. However, if the challenge is accepted, the proceedings or the award made by the tribunal are considered as void. The legislator's intention has been to facilitate arbitration, and to obstruct dilatory tactics that might be followed by one of the parties through challenging the appointment of the arbitrators. Nevertheless, such a provision has some drawbacks. It might cause a waste of time and money, if the challenge is granted.

The possibility of the inability of an arbitrator to pursue his duties or to cause an unjustified delay in the proceedings is foreseen by Omani law. Article 20 of Decree 47/97, as amended by Decree 3/2007, reads: upon the request of a party, if 'an arbitrator is unable to carry out his responsibility, fails or causes break in the arbitration proceedings and is unwilling to resign from his office and the parties have not agreed upon his removal, the president of the competent court of appeal may issue orders terminating his assignment.'¹⁰⁵ It has been argued that the decision of the court in such a case, unlike a successful challenge to an arbitrator in the court, does not lead to the invalidity of the proceedings or nullity of the award, if it has

¹⁰⁵ This is similar to the situation foreseen in Article 14(1) of the UNCITRAL Model Law on International Commercial Arbitration.

been made before the court decision.¹⁰⁶ Omani law, however, should be criticised for not containing an explicit provision similar to Article 14(2) of the UNCITRAL Model Law. According to this article, if an arbitrator withdraws from his office, or if a party agrees to terminate an arbitrator's mandate, this does not imply that the ground for challenging him is accepted either by him or by the relevant party. The existence of such provision can be regarded as creating peace of mind for the arbitrators to cease their functions.

It may be asked whether provisions regarding challenging an arbitrator are mandatory rules, or the parties are allowed to agree upon different rules for challenging arbitrators. While the spirit of the law points to the autonomy of the parties, particularly with regard to the procedural law of arbitration, specifying the above rules amounts to providing for mandatory rules.

4-3 Arbitrators' Responsibility

As seen before, the arbitrators must accept their position in writing.¹⁰⁷ This requirement indicates the contractual nature of the relationship between the arbitrators and the parties, under Omani law. This means that by accepting their post in writing, the arbitrators commit themselves to go through the arbitral procedure, follow the requirements of the arbitration agreement, and finally issue an award.

It can be said that, by accepting their post, the arbitrators create legal responsibility for themselves not only to follow the rules set in the arbitration agreement, but also to comply with Omani law of arbitration at large. For instance, they are obliged to declare any circumstance that might prejudice their impartiality or independence.

¹⁰⁶ El-Ahdab, *Arbitration in Arab Countries*, at 490.

¹⁰⁷ Article 16(3), Decree 47/97.

Arbitrators may be liable for their actions or omissions, as judges are. Hence, they may also be liable to compensation, if they are guilty of fraud or gross negligence giving rise to losses for any of the parties. Although there is no provision to such effect in Omani law, such liability may be concluded from the general principles of law in Oman. Nevertheless, it may be possible for the arbitrators to have immunity from liability, as rules of many arbitration institutions contain an immunity clause, excluding the liability of their arbitrators or staff for their acts or omissions in connection with settling disputes.¹⁰⁸

4-4 Jurisdiction of the Tribunal

Article 22(1) of Decree 47/97 provides that it is within the competence of an arbitration tribunal to decide about any objection to its lack of jurisdiction, and to ‘the non-existence or invalidity or the irrelevancy of the arbitration agreement to subject matter of the dispute.’ Such objections must be raised within a period of time set for the submission of a defence, as agreed upon between the parties or decided by the arbitration tribunal. The participation of one party in the process of appointing the tribunal does not deprive that party from raising the above objections. Any other objection alleging that an issue raised by one party during the course of the arbitration proceedings is not covered by the arbitration agreement must be made immediately. Nevertheless, any delayed objection may be considered by the tribunal, if it holds that the reasons for such a delay are justifiable.¹⁰⁹ Under Article 22(3), the tribunal must decide about the objections to its jurisdiction, the non-existence, invalidity or the irrelevancy of the arbitration agreement to the dispute either before or jointly with deciding on the dispute itself.

¹⁰⁸ For instance, Article 37 of the Rules of the Cairo Arbitration Centre of 1998 as amended in 2000, 2002 and 2006 .

¹⁰⁹ Article 22(2), Decree 47/97.

This part of the Omani law of arbitration is mainly similar to what is expressed under Article 16 of the UNCITRAL Model Law. A slight difference, however, is that Article 22(1) of the Omani law explicitly mentions the irrelevancy of the arbitration agreement to the dispute as one of the issues to be decided by the tribunal, but the UNCITRAL Model Law is not explicit in this regard. More importantly, Omani law diverges from the Model Law on the issue of recourse to the court for objecting to the tribunal's decision on its own jurisdiction. Under Article 16(3) of the Model Law, a request to the court can be made within thirty days of the tribunal's informing the parties of the rejection of their objection to its jurisdiction. The court decision shall be subject to no appeal. However, Omani law does not provide for such a possibility, and the parties can request the competent court to decide on the matter only after the issuance of the final award, through applying for its annulment.

One may say that Omani law provides an arbitration tribunal with excessive power, since it allows the tribunal to rule on its own jurisdiction without any possibility of appeal. Any external intervention to the tribunal's decision concerning its competence to consider a dispute must be delayed until the award on the merit of the dispute is issued by the tribunal. Nevertheless, it can be argued that the power vested in the tribunal in this regard is not excessive, and is mainly intended to prevent a party from obstructing the arbitration proceedings, since, as said before, it is ultimately possible to request the setting aside of an award through the court. Furthermore, it is a general principle of law known as *compétence de la compétence* (or *Kompetenz-Kompetenz*) that arbitration tribunals as well as courts determine their own jurisdiction. As a matter of fact, although the previous Omani authority for considering arbitral awards, the BSCD, never examined the subject-matter of a dispute, it did make the necessary investigation to ensure that the arbitrators had not

exceeded their powers.¹¹⁰ There is no reason to expect the present competent courts, under Article 9 of Decree 47/97 do otherwise.

Article 38 of the old Omani law of arbitration, that is, Decree 32/84, provided that the BSCD could at any stage of an arbitration procedure raise the issue of the tribunal's lack of jurisdiction. This could be done not only at the request of one of the parties, but also on the court's own motion. This was regarded as the excessive power of the courts at the expense of contractual obligations of the parties involved. However, it is the intention of the present Omani law of arbitration to limit the possibility of judicial intervention to challenging the award only after its issuance. The only problem is that when, after the issuance of the award, the court decides that the arbitral tribunal did not have jurisdiction, this means that a considerable amount of time and money spent by the parties and the arbitrators is wasted. Given the policy of facilitating arbitration, however, such a problem is worthy of toleration.

The question might arise as to what would happen, if the tribunal decides that it does not have jurisdiction to decide on a dispute. Such a possibility is not very likely, as arbitrators would be ending their own job and going against the intention of the parties to see their dispute ended. However, it is still a possibility that needs to be dealt with, and stipulated through law provisions. Omani law is not explicit on such occasion, but it can be argued that such a decision would be final and subject to no appeal, and that the court would not be able to rule on the contrary, as it has been said about the Egyptian law of arbitration.¹¹¹

¹¹⁰ El-Ahdab, *Arbitration in Arab Countries*, at 504.

¹¹¹ Aboul-Enein, "Egypt".

Power to Enforce Orders for Interim Measures

Under Article 24(2) of Decree 47/97, the arbitration tribunal has also some enforcing power, if the parties have an agreement to this effect. This is mainly when a party fails to execute orders of the tribunal to take interim measures. Such measures, under Article 24(1), can be in the form of an attachment or appropriate security to cover the cost of some other measures required by the tribunal or conservatory orders with regard to perishable goods. The tribunal has the power, upon the request of one party, to grant permission to the other party to take necessary steps for the execution of its orders, without prejudice to the party's right to resort to the court for an order and its execution.

5 Arbitration Procedure

It was Decree 32/84 that for the first time set procedural rules for arbitration in Oman. Under the Decree, there must have been oral hearings; the parties had the right to legal representation; and it was possible to call a witness, who could be fined, if he failed to attend a hearing. Cross-examination, by the leave of arbitrators, was also allowed. The parties could agree to empower arbitrators to act as *amiable compositeur*. Unless agreed otherwise, the award must have been issued within two months after the request for arbitration was made to the BSCD. Otherwise, the arbitration agreement was regarded as discharged, and it was possible to start litigation before the Board.¹¹² The replacement of Decree 32/84 with Decree 47/97 introduced a set of procedural rules more in line with the rules accepted by the rest of the world. These rules are analysed in the following sections.

¹¹² Articles 59-68, Decree 32/84.

Procedural law of arbitration

Article 6 of Decree 47/97 allows the parties to an arbitration agreement to choose the law applicable to their disputes. Specifically regarding the arbitration procedure, Omani law of arbitration provides that the procedure of arbitration must be agreed upon by the parties to the arbitration. It also permits the parties to subject the arbitration procedure to the rules and regulations ‘adopted by an arbitration organization or centre in the Sultanate of Oman or abroad.’¹¹³ Such a point is also emphasised in Article 5 of the Decree, which provides that when the law allows the parties to choose the procedure, either party may authorise a third party, which may be any arbitration organisation or centre based either in Oman or abroad, to choose such procedure. For instance, in *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, Article 14.06 of the arbitration agreement stated that all disputes arising in connection with their agreement will be settled by arbitration locally under the ICC Rules of Conciliation and Arbitration of 1988.¹¹⁴

In the absence of any agreement between the parties regarding the arbitration procedure, the tribunal itself, while taking account of Decree 47/97, can adopt the appropriate arbitration procedure.¹¹⁵ While Omani law is explicit about the possibility of adopting procedural rules established by an international or Omani arbitration institution, adopting procedural law of a foreign country is implicitly recognised. In this regard, Omani law exactly follows the pattern set by Articles 25 of the Egyptian Arbitration Law. Unlike Article 19(2) of the UNCITRAL Model Law, both Omani and Egyptian laws do not explicitly provide that the power

¹¹³ Article 25, Decree 47/97.

¹¹⁴ *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, (2000) Case No. 10521/OL/ESR (2), ICC International Court of Arbitration.

¹¹⁵ Article 25, Decree 47/97. This is, to a large extent, similar to Article 19 of the UNCITRAL Model Law on International Commercial Arbitration.

conferred upon the arbitral tribunal in conducting the arbitration includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Nevertheless, under both legal systems, the arbitrators have a power to do so subject to not undermining the right of defence.¹¹⁶ As a general rule, it is accepted that arbitrators are not bound by restrictive rules on the administration of justice, as judges are.

As noted earlier, Decree 47/97 can also be chosen by the parties as the applicable law to arbitration outside Oman. The question might arise, however, as to which law applies to the procedural details not specified by the Decree, for instance, about the details of a valid summons. Would it be the municipal law at the seat of arbitration or Omani law? It may be said that if the parties agree on Omani law as a whole as the applicable law, the details as determined by Omani law applies to the arbitration procedure. Otherwise, the law of the forum country will be applicable.

Date, Place and Language

Article 27 of Decree 47/97 provides that the arbitration proceedings begin on the date that the defendant receives a request for arbitration from the complainant, unless another date is agreed by the parties.¹¹⁷

Under Article 28, the parties to an arbitration agreement can choose the place of arbitration. However, if they fail to do so, the arbitration tribunal can decide on the place of arbitration, while taking into account the convenience of the parties and the circumstances of the case. Some commentators argue that the arbitration tribunal's choice of the place of arbitration is not as wide as that of the parties. Hence, arbitrators cannot choose a place outside Oman, unless it is approved by the

¹¹⁶ With regard to Egyptian law, see Aboul-Enein, "Egypt".

¹¹⁷ This is similar to Article 21 of the UNCITRAL Model law on International Commercial Arbitration.

parties.¹¹⁸ It is also worth mentioning that if the parties have chosen the arbitration rules of an arbitration centre, this does not necessarily indicate that they have agreed that the place of arbitration to be where the arbitration centre is located.¹¹⁹ The choice of the place of arbitration may have significant legal implications, since if the parties have not agreed on the law of arbitration, the law of the place applies to the case. Consequently, the arbitral award will be subject to the judicial review in the country where it is made, and the country's procedural law on issues such as arbitrability and international public policy may be applicable to the arbitration. Even if the parties have agreed on the law of arbitration, in some cases the law of the seat of arbitration might still be relevant.

Under Omani law, irrespective of the choice of the place, the tribunal has the authority 'to convene in any place it deems appropriate to undertake any arbitral procedure, such as the oral hearing of the parties to the dispute, witnesses or experts, the sighting of documents, the viewing of merchandise or property, the conducting of deliberations amongst its members, or otherwise.'¹²⁰ This is because, in certain circumstances, it might be more effective to conduct some parts of the proceedings somewhere other than the seat of arbitration. For instance, inspections have to be carried out where the goods or properties are located, or some witnesses or expert might not be available in the place of arbitration.

Article 29(1) of Decree 47/97 provides that Arabic is the language of arbitration, unless otherwise is agreed by the parties, or determined by the tribunal. This provision, while requiring Arabic as the official language of the country to be used in arbitration, respects the contractual nature of arbitration, by allowing the parties or

¹¹⁸ El-Ahdab, *Arbitration in Arab Countries*, at 491.

¹¹⁹ For a similar point about Egyptian arbitration law, see Sharkawy, at 16-17.

¹²⁰ Article 28, Decree 47/97. Omani law provisions regarding the place of arbitration are equivalent to Article 20 of the UNCITRAL Model law on International Commercial Arbitration.

the tribunal to choose the language they prefer. Allowing the parties to choose the language of arbitration provides a level ground for both Arab and the non-Arab parties. Thus, for instance, in *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*,¹²¹ English was chosen as the language of arbitration, while the place of arbitration was Muscat, the Capital city of Oman, and the arbitrators met for deliberation in Cairo. Under this article, unless the parties agree otherwise, the decision about the language affects written statements and memoranda, oral submissions and decisions taken by the tribunal including its letters and the award. Article 29(2) of Decree 47/97 provides that the tribunal can require that all or some of the written documents submitted must be translated into the language(s) of arbitration proceedings.¹²²

Time-Schedule

The Omani law of arbitration, which is concerned with the effectiveness of arbitration processes, sets a time schedule for considering a dispute and making the award. The intention is mainly to preclude any dilatory tactics used by a violating party or even by the arbitrators. Under Article 45(1) of Decree 47/97, arbitration proceedings must be completed and the award made within the timetable agreed by the parties. If there is no such agreement, the tribunal must issue its award within a year of the beginning of the proceedings.¹²³ Although it is possible to extend the time limit for the proceedings, such an extension cannot be more than six months, unless agreed by the parties. If the tribunal fails to make an award within this time

¹²¹ *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, (2000) Case No. 10521/OL/ESR, ICC International Court of Arbitration.

¹²² This is similar to Article 22, the UNCITRAL Model law on International Commercial Arbitration.

¹²³ Under the quasi-arbitral system of the CSCD, the Committee must render its decision within fifteen days from the submission of the evidence or seven days from the final date set for the submission of the final memoranda by the parties (Article 187(b) and (c), the Commercial Companies Law No. 4/1974).

limit, either party can request the president of the competent court of appeal to allow more time for the arbitration or to terminate the proceedings. Upon the termination of arbitral proceedings, either party can ask the originally competent court to consider the case.¹²⁴ Such a time limit is not stipulated in the UNCITRAL Model Law. The period of time when the arbitration proceedings are suspended, as stipulated under Article 46 of the Decree, is not considered as the time allocated to the proceedings.¹²⁵ As it can be seen, the Omani legislator has given the parties, acting consensually, the authority to determine the time limit for arbitration, while granting the tribunal and, in certain circumstances, the court some powers in setting the time schedule. In the latter situation, no limit is set for the length of extension granted by the court.

While a time limit is set for the arbitration process, neither the Model Law, nor does Omani law provide a schedule for different stages of arbitration, such as submitting statements of claim and defence, or notifying a party of such statements. Among various arbitration conventions or institutions to which Oman is a party, only the GCC Commercial Arbitration Centre provides for such a schedule.¹²⁶

¹²⁴ Article 45(2), Decree 47/97, as amended by Decree 3/2007.

¹²⁵ Article 46, Decree 47/97.

¹²⁶ See, for instance, Article 11, the GCAC Arbitral Rules of Procedure. Under the quasi-arbitral system of the CSCD, the defendant must have been notified of the statement of claim and the enclosed documents within three days after the filing of the statements. The notification must have been delivered to the defendant in person, or sent to his place of business or to the registered office of the defendant company. If the residence of the defendant was not known, the notification must be published in the *Official Gazette*, the local press or any other way decided by the CSCD (Article 181(a), the Commercial Companies Law No. 4/1974). The defence statement must be submitted within ten days after receiving the notification (Article 181(b), the Commercial Companies Law No. 4/1974). On the other hand, there was no time limit for the CSCD to render its decision.

Most GCC States statutory arbitration rules follow the same pattern for the time limit as Omani law does, with the exception of Qatar, where the law, rather than the parties, set the time limit.¹²⁷

The Adversarial Procedure

Article 30 of Decree 47/97, which is equivalent to Article 23 of the UNCITRAL Model Law, specifies the requirements of statements of claim and defence by the parties. Under Article 30(1) of Decree 47/97, the complainant must provide the defendant and every arbitrator ‘with a written statement of his claim, furnishing therein his name and address, name and address of the defendant, stating the facts of the case and highlighting the issues coming under the subject matter of the dispute, his claim and any other matter which is required to be stated in this statement,’ on the basis of the agreement between the parties. “Other matters” may include the remedy sought by the claimant. Such a statement initiates the arbitral proceedings. It is worthy of mention that a statement of claim requires much more details than that is required for a request to refer a dispute to arbitration.¹²⁸ A statement of claim must be provided within the period of time agreed upon by the parties or prescribed by the tribunal.¹²⁹ The difference with the Model Law is that while under Omani law, formal features of a statement of claim, such as the names and addresses of the parties, are stressed, the Model Law specifies issues such as the relief or remedy sought.¹³⁰ It is also a feature of Omani law that it emphasises that the statement must be written.¹³¹

¹²⁷ W. M. Ballantyne, “Arbitration in the Gulf States: ‘Delocalisation’: A Short Comparative Study”, *Essays and Addresses on Arab Laws*, (Richmond: RoutledgeCurzon, 2000), at 52-3.

¹²⁸ Compare Articles 27 and 30(1) of Decree 47/97.

¹²⁹ Article 30(1), Decree 47/97.

¹³⁰ Article 23(1), the UNCITRAL Model law on International Commercial Arbitration.

¹³¹ Article 30, Decree 47/97.

Article 30(2) of the Decree provides that within a period of time agreed upon by the parties or set by the tribunal, the respondent must submit to the arbitrators and the claimant a written statement of defence. It goes on to state, ‘The defendant shall have the right to include in his submission any incidental claim in respect of the subject matter of the dispute or to reserve the right arising from it with the objective to make a defence for setting off.’ The defendant, however, may make his counterclaims later in arbitration proceedings, on the condition that such a delay is found justifiable by the tribunal.¹³² It is an advantage of Omani law over the Model Law that the former stipulates the possibility of making any incidental claim with regard to the subject-matter of the dispute, while the Model Law lacks any provision to this effect.

Under Decree 47/97, the parties can enclose to their statements the copies of some supporting documents or evidence, and can make reference to them in their statements. The arbitration tribunal has the right to require a party to submit the original documents or evidence relied upon in the statements.¹³³ Article 31 of the Decree requires that each party must be provided with the copies of the submissions, documents, evidence, experts’ reports and any other record submitted to the arbitration tribunal by one of the parties or others.¹³⁴ Article 32 of the Omani law allows a party to amend or supplement his claim or defence during the course of arbitration proceedings, unless the tribunal rules that such modification is inadmissible in order to prevent delay in making the award. This provision is equivalent to Article 23(2) of the UNCITRAL Model Law. However, it has been

¹³² Article 30(2), Decree 47/97.

¹³³ Article 30(3), Decree 47/97.

¹³⁴ This is similar to Article 24(3) of the UNCITRAL Model law on International Commercial Arbitration.

argued that the power granted by Omani law to the arbitration tribunal should be used with caution, in order not to prejudice the right of a party to fair hearing.¹³⁵

Regarding hearings, Article 33(1) of Decree 47/97 provides that the arbitration tribunal can arrange hearing sessions in which the parties can explain the subject-matter of the dispute, and present their evidence and arguments. On the other hand, unless the parties agree otherwise, the tribunal may issue its award only on the basis of written submissions and documents. Therefore, a request for a hearing can be refused, unless requested by both parties. However, the tribunal's rejection of holding hearings may be considered as a breach of due process, and consequently may be regarded as a ground for setting aside or non-enforcing the arbitral award. Hence, the tribunal should allow holding hearings, even if the request is made only by one of the parties and refused by the other.¹³⁶ It would have been better if the Omani law of arbitration had contained a provision similar to Article 24 of the UNCITRAL Model Law that states, unless the parties have agreed otherwise, upon the request of a party, the tribunal shall hold oral hearings. Nonetheless, it can be said that the Omani law of arbitration implicitly requires holding a hearing, upon the request of only one of the parties. This is because, for instance, Article 36(4) of Decree 47/97 provides that the tribunal may decide to convene a session to hear its expert's report, if requested by one of the parties.

The parties must be given notice sufficiently in advance, as determined by the tribunal, of any hearing.¹³⁷ The minutes of the proceedings in each session will be recorded, and shall be communicated to the parties.¹³⁸ The arbitration tribunal may also allow the hearing of witnesses. It is a feature of the Omani law of arbitration

¹³⁵ El-Ahdab, "The New Omani Act in Civil and Commercial Matters", at 71.

¹³⁶ El-Ahdab, *Arbitration in Arab Countries*, at 495.

¹³⁷ Article 33(2), Decree 47/97.

¹³⁸ Article 33(3), Decree 47/97.

that it stresses that the witnesses and experts give evidence without the need to take an oath,¹³⁹ while such a provision is not stipulated in the Model Law. This can be compared to the Bahraini law which allows administration of the oath to witnesses by the arbitration tribunal. The latter law has the advantage of making false witnesses liable to the criminal charge of perjury before the court, although it is not clear whether it is at the discretion of the tribunal or mandatory for the court to bring such charges against perpetrators.¹⁴⁰ Compared to Sections 43 and 44 of the 1996 English Arbitration Act, the Omani law of arbitration is less specific about the powers of an arbitration tribunal in relation to witnesses, evidence and the like.¹⁴¹ For instance, under the English law, inquisitional powers is granted to the tribunal, in order to play an active role in ascertaining the facts and the law,¹⁴² whereas such a power for cross-examination is not explicitly provided for, under the Omani law. This can be regarded as a shortcoming of Omani law.

Under Article 26 of Decree 47/97, ‘Both parties shall be treated with equality and given adequate and full opportunity to submit their claims.’ This provision secures certain important requirements of due process, that is, non-discrimination and equal treatment of the parties, as well as full opportunity for claim and defence. It is the equivalent provision to Article 18 of the UNCITRAL Model Law.

The complainant’s failure to submit his written statement of claim, without any acceptable reason, requires the tribunal to terminate the proceedings, unless the

¹³⁹ Article 33(4), Decree 47/97

¹⁴⁰ Ballantyne, “Arbitration in the Gulf States: ‘Delocalisation’: A Short Comparative Study”, at 53.

¹⁴¹ For a discussion on the limitations of the powers imported into arbitration by the Act, see Hew R. Dundas, “Non-Party Disclosure and Witness, Enforcement of Foreign Awards and Costs: Recent Decisions in the English Courts”, *Arbitration*, vol. 71, no. 2 (2005), at 172-3.

¹⁴² Bandkura, at 6.

parties have agreed otherwise.¹⁴³ On the other hand, if the respondent fails to submit his statement of defence, in the absence of an acceptable reason, the tribunal must continue the proceedings. Such a failure, however, is not tantamount to admitting the claims of the complainant by the respondent.¹⁴⁴ Article 35 of Decree 47/97 provides that if a party fails to take part in a hearing or to submit a required document, the tribunal may continue the proceedings, and issue its award on the basis of the available evidence.¹⁴⁵ These provisions are stipulated, in order to preclude dilatory tactics by a party.

Decree 47/97 authorises the arbitration tribunal to use expert views in the arbitration proceedings. Article 36(1) of the Decree reads: 'It shall be permissible for the arbitration tribunal to appoint one or more experts to submit a written or oral report to be recorded in the minutes of the hearing, in relation to specific issues designated by it.' It has been argued that the appointment of experts is usually made upon the request of one of the parties. The tribunal may also do so, without requiring the consent of the parties, if it finds it necessary. In such a case, however, the parties may refuse to reimburse the expenses arising from employing the experts.¹⁴⁶ Omani law goes beyond Article 26(1)(a) of the Model Law by stressing that expert reports must be recorded in the form of minutes. It also requires that the copies of the tribunal's 'decision specifying the scope of the functions assigned to the expert shall

¹⁴³ Article 34(1), Decree 47/97. Under the CSCD system, if the claimant did not attend two consecutive hearings, upon the defendant's request, the Committee might terminate the proceedings, which could only be reinstated by the claimant's request within six months after the termination of the proceedings, and after the payment of certain fee. If the defendant failed to attend a hearing, a new date for hearing would be set (Article 183(b), the Commercial Companies Law No. 4/1974), but their continuous failure did not stop the hearings (Article 183(c), the Commercial Companies Law No. 4/1974).

¹⁴⁴ Article 34(2), Decree 47/97.

¹⁴⁵ Articles 34 and 35 of Decree 47/97 are equivalent to Article 25 of the UNCITRAL Model law on International Commercial Arbitration.

¹⁴⁶ El-Ahdab, *Arbitration in Arab Countries*, at 494.

have to be sent to each of the parties.’¹⁴⁷ This requirement is necessary because, under Article 36(2) of the Decree, the parties are obliged to provide the expert(s) with any relevant information, and to enable them ‘to inspect and check any of the documents, goods and other properties relating to the dispute as may be required by the expert[s]’. Again here Omani law goes beyond the Model Law, and provides that in any dispute between the parties and the expert(s), regarding access to the above information, the tribunal shall make the decision.¹⁴⁸ This is an important provision as it may resolve many such differences that often arise between the experts and a party. The experts usually investigate technical or accounting issues, and if the applicable law is a foreign law, they may provide the tribunal with legal assistance.¹⁴⁹

Another advantage of Omani law over the Model Law is that the former requires the tribunal to send a copy of expert reports immediately to the parties in order to give them the opportunity to comment on it and pursue and check the documents relied upon by the expert(s).¹⁵⁰ Inspired by the Model Law, Article 36(4) of Decree 47/97 provides that unless the parties have agreed otherwise, the tribunal, upon the request of one party or on its own initiative, can decide to convene a hearing where the parties can discuss with the experts about their report that has already been submitted. The parties can also present their own experts who can express their views regarding the tribunal experts’ reports.¹⁵¹ Beyond such expert discussion, the parties can present their own experts during the arbitration proceedings.¹⁵²

¹⁴⁷ Article 36(1), Decree 47/97.

¹⁴⁸ Article 36(2), Decree 47/97.

¹⁴⁹ El-Ahdab, *Arbitration in Arab Countries*, at 494.

¹⁵⁰ Article 36(3), Decree 47/97.

¹⁵¹ This is similar to Article 26(2) of the UNCITRAL Model law on International Commercial Arbitration.

¹⁵² El-Ahdab, *Arbitration in Arab Countries*, at 494.

It is a significant feature of the Omani law of arbitration that it allows the intervention of the court in taking evidence. Under Article 37 of Decree 47/97, upon the request of the arbitration tribunal, the President of the competent court of first instance has the power to fine those witnesses who fail to appear before the tribunal or abstain from doing so an amount of five to twenty Omani Riyals. Such a decision is final, without allowing any appeal. Following a request by the arbitration tribunal, the President can also issue orders for judicial delegation. The relevant Model Law provision that has inspired the Omani provision only vaguely mentions court assistance in taking evidence.¹⁵³ By contrast, the English Arbitration Act contains a more articulate provision, in this regard. It provides that ‘A party to arbitral proceedings may 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.’ The permission of the tribunal or the parties’ agreement is needed for recourse to such procedures. The above provision is applicable, when the witness is in the UK, and when the arbitral proceedings are conducted in England, Wales or Northern Ireland.¹⁵⁴

Since, unlike court procedures, arbitration is meant to be free from formalities, the parties may personally undertake the representation of their case, without seeking professional assistance. Nevertheless, a party can give the power of attorney to somebody else at various stages of arbitration.¹⁵⁵ Under Article 78 of Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes, such power must be given through special authorisation, when it is required by the law. However, the power of attorney before the arbitration tribunal can usually be granted

¹⁵³ Article 27, the UNCITRAL Model law on International Commercial Arbitration.

¹⁵⁴ Article 43, the English Arbitration Act of 1996.

¹⁵⁵ A similar right was recognised, under the CSCD system (Article 188(a), The Commercial Companies Law No. 4/1974).

less formally, through written communications or even orally, while representation before the court should be notarised. Omani law does not require the representative to be a lawyer. In oral hearings, the parties may be accompanied by legal counsels, who may be foreign citizens and not necessarily lawyers admitted to the bar.

The arbitration proceedings are terminated when a final award is made by the tribunal, or when, in accordance to Article 45(2) of Decree 47/97,¹⁵⁶ upon the request of one of the parties, an order is issued by the president of the competent court of appeal to bring the proceedings to an end, after the deadline for making an award has passed. The termination of the proceedings may also be the result of a decision by the tribunal, if both parties agree to terminate the proceedings. Similarly, the proceedings shall stop, if the plaintiff abandons his claims, unless the tribunal decides not to do so, because the defendant has a legitimate reason to continue the case until the proceedings are completed. Also, the proceedings are ended, if the tribunal comes to the conclusion that it is impossible or unnecessary to continue the proceedings.¹⁵⁷

Although not explicitly stated in the law, the arbitrators may render their award after summary proceedings, when the respondent does not have an arguable and meritorious defence. Making a summary award, before full disclosure of documents, helps avoiding undue delay and expenses, in the absence of defences. The tribunal should conduct summary proceedings in such a way that the defendant cannot challenge the award in an action for setting it aside.

¹⁵⁶ As amended by Decree 3/2007.

¹⁵⁷ Article 48, Decree 47/97. This article is similar to Article 32 of the UNCITRAL Model law on International Commercial Arbitration.

Suspension and Interruption of the Arbitration Proceedings

Article 38 of Decree 47/97 allows the suspension of arbitral proceedings in certain circumstances set out in law. It does not, however, specify such circumstances. There is no such a provision in the Model Law. Under Article 62(2) of the Omani Commercial Court Law, the arbitral proceedings are interrupted in the following cases: the death of one of the parties, his loss of capacity, the commencement of proceedings for forgery, or the commencement of criminal proceedings for forgery or for other criminal offences. Any procedural action taken during the interruption period is void, and this period is not considered as part of the time limit for arbitration proceedings.

On the other hand, under Article 46 of Decree 47/97, if an issue is raised that does not fall under the jurisdiction of the tribunal, or if a legal action is taken regarding the forgery of a document submitted to the tribunal or any other criminal offence, the arbitration proceedings can continue, on the condition that the tribunal comes to the conclusion that the outcome of the above legal action will not have any impact on the decision of the tribunal. However, if such an impact is predicted, the arbitration proceedings must be suspended, until a final decision about the alleged offence is made by the court.

It is important to notice that under Article 46 of the Decree, it is the arbitration tribunal that decides whether a matter outside its jurisdiction may affect its decision, and hence halt the proceedings or not. Therefore, not any matter outside the jurisdiction of the tribunal, but relating to the proceedings, can automatically interrupt the proceedings. Article 180 of the Kuwaiti Law No. 38 of 1980 on Civil and Commercial Procedure has a similar effect, and permits the arbitrators to

suspend the proceedings for up to six months pending the settlement of any matter that they see as virtually affecting the award.

6 Substantive Law of Arbitration

Decree 47/97 provides that the parties to an arbitration agreement can choose the law to be applied to their disputes by the arbitrators.¹⁵⁸ Article 6(2) of the Decree reads: ‘If the two parties to the arbitration agree to make the legal relationship between them subject to the provisions of a model-format contract, an international convention or any other text, effect shall be given to the provisions of such text, including any provisions relating to arbitration which it contains.’

Specifically regarding the substantive law of arbitration, Article 39(1) of Decree 47/97 provides that the arbitrators must apply to the subject-matter of the dispute the terms and conditions agreed upon by the parties. In *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, Article 14.13 of the arbitration agreement provided that ‘This Agreement and the rights and obligations of the parties hereto shall be governed by and construed and given effect to in all respects in accordance with the local law’.¹⁵⁹ In the above case, the arbitrators not only applied the relevant provisions of Omani law, but also when there was no such provision relating to the dispute, they referred to the jurisprudence of the Omani Court.¹⁶⁰ Under Omani law, if the parties have chosen the law of a country to be applied to their disputes, it is the substantive rules of such law that apply to the dispute, and not its conflict of laws rules, unless the parties agree otherwise.¹⁶¹

¹⁵⁸ Article 6(1), Decree 47/97.

¹⁵⁹ *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, (2000) Case No. 10521/OL/ESR (3), ICC International Court of Arbitration.

¹⁶⁰ For instance, see *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, (2000) Case No. 10521/OL/ESR (6), ICC International Court of Arbitration. The arbitration tribunal referred to Omani Court decisions on the termination or rescission of contracts.

¹⁶¹ Article 39(1), Decree 47/97.

Therefore, under Decree 47/97, the parties can make their disputes subject to foreign law. In this way, Oman follows some other GCC countries, such as Kuwait¹⁶² and Bahrain,¹⁶³ in allowing the application of foreign laws on disputes referred to arbitration in the country, without being considered as a foreign arbitration. Authorising the contracting parties to stipulate for a foreign law to govern their agreement, on the condition that it is not contrary to public order, was also confirmed in a BSCD ruling.¹⁶⁴ It can be considered as a shortcoming of the Omani law of arbitration that it does not stipulate a situation where the parties' choice of the applicable law is implicit.

In the absence of an agreement by the parties on the applicable law to the substance of the dispute, the arbitration tribunal shall apply the law that it finds 'very much relevant to the dispute.'¹⁶⁵ When deciding on the substance of the dispute, the tribunal must take into consideration the terms of the agreement as well as the commercial customary laws which are relevant to the subject-matter of the dispute.¹⁶⁶ The latter requirement can be interpreted as the need for the agreement to comply with the current trade customs and usages prevailing in the similar type of transactions. The Omani law of contracts plays an important role in determining the proper law applicable to the contract, indicating the type of the contract, which can be the sale of goods or real property, the terms of employment, and ownership of intellectual property developed as part of a work for hire, and the like.

¹⁶² The Kuwaiti Conflict of Laws Code No. 5 of 1961.

¹⁶³ Article 237, the Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures.

¹⁶⁴ In Case 642/1989, BSCD Judgment, *Majmou'a*, vol. VI, at 280, the BSCD held that it was legal to govern a loan agreement and a guarantee respectively by Kuwaiti and English laws, but did not find sufficient evidence of agreement upon the laws in the case.

¹⁶⁵ Article 39(2), Decree 47/97. This is equivalent to Article 28(2) of the UNCITRAL Model law on International Commercial Arbitration. However, the latter specifies that the tribunal 'shall apply the law determined by the conflict of laws rules which it considers applicable.'

¹⁶⁶ Article 39(3), Decree 47/97.

It is an important feature of the Omani law of arbitration that, following the UNCITRAL Model Law, it allows the tribunal to decide *ex aequo et bono* or as *amiable compositeur*, and to facilitate conciliation between the parties, if the parties expressly authorise it to do so. In other words, if authorised, the tribunal may settle the dispute on the basis of equity, fairness and proportionality, without being restricted to the provisions laid down by the law.¹⁶⁷ On such occasions, the tribunal can 'take a lenient view of the legal rules, but cannot totally disregard them.'¹⁶⁸ This paves the way for choosing non-lawyer arbitrators, who can bring their professional expertise and experience to arbitration, without strictly following the rules of law. This is important, because the law is developed by legislators who are not fully familiar with the subtle details of the business in question. Similar position is taken by Egyptian law. In Case No. 41, the Cairo Court of Appeal ruled that since the parties empowered the arbitrators to act as *amiable compositeur*, the tribunal was allowed to apply an interest rate above the maximum rate set by the law, and, more importantly, the tribunal's decision was not contrary to public order, as it was claimed by the losing party.¹⁶⁹ Such position can be compared to the Kuwaiti provision according to which the arbitrators can arrive at an *amiable composition*, only if they are named in the arbitration agreement. In such a case, the only restriction for the arbitrators in issuing the award would be public policy. Abul Wafa, an Egyptian legal writer, argues that since confidence in the person acting as

¹⁶⁷ Article 39(4), Decree 47/97. Article 39 of the Decree is similar to Article 28 of the UNCITRAL Model law on International Commercial Arbitration. Under the CSCD quasi-arbitral system, the Committee was required to decide upon disputes, according to statutes in force, the parties' contracts, on the condition of not being contrary to the statutes and public policy, trade custom, and the principles of fairness and equity (Article 178, the Commercial Companies Law No. 4/1974). The order indicates which substantive rules prevailed over others (Saleh, *Commercial Arbitration in the Arab Middle East*, at 383).

¹⁶⁸ Indira Carr, *International Trade Law*, 3rd ed., (London: Cavendish Publishing Ltd., 2005), at 628.

¹⁶⁹ Case No. 41 of the 114th Judicial Year (2 October 1997), Cairo Court of Appeal.

amiable compositeur is crucial to the effectiveness of such a solution, it is important that such a person is known to the parties.¹⁷⁰

An important misgiving about arbitration by *amiable composition* is that, in some Arab jurisdictions, it is sometimes confused with mediation or conciliation (*sulh*) by a nominated third party.¹⁷¹ This is so particularly in the Gulf states, and even in those jurisdictions where the two settlement methods are defined and provided for separately. In the case of Oman, the wording of the Omani provision authorising the arbitrators to settle a dispute as *amiable compositeur* reinforces the above mentioned confusion. It states that if the disputants expressly authorise the tribunal to reach conciliation between the parties, the tribunal may settle the dispute on the basis of equity and fairness, without being restricted to the applicable law. There can be two reasons for such a chronic confusion within Arab legislation. First, since under the *Shari'a*, only disputes are arbitrable that can be subject to compromise or conciliation, there has been a tendency among Islamic law experts to take the two methods identical. Moreover, as seen before, according to some versions of the *Shari'a*, so far as no award is issued, the arbitrators' mandate may be revoked. This makes arbitration similar to a conciliation process. However, as we know, there are fundamental differences between arbitration and conciliation. The least is that the award of arbitrators acting as *amiable compositeur* is binding, whereas conciliators can only recommend a solution. As mentioned before, the *Shari'a* is clear that arbitration is not a diplomatic dispute resolution method, but an adjudicative one whose outcome is binding on the parties, as it is clear from the Quranic Verse 35 of the *Sura Al Nisa'*. Another reason for such confusion might be traced to the fact that

¹⁷⁰ Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", at 51.

¹⁷¹ See Saleh, "the Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law". This may be due to the close link between *sulh* and arbitration in the *Shari'a*.

modern commercial law has come to the Arab world through few channels, the most important of which is Egypt. Consequently, such a mistake has spread throughout the Arab world.

Hence, it is said that the Western concept of arbitration by *amiable composition* has not yet fully assimilated into Arab legal systems; and that the concept of equity, in Arab legal thinking, is not linked to adjudication but to mutual concessions.¹⁷² Nevertheless, there is nothing inherent in the legal systems of Arab states and even the *Shari'a* that prohibits arbitration by *amiable composition*. On the contrary, *Shari'a* law itself provides for this type of arbitration.¹⁷³ The aforementioned difficulties can be addressed by modification of the law and the expansion of doctrinal works.

7 Arbitral Awards

Arbitral proceedings are ended when an award is made by the arbitration tribunal. The arbitration tribunal, if consisted of more than one person, must make its award on the basis of the majority vote, unless otherwise is agreed by the parties.¹⁷⁴ Hence, it is conceivable that the parties agree that the award must be made unanimously, or by the chairman of the tribunal. A possibility, about which Omani law is silent, is the cases where, despite the parties' agreement, a majority vote is not achieved, for example, when each arbitrator gives a different vote. The law should provide appropriate arrangements for such a possibility.¹⁷⁵ One way out of this

¹⁷² Saleh, *Commercial Arbitration in the Arab Middle East*, at 435-6.

¹⁷³ El-Ahdab, "The Moslem Arbitration Law", at 383-384.

¹⁷⁴ Article 40, Decree 47/97. This is equivalent to Article 29 of the UNCITRAL Model law on International Commercial Arbitration, though in the latter it is also stipulated that the issues of procedure may be settled by a presiding arbitrator, if so authorised by the parties or all members of the tribunal.

¹⁷⁵ Haddad, "Al-Tahkim al-Tejari al-'Arabi ad-Dowali", at 10.

difficulty can be providing the chairman of the tribunal with the right to make the final decision.

Going beyond the Model Law, Article 40 of Decree 47/97 emphasises that after due deliberations, “in the manner prescribed by the tribunal”, the award shall be made. It may be asked, however, why the above provision stresses making an award after deliberation, which is an indispensable part of any arbitration process. It has been suggested that perhaps the Article means that it must be mentioned in the award ‘how the deliberation was made in presence of all arbitrators and in one or several hearings.’¹⁷⁶ While it can be justified that the award must specify how the deliberation leading to the award is conducted, its being conducted in the presence of all arbitrators is not indispensable. Since, if the presence of all arbitrators in deliberations is required, the refusal of an arbitrator to participate in the deliberations may render the award as being contrary to mandatory rules of law, and thus subject to vacation or non-enforcement. Such a result would not be plausible, particularly in foreign arbitration.¹⁷⁷ It can be concluded that what is required by Article 40 is merely that deliberations must be conducted in the way that the arbitration tribunal has specified. Hence, only unintended non-participation of an arbitrator in such types of deliberation may render the award invalid. This provision stresses a requirement of due process in arbitration the violation of which may render the award invalid.

Article 44(2) of Decree 47/97 requires that the arbitration award or a part of it cannot be published without the approval of the parties. This is because arbitration is a confidential method of dispute settlement. However, when an arbitration case is

¹⁷⁶ El-Ahdab, *Arbitration in Arab Countries*, at 498.

¹⁷⁷ As a matter of fact, a similar argument has been forwarded by Egyptian lawyers with regard to Egyptian law of arbitration (see El-Kosheri, “Public Policy under Egyptian Law”, at 325-6).

brought before the court, whether for enforcement or setting aside, it may become public and available for comment and citation.

Binding Awards, without the Possibility of Appeal

Article 64 of Decree 32/84 provided that award were final and binding, without the possibility of appeal.¹⁷⁸ Given that the BSCD was involved in the arbitration by appointing the chairman of any tribunal, and that arbitration in Oman was a type of institutional arbitration with significant judicial features, such a restriction was not surprising.¹⁷⁹ Similarly, Article 52(1) of Decree 47/97 reads: ‘The arbitration awards passed in accordance with the provisions of this law shall not be subject to appeal in any manner prescribed by law.’ Other decisions of the tribunal are also not subject to appeal. For instance, under Article 22(3) of the Decree, there is no right of appeal to the tribunal against its decision regarding objections to its jurisdiction, or the non-existence, invalidity or the irrelevancy of the arbitration agreement to the dispute. This indicates not only that there cannot be any appeal against such awards by recourse to arbitration, but also that it is not possible to resort to the court to appeal against these awards. Although, as we will see later, it is possible to request a court action for setting aside the award, such a legal action cannot be considered as an appeal. This is because errors of fact and law are not usually investigated, when a request for vacating an award is dealt with. Only procedural irregularities or substantive problems involving obvious and grave mistakes may lead to the nullity of an award. Moreover, Article 55 of Decree 47/97 provides that arbitral awards

¹⁷⁸ Alastair Hirst, “Settlement of Dispute through Arbitration: Sultanate of Oman”, in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987), at 142. Under the quasi-arbitral system of the CSCD, the Committee's decisions were binding, final and not subject to appeal. A party against whom the ruling was made, however, has the right to lodge an appeal, if the decision was made *in absentia* (Article 183(b), the Commercial Companies Law No. 4/1974).

¹⁷⁹ Ballantyne, “Arbitration in the Gulf States: ‘Delocalisation’: A Short Comparative Study”, at 56.

‘shall be treated as *res judicata* and shall be enforceable pursuant to the provisions laid down in this law.’ This means that arbitral awards are final and binding, and that they must be enforced.

Although there cannot be an appeal against an award, it cannot be ruled out that a dispute be referred to arbitration again, for instance if the award is annulled. In Case No. 89/39,¹⁸⁰ the BSCD ruled that annulling an award does not mean that the concerned dispute cannot be referred back to arbitration. In that case, it was mentioned that if an award is annulled because of not observing a principle in making the award, it can be sent back to the arbitral tribunal.

As seen before, modern legal systems tend to deny the possibility of appeal against an arbitral award. Nevertheless, under certain circumstances, appeal is possible in some GCC States, within a fixed period of time, and before the enforcement of the award by the court. For instance, under the Kuwaiti Law No. 38 of 1980 on Civil and Commercial Procedure, appeal is disallowed, unless the parties have agreed otherwise. In Bahrain, on the other hand, appeal is allowed, unless the parties have an agreement to the contrary. In both countries, if the award is a result of *amiable composition*, or compromise, there will be no possibility of appeal. The pre-1968 Egyptian arbitration regime, which was the origin of some GCC states arbitration law, also permitted appeal against an arbitral award to the court.¹⁸¹

Interim Measures

Omani law, unlike the UNCITRAL Model Law, expressly permits the tribunal to make interim and partial awards. Under Article 42 of Decree 47/97, the arbitration tribunal may issue provisional decisions, or decide on part of the claims, before

¹⁸⁰ Case No. 89/39 (February 1990), BSCD Judgment.

¹⁸¹ Article 510, the Egyptian Code of Civil and Commercial Procedures promulgated by Law No. 77 of 1949.

making its final award. Partial awards dispose of some of the main matters, and usually are made on the basis of the urgency of some issues. For instance, when a contractor has completed his works, but the employer refuses to issue the certificate of completion until the final award is made. In such a case, the tribunal may order the issuance of the certificate. Interlocutory awards, on the other hand, deal with procedural issues, such as the non-arbitrability of the dispute, the invalidity of the arbitration agreement, and lack of jurisdiction of the tribunal. As seen before, interlocutory awards can be made before, or jointly with, the final award.¹⁸² Interlocutory awards do not require enforcement, though partial awards may do so. The Article is silent about enforceability of such awards, which is probably left to the judicial authorities to decide upon. Those partial awards that finally resolve a matter should be enforceable.

Decree 47/97 also stipulates another type of interim measures that are mainly intended to protect the subject-matter of the dispute. Under Article 24(1) of the Decree, upon the request of a party, the arbitration tribunal ‘may issue orders to any of them to take suitable temporary or precautionary measures necessitated by the nature of the dispute’. The tribunal may also order the submission of an adequate security to cover the cost of the measures to be taken by its orders. Such a pragmatic measure secures compliance with the tribunal’s protective orders. Both types of arbitral orders are allowed on the condition that the parties already have an agreement permitting the tribunal to issue such orders.¹⁸³ The difference between this Article and its equivalent under the UNCITRAL Model Law is that while the Omani law requires an explicit agreement between the parties to allow the tribunal to

¹⁸² Article 22(3), Decree 47/97.

¹⁸³ Article 24(1), Decree 47/97.

issue such orders, the Model Law provides that the tribunal may make such orders, unless otherwise is agreed by the parties.¹⁸⁴ In this respect, the Model Law is more than the Omani law conducive to the functioning of arbitration.

Only certain urgent types of interim measures can be ordered by the tribunal, such as the sale of perishable goods, the destruction of food harmful to public health, and the suspension of the calling of guarantees. A tribunal is not competent to order measures like placing a building under sequestration, or imposing conservatory attachment on assets or disputed sums of money, due to the nature of such measures. The emphasis of Article 24(1) of Decree 47/97 that the interim award must be “necessitated by the nature of the dispute” is susceptible to a restrictive interpretation according to which only provisional measures that are directly related to the subject-matter of the dispute can be permitted. Hence, for instance, freezing of assets that are not directly the subject-matter of the dispute may not be allowed. There is a similar difficulty with regard to Article 17 of the Model Law that states the arbitral tribunal takes interim measures of protection that are “necessary in respect of the subject-matter of the dispute”. Neither the Omani law, nor the Model Law, does explicitly provide for the termination or modification of interim measures, but there is no reason to assume that they do not allow such decisions. A more important issue is that they do not provide for the obligation of the party requesting the interim award to inform the tribunal of any material change to the circumstances requiring the measure. This may be considered as a shortcoming of both pieces of law.¹⁸⁵

¹⁸⁴ Article 17, the UNCITRAL Model law on International Commercial Arbitration.

¹⁸⁵ Regarding the Model Law, UNCITRAL Working Group II (Arbitration and Conciliation) considered the introduction of such an obligation (see Renaud Sorieul, “UNCITRAL’s Current Work in the Field of International Commercial Arbitration”, *Journal of International Arbitration*, vol. 22, no. 6 (2005), at 557-8).

Settlement during Proceedings

Article 41 of Decree 47/97 provides that if, during arbitral proceedings, the parties reach a settlement ending their dispute, they may submit to the tribunal the terms of their settlement agreement. In such a case, the tribunal passes a decision that mentions the terms of the settlement, and terminates the proceedings. The decision containing settlement will have the same effect as an award has, regarding enforcement. Unlike the UNCITRAL Model Law, Omani law does not make the issuance of an award containing the settlement reached by the parties subject to the approval of the tribunal.¹⁸⁶ If, as the UNCITRAL Model Law provides, an agreed solution can be made into an award only after the approval by the tribunal, its legal effect can be weightier in later stages; and also the legal responsibility of the tribunal will continue.

The submission of a settlement in the form of an enforceable award precludes a party from embarking on a dilatory tactic by entering into a settlement that cannot be enforced. Whereas the Model Law expressly provides that the award made on agreed terms must have the same formal requirements that a normal award has, Omani law is not explicit in this regard. Probably, only the reasons for the award are not necessary to be mentioned. It can be argued that making an agreed settlement in the form of an award provides for the possibility that not only is it enforceable, but also it may be set aside or refused enforcement for certain reasons, such as the incapacity of one of the parties, non-arbitrability of the dispute and a breach of public policy.¹⁸⁷

¹⁸⁶ Article 30, the UNCITRAL Model law on International Commercial Arbitration.

¹⁸⁷ For a similar argument regarding the Egyptian Law of Arbitration that has inspired the Omani law, see Aboul-Enein, “Egypt”.

Formal Features of an Award

An arbitral award must be written and signed. Where there are more than one arbitrator, the award may have the signatures of the majority of the arbitrators, and the reason for not having the signatures of the other arbitrators must be stated.¹⁸⁸ Hence, the possibility of the refusal by some arbitrators to sign the award is envisaged. It is implicit in the above provision that the dissentient arbitrators are allowed to mention their dissenting opinion, which would be annexed to the award. However, *pace* some commentators,¹⁸⁹ it cannot be concluded that such an opinion forms an integral part of the award.¹⁹⁰ Such an opinion might be helpful when a court considers the recognition and enforcement of the arbitral award or, more importantly, its vacation.¹⁹¹ However, the question might arise as to what would happen if the dissentient arbitrators refuse to state the reasons for not signing the award. In such a case, it seems that the award would be invalid, unless the other arbitrators state the reason for the dissentient arbitrators' refusal, which in turn seems inappropriate. In a case before it, the Cairo Court of Appeal ruled that there is no need for the arbitral award to contain the reasons for an arbitrator's refusal to sign the award, if he did not mention those reasons himself. The Court also held that an arbitrator's non-signature of the arbitral award does not mean that deliberations did not take place in the tribunal; it only means that the concerned arbitrator did not approve of the award after deliberations in the case under consideration.¹⁹²

¹⁸⁸ Article 43(1), Decree 47/97. Under the CSCD system, the dissenting members of the Committee were allowed to record their views in the minutes of the proceedings, though the disputants did not have access to such a view (Article 176(d), the Commercial Companies Law No. 4/1974).

¹⁸⁹ El-Ahdab, *Arbitration in Arab Countries*, at 498.

¹⁹⁰ For a long time, the Egyptian legal system, and systems following it, have been alien to the concept of issuing dissenting opinions that are part of the award. So, dissenting opinions have not usually been taken into consideration (see El-Kosheri, "Egypt": Supplement 11).

¹⁹¹ El-Ahdab, *Arbitration in Arab Countries*, at 498.

¹⁹² Commercial Case No. 61 of the 113th Judicial Year (11 August 1996), Cairo Court of Appeal

Omani law also requires that the award must contain the reasoning behind the decision, unless the parties have agreed otherwise, or the law applicable to the proceedings does not require so.¹⁹³ In other words, an award may not contain the reasons for making the decision. Mentioning the reasons for making the award is important when a court considers setting it aside. Hence, this provision of Omani law has been criticised for not taking seriously such a need. It has been argued that party autonomy should not apply to the methods of making the award and the conditions of its validity. Particularly when the parties do not authorise the arbitrators to act as *amiable compositeurs*, but to make an award according to the law, it should be clear on which grounds the arbitrators have based their award.¹⁹⁴ The above provision of Omani law may be intended to protect those awards made outside Oman and under Omani law that, because of the prevailing law at the seat of arbitration, might not mention the reasons for making the award.¹⁹⁵

Article 43(3) of Decree 47/97 provides that the award must contain the names and addresses of the parties and the arbitrators, the latter's nationality and capacity, a copy of the arbitration agreement, the summary of the claims, the statements and documents, the summary of the award, the date and place of making the award, and, if required, the grounds of the award. In general, Omani law is much more precise than the Model Law, regarding the formal features of the award.¹⁹⁶

The tribunal must deliver a copy of the award duly signed to each party, within thirty days of issuing the award.¹⁹⁷ The advantage of Omani law over the Model Law

¹⁹³ Article 43(2), Decree 47/97. Under the CSCD system, there was no provision to require the award to contain the reasoning of the decision.

¹⁹⁴ El-Ahdab, *Arbitration in Arab Countries*, at 498-9.

¹⁹⁵ El-Ahdab, "The New Omani Act in Civil and Commercial Matters", at 75.

¹⁹⁶ See Article 31, the UNCITRAL Model law on International Commercial Arbitration.

¹⁹⁷ Article 44(1), Decree 47/97.

is the deadline set by the former to deliver a copy of the award to the parties.¹⁹⁸ The winning party must deposit with the Secretariat of the relevant court, mentioned in Article 9 of Decree 47/97, either the original award or its copy signed by him. The deposited award or its copy may be in its original language or its translation in Arabic endorsed by a certified firm. The Secretariat prepares the minutes of the registration of the award, and makes them available to the parties, if they wish to have a copy of the minutes.¹⁹⁹ There is no time limit for registering the award, and it is up to the winning party to do so in his own time. Such registration, however, is crucial if the enforcement of the award by court becomes necessary due to the refusal of the losing party to comply voluntarily with the award.

Interpretation, Correction and Additional Awards

Decree 32/84 empowered the President of the BSCD to resolve any ambiguity in arbitral awards.²⁰⁰ Under Decree 47/97, however, each of the parties can request the arbitration tribunal to interpret its award, if he considers it ambiguous. Article 49 of the Decree provides that such a request must be made within thirty days of the receipt of the award. Before making his request, this party must inform the other party of his intention to make the request. The interpretation is considered as the complementary and integral part of the award. The tribunal is obliged to provide its interpretation within thirty days of receiving the request. This period can be extended for another thirty days, if necessary.

Similarly, under Article 50(1) of the Decree, if there is any clerical, typographical or mathematical error in the award, upon the request of a party or on its own initiative, the tribunal must correct the error. Such correction must be made

¹⁹⁸ Compare the above provision of the Omani law with Article 31(4), the UNCITRAL Model law on International Commercial Arbitration.

¹⁹⁹ Article 47, Decree 47/97.

²⁰⁰ Article 68, Decree 32/84.

within thirty days after the award is made or a request is made by a party. If necessary, the period can be extended for another thirty days. The correction may be carried out without deliberations, pleading or hearing. Article 50(2) requires that the tribunal shall make its decision in writing, and notify the parties within thirty days of making the decision. If the tribunal, in correcting the award, exceeds its jurisdiction, each party may request its annulment.

Article 51 of Decree 47/97 provides that, upon the expiry of the arbitration period and within thirty days of the receipt of the award, a party may request the tribunal to make an additional award regarding the claims raised in the proceedings that are not dealt with in the award. The other party must be notified before making such a request. The tribunal must make the additional award in sixty days, or in ninety days, if an extension is necessary. Although not provided for in the Omani law, it can be said that after the expiry of the period for the tribunal to interpret the award, to make correction to it, or to issue an additional award, the court that originally had jurisdiction over the dispute may provide the interpretation, correction or additional awards.²⁰¹

What distinguishes Omani law from the Model Law, in this regard, is that while the latter allows the parties to agree upon a time limit for making a request for interpretation, correction or additional awards,²⁰² the former fixes the thirty days limit for a request for interpretation or an additional award, and does not set a limit for a party to request correction, though such correction, if made on the tribunal's own initiative, must be made within thirty days of the issuance of the award.

²⁰¹ El-Ahdab, *Arbitration in Arab Countries*, at 500. See also El-Ahdab, "The New Omani Act in Civil and Commercial Matters", at 16-17.

²⁰² See Articles 33(1) and 33(2), the UNCITRAL Model law on International Commercial Arbitration.

Moreover, Omani law does not allow the tribunal to have an extension of more than thirty days, while the Model Law does not set such a limitation.²⁰³

8 Formal Features of Arbitration

We have already examined formal features necessary to be observed in various stages of arbitration. In this section, these formal requirements and those that are not yet considered are discussed together.

Concerning written communication between the parties and others involved in the arbitration procedure, Article 7 of Decree 47/97 provides that any letter or notice must be delivered to the addressee personally or to his place of work or domicile or to his postal address, unless otherwise has been agreed by the parties. In case that none of these addresses are found, such a written communication is deemed to have been received, if sent by registered mail to the addressee's last place of work, domicile or postal address.²⁰⁴

The arbitration agreement must be in writing, although it can be exchanged though any means of communication.²⁰⁵ An arbitrator's acceptance of his position must also be in writing.²⁰⁶ An application to challenge the appointment of an arbitrator, too, must be in writing.²⁰⁷ Further, statements of claim and defence submitted by the parties to the tribunal must be in writing.²⁰⁸

The arbitral award must be written and signed by the majority of the arbitrators, stating the reason for not containing the signatures of the other arbitrators. It must contain the reasoning for making the decision, unless the parties have agreed

²⁰³ See Article 33(4), the UNCITRAL Model law on International Commercial Arbitration.

²⁰⁴ This is similar to Article 3(1)(a) of the UNCITRAL Model law on International Commercial Arbitration.

²⁰⁵ Article 12, Decree 47/97.

²⁰⁶ Article 16(3), Decree 47/97.

²⁰⁷ Article 19(1), Decree 47/97.

²⁰⁸ Article 30, Decree 47/9.

otherwise, or not required by the applicable procedural law. The award must contain the names and addresses of the parties and the arbitrators, the arbitrators' capacity and nationality, the text of arbitration clause, the summary of the claims, the statements and documents, the summary of the award, and the date and place of making the award.²⁰⁹ The award must also be registered with the Secretariat of the relevant court in Oman.²¹⁰

A pattern can be recognised concerning the formal requirements at various stages of arbitration, under Omani law, and that is the emphasis on writing as the way of recording events and evidence and communicating between all those involved. Although most arbitration laws in various countries require writing as a method of making the arbitral agreement and the award, Omani law is more persistent, and requires such a method in some other stages of arbitration. This can be attributed to the influence of *Shari'a* law on the Omani law of arbitration, as the Ibadis' stress on written documents is more than that of other Muslim schools of the *Shari'a*.²¹¹

9 Conclusion

In Oman, there has been a conscious attempt to revise those provisions and customary rules that hinder arbitration, or to find some ways of reconciling those rules with the requirements of modern arbitration. Omani law of arbitration has more and more become aligned with the internationally accepted standards of arbitration, as it is heavily influenced by the UNCITRAL Model Law on International Commercial Arbitration. It has also become more and more codified and regulated. More importantly, it has become more reliable and facilitative of arbitration. Arbitration institutions have also been established in Oman, though mainly domestic,

²⁰⁹ Article 43, Decree 47/97.

²¹⁰ Article 47, Decree 4/97.

²¹¹ See, for instance, 'Abduallh ibn Humayd al-Sālimī, *Jawhar al-Nizam fi 'Ilm al-Adyan wal-Ahkam*, 2 vols, (Cairo: 1344 H), at 617.

rather than international disputes, are referred to them. It should be added, however, that although the impact of the *Shari'a* on Omani arbitration law has diminished through recent legislations, its presence can still be felt in various areas of the law.

International arbitration, particularly in commercial disputes, is recognised, under the new Omani law of arbitration. Broad definition of international commercial arbitration, in Oman, facilitates arbitration in various areas of international trade, investment, development and technology transfer. However, differences between domestic and international arbitration, with a view to providing a more favourable environment for international arbitration, are not seriously taken into account. Nevertheless, the example of making the Muscat Court of Appeal competent in dealing with issues of international arbitration, while the ordinary competent courts have jurisdiction with regard to domestic arbitration, indicates that the Omani legislator acknowledges the distinction between the two types of arbitration.

There has been a tendency towards strengthening the contractual features of arbitration and to make it more independent of Omani judicial system, in order to attract the trust of foreign parties to arbitration. At the same time, there has been an attempt to protect such contractual agreements through the legal system, for instance, by allowing court intervention on certain occasions, which will be elaborated in the next chapter. Nevertheless, it can be said that the court, and specifically the president of the competent court of appeal, is given too much power, particularly when a disagreement between the parties impedes the arbitration procedure. This might be interpreted as the residual of the approach towards judicialisation of arbitration in Oman, and may weaken the confidence of a foreign party in Omani arbitration. Under Omani law, formal requirements of arbitral agreements and awards are much

more detailed than they are under many other legal systems and particularly the Model Law; and this might not be regarded as favourable to international arbitration.

Chapter Four: Court Intervention: Vacation and Enforcement of Arbitral

Awards Made under Omani Law

1 Introduction

Omani law of arbitration takes the contractual obligations made through arbitration agreements seriously; and, so far as possible, it tries to limit court intervention in cases where there are arbitration agreements. Nevertheless, given that arbitral awards are binding and enforceable, arbitration has some judicial features that need to be taken into account. Admittedly it is a difficult task to strike a balance between judicial and contractual features of arbitration; and there has been an attempt by the Omani legislator to follow internationally established patterns in this regard. In this chapter, four categories of court interventions are discussed: first, referring to arbitration a dispute about which there is an arbitration agreement, when an action is made to bring the dispute before the court; second, court competence in the process of arbitration; third, the possibility of setting aside an award by the court; and finally, the role of the court in the enforcement of an award. The interference of the judicial system is particularly crucial in considering the vacation and enforcement of an award, where the ultimate upshot of the arbitration process is at

stake. As it is said, enforcement of the award is “the moment of truth” for arbitration.¹ Hence, it is important to assess the rules on setting aside and enforcing awards by the Omani court, to see to what extent they converge with, or diverge from, internationally accepted standards and attract the confidence of foreign or even Omani parties.

In this chapter, powers of the Omani court with regard to arbitration are discussed. First the inadmissibility before the court of a dispute about which there is an arbitration agreement, and then the court’s competences during the arbitration process are examined. In the next section, the issue of setting aside an arbitral award, as it is provided for under Chapter VI of Decree 47/1997, is explored in some detail. The last section, which is on the crucial issue of enforcement, begins by examining the background to enforcement of awards in Oman and general provisions of the existing Omani law. Then, the procedure for enforcement of awards is discussed. It is followed by exploring grounds for refusing enforcement of arbitral awards in Oman. Chapter VII of Decree 47/97 governs enforcement of awards made in Oman, whether international or domestic, as well as those made outside Oman but under Omani law. Enforcement of foreign arbitral awards is discussed in the next chapter. Finally, the important issue of public policy under Omani law, which plays an important role in vacation and non-enforcement of arbitral awards, is considered in this chapter.

2 Inadmissibility of a Case about which there is an Arbitration

Agreement

¹ Pierre Lalive, “Enforcing Awards”, in International Chamber of Commerce, *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future*, (Paris: ICC Pub. S.A., 1984), at 317 and 321.

Given that Omani law recognises arbitration agreements as binding, if there is an arbitration agreement regarding a dispute, it will be inadmissible before the court. Such inadmissibility was also recognised by the BSCD.² The Board held that an agreement to refer a dispute to arbitration amounts to a departure from the ordinary method of dispute resolution, that is, litigation.³ In another case, the BSCD ruled that an agreement to arbitrate makes the dispute inadmissible before the judicial bodies, if the agreement is not waived, and if a party invoke the agreement before making a substantive defence.⁴ Article 13(1) of Decree 47/97 provides that the court dismisses a suit that is filed regarding a dispute about which there is an arbitration agreement, provided that the defendant raises his objection to the admissibility of the case, before submitting any defence on the merit of the case. Moreover, filing a suit in respect of a dispute about which there is an arbitration agreement does ‘not prevent the commencement or continuation of the arbitration proceedings or the passing of an award.’⁵ Although this provision is about cases where the Omani law of arbitration is applicable, given Oman’s accession to the New York Convention, Omani courts must do the same in cases where Omani law of arbitration is not applicable, but the Convention is.

When an action is taken to bring a dispute about which there is an arbitration agreement before the court, it is crucial that one of the parties, and presumably the defendant, request the court to refer the dispute to arbitration. In Case No. 168/97 (24/11/1997), the Court of Appeal ruled that the court by itself cannot refer a dispute about which there is an arbitration agreement to arbitration. However, if the parties explicitly or implicitly did not object to a dispute being considered by the court, they

² Case 260/85 (23/2/1986), BSCD Judgment; and Case 52/86 (25/5/1986), BSCD Judgment.

³ Case No. 465/1984, BSCD Judgment (30/10/1985), *Majmou’a*, vol. II, at 47.

⁴ Case 330/87, BSCD Judgment, *Majmou’a*, vol. IV, at 215.

⁵ Article 13(2), Decree 47/97.

cannot object to the court and request arbitration, when the substantive part of the dispute is considered.⁶ All other GCC states follow the same rule about the inadmissibility of a case about which there is an arbitration agreement. In Case No. 240/2001 (8/12/2001), the Dubai Court of Cassation confirmed a decision by the Court of Appeal that upheld the ruling by the Dubai Court of First Instance not to consider a case, because of the existence of arbitration clause in the agreement signed by the litigants.⁷

3 Court's Competences Regarding the Arbitration Process

Under Article 9 of Decree 47/97, as amended by Decree 3/2007, regarding those issues of domestic arbitration that are referred to the Omani Judiciary, the competent court is the court designated by Sultani Decree 90/99 on the Judicial System Law (Qanoon al-Sulta al-Qadaiyya). As to international arbitration, whether the proceedings are carried out in or outside Oman, the competent court is the Muscat Court of Appeal. This provision is in line with the Egyptian arbitration law, which considers the court that has original jurisdiction as competent to decide upon such issues.⁸

Article 14 of Decree 47/97 provides that, upon the request of a party to an arbitration agreement, the court is competent to take interim or conservatory measures, whether before the commencement, or during the course, of the arbitration proceedings. Such measures are of temporary or precautionary nature, and are intended to protect the outcome of the arbitration procedure. Sequestration or the

⁶ For similar cases, see Case No. 180/92 (16/12/1992), BSCD Judgment; and Case No. 33/96 (27/5/1996), Court of Appeal; and Case No. 34/96 (27/5/1996), Court of Appeal.

⁷ Case No. 240/2001 (8/12/2001), Dubai Court of Cassation, *GCC Commercial Arbitration Centre Bulletin*, issue 22/23 (June 2002), at 19. Also, In 1996, the Dubai Court of Cassation upheld the ruling passed by the Court of First Instance and then the Court of Appeal as to not considering a case and not referring it to local arbitration. Instead, at the request of one of the defendants, it sent the case to arbitration in Geneva or Paris, in accordance with the terms of the arbitration agreement between the parties (Al Tamimi and Company, *Law Update News*, February 1996, at 3).

⁸ Article 9, Egyptian Arbitration Law No. 27 of 1994.

attachment of the debtor's assets by the court may be carried out on the basis of this provision. The question might arise as to whether the Omani court can order interim measures, when the seat of arbitration is outside Oman. The answer to this question may be positive, if the applicable law is Decree 47/97. However, in other cases, the answer may not be so straightforward.

Under the Omani law of arbitration, the court may also be involved in taking evidence. If requested by the arbitration tribunal, the President of the competent court of first instance may fine the witnesses who fail to appear before the tribunal or abstain from doing so, or issue judicial delegation orders.⁹ Under Bahraini and Kuwaiti laws, too, the tribunal can apply to the court to compel attendance of witnesses and production of evidence.¹⁰

We have already seen that the president of the competent court of appeal has some powers in appointing an arbitrator, if a party or both parties or even a third party has failed to appoint the arbitrator, as required.¹¹ Under Article 19(3) of Decree 47/97, the rejection of a challenge to the appointment of an arbitrator can also be appealed by making a request to the competent court, according to Decree 90/99, or the Muscat Court of Appeal, in case of international arbitration. A request for the removal or disqualification of arbitrators can be brought before the court in most GCC countries, including Kuwait and Saudi Arabia.¹²

Also Article 45(2) of Decree 47/97¹³ provides that, if there is no agreement between the parties as to the time limit for making the arbitral award, and if the tribunal is unable to make the award within 18 months, upon the request of one of

⁹ Article 37, Decree 47/97, as amended by Decree 3/2007.

¹⁰ W. M. Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", *Essays and Addresses on Arab Laws*, (Richmond: RoutledgeCurzon, 2000), at 53.

¹¹ Article 17, Decree 47/97, as amended by Decree 3/2007.

¹² Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", at 52.

¹³ As amended by Decree 3/2007.

the parties, the president of the competent court of appeal can terminate the proceedings, or grant more time for the arbitration.

The court may also intervene, when the tribunal is faced with an issue falling outside its jurisdiction, such as the forgery of a document or any other criminal offence connected with the proceedings that require to be dealt with by the court.¹⁴

In a nutshell, it seems that in order to tackle some difficulties arising from disagreement between the parties, Omani law has given some powers to the court. While the first category of court intervention, that is, the inadmissibility of a case about which there is an arbitration agreement, is of negative nature, the second one discussed in this section is positive. In other words, in the first category, the court is asked not to interfere with the settling of a dispute about which there is an arbitration agreement, whereas in the second category, the court is asked to interfere to deal with an issue that has hindered the arbitration process. Although it might be said that such interventions may undermine the confidence of some parties, particularly non-Omani ones, we should notice that such interventions are mostly of procedural nature, and are intended to remove problems that can affect the speed and fairness of the arbitration process.

4 Setting Aside an Arbitration Award

Although arbitral awards made under Omani law cannot be subject to appeal, it is allowed to litigate against them and request their nullification by the court.¹⁵ It can be assumed that it is possible to request the nullification of only those awards that are made under Omani law, whether in Oman or outside it. Article 54(1) of Decree 47/97 provides that the party against whom the award is made can request the setting

¹⁴ Article 38 of Decree 47/97 and Article 62(2) of the Commercial Court Law provide for the suspension of arbitral proceedings in such circumstances.

¹⁵ Article 52, Decree 47/97.

aside of the award, within ninety days of being notified of the award. Article 55 of Oman's previous law of arbitration, Decree 32/84, allowed only thirty days to make a request for setting aside an award, beginning from the date the award was issued, or received by the parties, or a fraud or forgery was discovered or affirmed judicially, or a document not revealed by a party was discovered, or a witness was sentenced for false testimony. Similar to the second category of court intervention measures, a request to the court for setting aside an award is also of positive or affirmative nature, that is, it requires the active interference of the court, rather than it abstinence.

Article 54(1) of Decree 47/97 is inspired by Article 34(3) of the UNCITRAL Model law, but diverges from it in two points. First, the Model Law is more precise, and states that the three month deadline for challenging an award also applies from the date the arbitral tribunal has disposed of a request for a correction or interpretation of the award or for an additional award dealing with claims presented in the arbitral proceedings but omitted from the award.¹⁶ No such details are mentioned in Omani law. Also, the Model Law provides that the court may suspend the setting aside proceedings for a period of time determined by it, if it finds it appropriate or if requested by a party, '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.'¹⁷ Unfortunately, Omani law of arbitration does not contain such a provision that is intended to resolve problems arising from arbitration by referring them back to arbitration as wished by the parties in the first place. Providing the tribunal with an

¹⁶ Article 34(3), the UNCITRAL Model Law on International Commercial Arbitration.

¹⁷ Article 34(4), the UNCITRAL Model law on International Commercial Arbitration.

opportunity to remove grounds that may lead to the vacation of the award manifests respect for the contractual agreement of the parties, and expresses confidence of a legal system in arbitration.

Second, under Omani law, '[a] waiver of the right to submit the nullification suit prior to the passing of the award shall not prevent the aggrieved party from submitting his suit thereafter,'¹⁸ while there is no such a provision in the Model Law. It has been argued that this is because the right to make a request to set aside an award arises only after the award has been made and not before that. Therefore, a right that has not yet arisen cannot be waived. On the other hand, when the award has been made, the right to request the setting aside of an award can be waived by either not making such a request,¹⁹ or expressly agreeing on such a waiver. This does not seem to be a convincing argument for prohibiting such a waiver. A better defence can be that protection by the legal system is a right that cannot be abrogated, even by the beneficiary of the right. Still, it is not very well justified why the parties cannot consent to waive their right to request vacation of the award by the court. By stipulating the above possibility, Omani law follows the pattern used by some other Gulf States, such as Bahrain and Kuwait. On the contrary, the Abu Dhabi Code allows the parties to exclude some of the court's power in this regard.²⁰

Under Article 54(2) of Decree 47/97, as amended by Decree 3/2007, all requests for nullifying an award must be submitted to the appeal court of the court mentioned in Article 9, that is, the court having original jurisdiction over the dispute, under Decree 90/99 on the Judicial System Law. In the case of international arbitration, the Muscat Court of Appeal is competent to consider annulment requests. Before the

¹⁸ Art 54(1), Decree 47/97.

¹⁹ Abdul Hamid El-Ahdab, "The New Omani Act in Civil and Commercial Matters", *Journal of International Arbitration*, vol. 14, no. 4 (1997), at 83.

²⁰ Article 96, the Abu Dhabi Civil Procedure Code No. 3 of 1970.

amendment, the Appellate Division of the Commercial Court was competent to do so. Hence, in case No. 18/2001,²¹ Gulf Hotel Company, the losing party in *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*,²² requested the Appellate Division of the Commercial Court to vacate the IIC award. In this regard, Omani law follows the Egyptian arbitration law according to which appellate bodies of the Egyptian Court are competent to consider a request for the annulment of an arbitral award.²³ This is intended to expedite the process of settling such disputes.²⁴ It is also based on the principle that the arbitral tribunal making the award works as a first instance court.²⁵ A request for the vacation of an award must be made as a normal legal action. Although Omani law does not expressly stipulate the possibility of appealing against a decision to set aside an award, making an appeal is permitted, as it is in any normal legal action. In the above dispute, Rotana Hotel Management appealed to the Omani Supreme Court, which, in turn, ruled against the decision of the Appellate Division of the Commercial Court, and ordered it to reconsider the case.²⁶ Under Omani Decree 32/84, the award once deposited with the Board for the Settlement of Commercial Disputes, was unchallengeable and enforceable.

In order to respect the contractual nature of arbitration, Omani law has restricted the grounds on the basis of which an arbitral award can be vacated. It has been the intention of the Omani legislator to permit the setting aside of awards only in certain

²¹ Case No. 18/2001 (22/10/2001), Appellate Division, Commercial Court.

²² *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, (2000) Case No. 10521/OL/ESR (2), ICC International Court of Arbitration.

²³ Article 54, Egyptian Arbitration Law No. 27 of 1994. For the annulment of an international award, the legal action must be brought before the Cairo Court of Appeal.

²⁴ Abdul Hamid El-Ahdab, *Arbitration in Arab Countries*, 2nd ed., (London and Boston: Kluwer Law International, 1998), at 508.

²⁵ See Ahmed S. El-Kosheri, "Egypt": Supplement 11, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, (The Hague: Kluwer, 1990).

²⁶ *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, Case No. 5/2001 (22/10/2003), Commercial Department, Supreme Court.

circumstances, in order to facilitate and protect arbitration. This has been a major step forward, since Omani courts can no longer review the facts and law of the dispute concerned. The grounds for vacating an award are, to a large extent, inspired by what is provided under the UNCITRAL Model Law. However, a shortcoming of Omani law is that it does not make it clear who has the responsibility to establish these grounds, while, under the Model Law, the onus of proof regarding some grounds is on the party requesting the vacation of the award, and regarding other grounds on the court.²⁷

Article 53 of Decree 47/97 provides that a suit for the nullification of an arbitration award must be refused except on one of the following grounds:

Lack of Valid Arbitration Agreement

If there is no agreement between the parties to refer the dispute to arbitration, or if such agreement is void or is voidable, or if it has a time limit that before referring the dispute has been ended, the award may be set aside.²⁸ Unlike Omani law, the Model Law does not specify the voidability, or relative nullity, of an agreement as a ground for setting aside the award. More importantly, the Model Law states that the validity of an agreement must be assessed against the law to which the parties have referred, or in the absence of such agreement, against the law of the seat of arbitration,²⁹ but the Omani law does not make it clear which law is relevant. It is, however, assumed that the parties have chosen Decree 47/97 to govern their dispute. Nevertheless, if arbitration is taken place outside Oman, despite selecting Omani law, sometimes the law at the seat of arbitration might prevail.

²⁷ See Article 34, the UNCITRAL Model law on International Commercial Arbitration.

²⁸ Article 53(1)(1), Decree 47/97.

²⁹ Article 34(2)(i), the UNCITRAL Model law on International Commercial Arbitration.

In general, under Omani law, an arbitration agreement has to be in writing, in order to be valid.³⁰ Issues such as the number of arbitrators being even and non-arbitrability of the subject-matter of the disputes covered by the agreement may also lead to the nullity of the award.³¹ It has been argued that voidable agreements cannot be nullified, if a valid waiver has already been made by the party making a claim regarding the voidability of the award.³² Also, if an award is made after the expiry of the arbitration agreement, but within the time period extended by the tribunal or by the parties, it cannot be set aside.³³ The possibility of litigation against a tribunal decision by establishing the non-existence or invalidity of the arbitration agreement has also been stipulated in Article 22(3) of Decree 47/97.

Incapacity to Enter into an Arbitration Agreement

An award can also be nullified, if either party has been insane or under some incapacity to enter into an arbitration agreement, under the law that governs the issue of capacity.³⁴ A difficulty is that, while the UNCITRAL Model Law specifies that it is the law to which the parties have subjected their agreement or, failing that law, the law at the seat of arbitration that determines the issue of legal capacity,³⁵ Omani law does not specify the governing law. It is odd that Omani law regards it necessary to specify insanity, alongside incapacity, of a party as a ground for setting aside an arbitration award.

Lack of Due Process

If one of the parties has been unable to present his defence or claims, because he was not properly notified of the appointment of the arbitrators or of the proceedings,

³⁰ Article 12, Decree 47/97.

³¹ El-Ahdab, *Arbitration in Arab Countries*, at 506.

³² *Id.*

³³ *Id.*

³⁴ Article 53(1)(2), Decree 47/97.

³⁵ Article 34(2)(i), the UNCITRAL Model law on International Commercial Arbitration.

or because of any reason beyond his control, the award can be vacated.³⁶ There is a minor, though important, difference between Omani law and the Model Law³⁷ to the effect that the Model Law provision is rather vague and general, and states that if a party was unable to present his case, the award may be set aside. The Omani law, on the other hand, specifies that if the tribunal has given the chance to one party to present his defence, but because of reasons beyond his control, he could not use this opportunity, the award may be set aside. In general, under Omani law, lack of due process in the form of breach of fairness and equal treatment of the parties in the hearings, as well as problems such as preventing a party from presenting his evidence or from bringing his expert to give evidence can result in the setting aside of an award. For instance, it has also been argued that the defendant must be the last person to speak.³⁸ The rejection of holding hearings by the tribunal may also be considered as a breach of due process, and lead to the setting aside of the arbitral award.³⁹

Failure to Apply the Applicable Law

Article 53(1)(4) of Decree 47/97 provides that if the law agreed by the parties to apply to their disputes was not applied in making the award, the award may be set aside. Omani law in this aspect follows Egyptian law,⁴⁰ while there is no such a provision in the UNCITRAL Model Law. Many other legal systems as well do not contain such a provision. If a failure to apply the applicable law can lead to the setting aside of an award, a misapplication of the law, or at least a serious misapplication, may also lead to the vacation of an award. Therefore, it can be said

³⁶ Article 53(1)(3), Decree 47/97.

³⁷ Article 34(2)(ii), the UNCITRAL Model law on International Commercial Arbitration.

³⁸ El-Ahdab, *Arbitration in Arab Countries*, at 506-507.

³⁹ *Id.*, at 495.

⁴⁰ Article 53, Egyptian Arbitration Law No. 27 of 1994.

that the above provision of Omani law opens the way for the substantive review of arbitral awards, while at the same time restricting such a review to the application of the applicable law. Allowing court investigation into the way that the law has been applied in arbitration, without setting a clear framework, may prove not to be facilitative of arbitration. With regard to Egyptian Law, some commentators believe that ‘the court may not enter, discuss or look into the merits of the dispute. An award may not be set aside for an error in law or fact.’ In Kuwait, the court setting aside the award may consider the substance of the dispute.⁴¹ The Abu Dhabi Civil Procedure Code even makes contravention of general principles of justice a ground for cancellation of the award.⁴²

As to errors in fact, it has been asked whether the court must ignore the facts, if it is established that the evidence or testimonies on the basis of which the award was issued were false, that some evidence was not revealed by one of the parties, that there are some contradictions in the award, or that one of the parties has used fraudulent methods in the arbitral proceedings.⁴³ In general, it can be said that errors of fact are not investigated when the court considers a request for vacating an award. Only procedural problems and obvious or serious non-implementation of the substantive applicable law may be considered as grounds for the setting aside of an award.

Wrong Composition of the Tribunal

If the composition of the arbitration tribunal or the appointment of the arbitrators has been contrary to the parties’ agreement or to the law, the award may be

⁴¹ Article 187(5), the Kuwaiti Code of Civil and Commercial Procedure No. 38 of 1980.

⁴² Article 91(2) in conjunction with Article 92 of The Abu Dhabi Civil Procedure Code No. 3 of 1970.

⁴³ El-Ahdab, *Arbitration in Arab Countries*, at 506.

vacated.⁴⁴ This covers issues such as the number of the arbitrators, and the procedure through which the arbitrators are appointed, and even the independence and impartiality of the arbitrators. For instance, it has been suggested that if an arbitrator, upon his appointment, did not disclose circumstances that might cause serious doubt about his impartiality and independence, and the losing party becomes aware of these circumstances after the award is issued, the award may be set aside. This is because it is required by the law that the tribunal be composed of impartial and independent arbitrators.⁴⁵ The wording of the Omani provision indicates that, in determining the composition of the tribunal, there is no priority for the parties' agreement over the Omani law and vice versa, whereas the international trend is to give priority to the agreement. Particularly, if a rule of Omani law is considered as mandatory, the parties cannot agree to its contrary. Hence, under Article 15(2) of Decree 47/97, if the number of arbitrators is even, the award will be nullified. Although it is an established international practice to require the number of arbitrators to be odd, it does not seem justified that violation of this rule must lead to the vacation of the award, particularly in international arbitration.

Lack of Jurisdiction

Article 53(1)(6) of Decree 47/97 provides that if the award is about a dispute that does not fall within the ambit of the arbitration agreement or goes beyond the scope of the agreement, it may be set aside. If it is possible to separate that part of the award that settles issues falling within the scope of the agreement and the other part dealing with issues not falling within that scope, only the latter part will be

⁴⁴ Article 53(1)(5), Decree 47/97. This is similar to Article 34(2)(iv), the UNCITRAL Model law on International Commercial Arbitration.

⁴⁵ El-Ahdab, *Arbitration in Arab Countries*, at 507.

vacated.⁴⁶ The possibility of litigation against a tribunal decision by objecting to its jurisdiction or the irrelevancy of the arbitration agreement to the dispute is also stated in Article 22(3) of Decree 47/97. Specifically about corrections made to an award after its issuance, Article 50(2) of the Decree provides that if the tribunal acts beyond its jurisdiction, the losing party may request the court to vacate the award on the basis of lacking validity. Broadly speaking, it has been said that, unlike some other legal systems, such as the US system, Omani law adopts a restrictive interpretation of arbitration clauses, because arbitration is regarded as an exceptional means of settling disputes.⁴⁷

It can be added that the lack of jurisdiction ground not only covers those disputes the subject-matter of which falls outside the mandate of the tribunal, but also is applicable when third parties unduly are affected by the award.

Defect in the Award or in the Proceedings

Under Article 53(1)(7) of Decree 47/97, if there is a defect in the arbitration award or in the proceedings to the extent that it affects the terms of the award, the court may set aside the award. However, the question arises as to what does a defect in the arbitration proceedings mean. If it is the same as lack of due process, there is no point in repeating it, and if it is different, which presumably is, its meaning is not clear. A defect in the award, though still needs clarification, probably can be caused by the existence of a contradiction in the award or lack of some formal requirements of arbitral awards. The latter might be the case when, for instance, the award is not written or signed, the reason for not having the signatures of the minority arbitrators is not stated, the reasoning behind the decision is not mentioned, despite the need to

⁴⁶ This is inspired by Article 34(2)(iii), the UNCITRAL Model law on International Commercial Arbitration.

⁴⁷ El-Ahdab, “The New Omani Act in Civil and Commercial Matters”, at 80-81.

do so, or the names and addresses of the parties and the arbitrators, the latter's nationality and capacity, the text of the arbitration clause, the summary of the claims, the statements and documents, the summary of the award, and the date and place of making the award are not recorded in the award.⁴⁸ However, some of these requirements are not substantial enough to require the vacation of an award. The difficulty with Omani law is that it is not clear about those defects of an award that may lead to its nullification by the court.⁴⁹ There is no equivalent to this provision in the Model Law.

Being Against Public Order

If an award is contrary to "the public order" of the Sultanate of Oman, the court may nullify it, under Article 53(2) of Decree 47/97. The Omani Supreme Court, in a case before it, held that arbitral awards can be voided on the basis of the above Article, only if its consequences contradict the basic principles of Omani law.⁵⁰ Similarly, the UNCITRAL Model Law provides that an award in conflict with "the public policy" of the forum state may be vacated.⁵¹ The term public order is as ambiguous as the term public policy is; and both need to be clarified. In the case of setting aside awards on the ground of being contrary to public order, Omani law is explicit that the court can do so on its own initiative.

A provision stipulated in the Model Law, but not in the Omani law, is that if the dispute is not capable of being resolved through arbitration, the award issued about it may be set aside.⁵² Despite lack of a similar provision in the Omani law, such a ground may be relied upon in vacating an award on several legal bases, under Omani

⁴⁸ Article 43, Decree 47/97

⁴⁹ See El-Ahdab, *Arbitration in Arab Countries*, at 507-508.

⁵⁰ Case No. 127 on the Appeal No. 10/2000, Supreme Court Decision.

⁵¹ Article 34(2)(b)(ii), the UNCITRAL Model law on International Commercial Arbitration.

⁵² Article 34(2)(b)(i), the UNCITRAL Model law on International Commercial Arbitration.

law. For instance, an arbitration agreement that refers a non-arbitrable dispute to arbitration may be regarded as invalid; and therefore the award rendered on its basis may be set aside. Also, making an award about a non-arbitrable dispute is against the applicable law, if it is Decree 47/97; and thus may be vacated.

It worth mentioning that, in most legal systems, certain disputes are not arbitrable, because they are related to public policy. However, it is not adequately justifiable to vacate an award, if the dispute in question is merely *related* to public policy. It would be more justifiable to set aside an award, if it is *against* public policy.⁵³ It seems that the Omani legislator has wisely avoided mentioning non-arbitrability of a dispute expressly as a ground for the vacation of the award, and instead has emphasised being against public policy as a ground for doing so.

5 Enforcing an Arbitral Award

Enforceability is what distinguishes arbitration from other Alternative Dispute Resolution methods, and puts it alongside litigation, as explained in the first chapter. The reason that many businesses, particularly in international trade, opt for arbitration to settle their existing or prospective disputes is that arbitral awards are enforceable at law. Enforcement is the point where a purely contractual agreement is transformed into a judicial decision. Therefore, arbitration has the advantages of Alternative Dispute Resolution mechanisms by providing the parties with an independent, flexible and private method tailored to their needs, as well as the advantage of litigation, that is, enforceability of the final decision. Various countries have adopted different judicial mechanisms for enforcing arbitral awards. As

⁵³ Mahmoud Samir El-Sharkawy, "New Trends in Egyptian Arbitration Law", *Journal of International Arbitration*, vol. 16, no. 1 (1999), at 8.

explained before, the tendency in international and municipal laws is to facilitate enforcement of arbitral awards.

5-1 Background and General Points

Under Decree 32/84 on the Rules for the Hearing of Law Suits and Arbitration, arbitral awards were enforceable.⁵⁴ However, until 1990, when Sultani Decree 73/1990 was promulgated, containing a chapter on enforcement, BSCD judgments or awards were enforced, following the request of the winning party, in a commonsense *ad hoc* manner by the President or the Registrar of the BSCD, who formally instructed the police or third parties to take necessary measures.⁵⁵ Under Decree 32/84, disputes over the enforcement of awards were settled by the BSCD President,⁵⁶ and arbitral awards made through private arbitration were enforced by him, upon the request of the winning party. The other party could impugn the award, by starting litigation before the Board. However, awards made within the framework of the Board were enforceable as if they were judgments of the Board. The increasing number of cases before the BSCD required codified rules and a specific authority, that is, the BSCD Registry, to be in charge of enforcement. With the introduction of new Omani law of arbitration, that is, Decree 47/97, arbitral awards issued in accordance with Omani law of arbitration, whether in Oman or outside it, must be treated as *res judicata*, and are enforceable.⁵⁷ Omani law does not make a distinction between recognition and enforcement. This is a disadvantage of the new law, as a winning respondent may wish to request recognition of an award, in order to block new actions by the losing claimant, or a winning party may have to delay the

⁵⁴ Article 64, Decree 32/84.

⁵⁵ Alastair Hirst, "Contemporary Mercantile Jurisdiction in Oman", *Arab Law Quarterly*, vol.7, no.1 (May 1992), at 13.

⁵⁶ Article 68, Decree 32/84.

⁵⁷ Article 55, Decree 47/97.

enforcement of an award, and recognition of the award would guarantee such a future action. It seems to be a chronic problem with Arab arbitration laws that they rarely stipulate the issue of recognition as distinct from enforcement.⁵⁸

Under new Omani law, enforcement of domestic as well as international arbitral awards needs a legal action. Their enforcement needs a legal action converting the award into a court judgment. In general, this requirement works to the disadvantage of arbitration, and can help a losing party who might wish to delay the compliance with the award. This is the same in almost all GCC states and Egypt. For instance, in the UAE, arbitral awards, whether domestic or international, cannot automatically be enforced at law. Either party can apply to the court for the enforcement of the award or its annulment.⁵⁹

5-2 Procedure of Enforcement of Awards

Under Article 56 of Decree 47/97,⁶⁰ the President of the competent court of first instance or a judge appointed by him has the power to issue orders to enforce arbitral awards. Such orders can be issued, upon an application for enforcement submitted with the following documents: the original award or its duly signed copy, a copy of the arbitration agreement, the Arabic translation of the award authenticated by a certified firm, if the original award is not in Arabic, and a copy of the minutes confirming that the award has been deposited with the relevant court.⁶¹ In a request for enforcement, the court procedure will be the same as that of ordinary cases. The parties present their arguments, submissions, witnesses and evidence, and there may

⁵⁸ See Samir Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", *Arab Quarterly Law*, vol. 1, no. 1 (1985), at 20.

⁵⁹ Article 217, the UAE Civil Procedures Law.

⁶⁰ As amended by Decree 3/2007.

⁶¹ This is inspired by Article 35(2) of the UNCITRAL Model law on International Commercial Arbitration, though the last document, that is, the copy of minutes confirming registration with the court, is not required by the Model law.

be several hearings. Article 58(1) of the Decree reads: ‘The application for enforcement of an arbitration award shall not be accepted, unless the [ninety days] period prescribed for filing of a suit for nullification of such award is lapsed.’ The Model Law does not contain a provision equivalent to Article 58(1) of Decree 47/97. This might be considered as a drawback for the Omani law of arbitration, which, in this regard, looks more restrictive than the Model Law. Nevertheless, it can be argued that by the above provision, the Omani legislator probably wished to provide a surer start for the enforcement procedure. In other words, the enforcement procedure can begin, only when it is ascertained that there has not been a request as to its vacation. Such innovation in the Omani law can be attributed to the Egyptian law, which contains an identical provision.⁶²

It is not possible to appeal against a court order for enforcement of an award. However, an appeal can be made against an order refusing enforcement of an award to the competent court, in domestic arbitration, and to the Muscat Court of Appeal, in international arbitration, within thirty days of issuing such an order.⁶³ The initiation is to avoid unnecessary prolongation of arbitration enforcement. This provision indicates the pro-enforcement bias of new Omani law, which allows appeal against a decision refusing enforcement of an award, while denying such an action against a decision to enforce the award.

This is comparable with Egyptian law, which contained an identical provision. Later on, the Egyptian Supreme Constitutional Court decided that such disparity was unconstitutional, and that an appeal may be lodged in both enforcement and non-

⁶² Article 58(1), Egyptian Arbitration Law No. 27 of 1994.

⁶³ Article 58(3), Decree 47/97.

enforcement of an award.⁶⁴ However, given that arbitration is a contractual method of dispute settlement agreed by the parties, and that the losing party has the opportunity to apply for its vacation, and then to challenge its enforcement, allowing him to appeal against an order for enforcement of the award causes unnecessary prolongation of dispute resolution through arbitration. Disparity in providing right of appeal against enforcement and non-enforcement orders seems to be of lesser importance, and is outweighed by the need for facilitation of arbitration. Fortunately, Omani law has not followed this latest development in the Egyptian case law, keeping its pro-enforcement position. In this respect, Omani law is similar to French law. Under Bahraini law, a court judgment containing an enforcement order may be appealed against within 45 days of the issuance of the judgment. Also, a judgment containing an enforcement order made by the Bahraini Civil High Court of Appeal may be challenged within 45 day by making an appeal to the Court of Cassation.⁶⁵ Similarly, in the UAE, the decision made by the court regarding enforcement of an award can be subject to appeal by the Court of Appeal and then to the Court of Cassation.⁶⁶ Such a further stage of appeal, that is, appeal to the Court of Cassation, is not stipulated, under the Omani law of arbitration, shortening the process, if enforcement is refused.

Article 57 of Decree 47/97 provides that filing a court suit for vacating an arbitral award does not automatically result in suspending enforcement of the award.⁶⁷ Nevertheless, if the party who has taken a legal action against the award requests the

⁶⁴ M. I. M. Aboul-Enein, "Egypt", in J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, Supplement 36 (The Hague: Kluwer, November 2002).

⁶⁵ Jalila Sayed Ahmed, "Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain", *Arab Law Quarterly*, vol 14, no. 2 (May 1999), at 176.

⁶⁶ Judgment 186/96 (5 January 1997) of the Dubai Court of Cassation.

⁶⁷ There was a similar provision in the old Omani law of arbitration, that is, Decree 32/84.

suspension of enforcement of the award, the court may accept such a request, if there are valid grounds for doing so.⁶⁸ Articles 57 and Article 58(1) complement each other. While, under the latter, application for enforcement cannot be accepted, unless the period of time for requesting its vacation is expired, the former provides that, if no decision is made regarding the request for the vacation of the award within the ninety day period, its enforcement may be suspended, only if decided by the court. It should be argued that filing a suit against the award does not relieve the losing party of his responsibilities regarding enforcement of the award. In other words, he will be responsible for issues such as compensating the damages occurred between the date that the award has been made and the date that the request for its vacation was rejected by the court and then the date of its enforcement.

A decision for suspending enforcement of an award must be taken within sixty days from the date of the first court hearing held to consider such a request. Omani law allows the court to order submission of a guarantee or financial security, if it issues an order for suspending enforcement of an award. Moreover, in case that a suspension order is made, the court must decide within six months as to whether or not to set aside the award.⁶⁹ Such a strict time-table is necessary for preventing the abuse of the above provisions by a party unwilling to enforce the award.

As it can be seen, Omani law significantly facilitates the enforcement of arbitral awards made on the basis of Omani law, by requiring only a request to the court and providing some documents that are presumably available to the winning party. Enforcement of domestic awards are ordered by the court having jurisdiction according to Decree 90/99 on the Judicial System Law, but the awards of

⁶⁸ This is similar to Article 36(2), the UNCITRAL Model law on International Commercial Arbitration.

⁶⁹ Article 57, Decree 47/97.

international trade, irrespective of whether the arbitration proceedings have taken place in Oman or in other countries, are enforced by the Muscat Court of Appeal.⁷⁰

Under Omani law, the procedure of executing enforcement orders for an award is the same as that of judgements, and is relatively straightforward. A request for executing enforcement orders must be made to the court of the area where it is to be enforced, and it will be carried out under the supervision of an enforcement judge, who is selected from the judges of court of first instance in the area, assisted by sufficient number of bailiffs.⁷¹

The Tribunal's Power to Grant Enforcement of Orders

Alongside the court, the arbitration tribunal has some power to enforce certain decisions of its own, if the parties have already agreed so. These are orders for temporary or precautionary measures or security guarantees. Under Article 24 of Decree 47/97, if a party fails to execute such orders, upon the request of the other party, the tribunal 'may grant permission to such other party to take necessary steps for the execution of the order.' Such a possibility, however, does not prejudice the right of this party to request the president of the competent court of appeal to execute the order.⁷² This is because the original authority to issue and enforce interim measures is the court. However, the problem is that, unlike the court, the tribunal does not have the punitive power of the state that is the instrument of enforcement.⁷³ So, if a party does not voluntarily comply with an interim award, there is not much

⁷⁰ Article 9 of Decree 47/97, as amended by Decree 3/2007.

⁷¹ Chapters One to Three, Part One of Book Two, Sultani Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes . For an extended examination of such a procedure, see Appendix A.

⁷² Article 24(2), Decree 47/97, as amended by Decree 3/2007.

⁷³ Under the judicial-arbitral system of the CSCD, upon the request of either party or on its own motion, the Committee could take preventive measures such as preventing a person from leaving Oman, seizing registers or records, and attaching bank accounts. More importantly, the Committee had the right to request the authorities to enforce such decisions (Article 188(a), the Commercial Companies Law No. 4/1974).

that the tribunal can do. Therefore, the question might arise as to what is the point of a provision empowering the tribunal to issue and enforce interim orders. It has been argued that there might be certain interim or conservatory measures that the tribunal might order, without the need for the voluntary cooperation of a party and without punitive powers. These are, for instance, the ‘proof of the capacity of a party by an expert appointed by the Tribunal or if the Tribunal orders that the goods, subject to the dispute, be stored in a vault or with a trustee or in a bank account subject to the arbitral tribunal signature (or [that] of its chairman), or ordering not to withdraw a letter of guarantee before an award was made’.⁷⁴ If the winning party or the tribunal has already some control over the other party’s goods and assets or promissory notes signed by it, such enforcement powers by tribunal may be effectively used. Such a power is not stipulated in the UNCITRAL Model Law.

5-3 Grounds for Refusing Enforcement of an Arbitral Award Made under Omani Law

Omani law of arbitration provides for three grounds for refusing the enforcement of an award made under Omani law, whether in or outside Oman. First, if the award is in conflict with a decision made by Omani courts prior to the issuance of the award. Second, if the award is against the public order of Oman. Third, if the losing party has not been properly notified of the award.⁷⁵ Giving proper notice is a prerequisite of due process. As it can be seen, the Omani law of arbitration has rightly restricted court investigation to procedural issues, without the possibility of considering the merit of the case.

⁷⁴ El-Ahdab, *Arbitration in Arab Countries*, at 493.

⁷⁵ Article 58(2), Decree 47/97.

There are several differences between Omani law and the UNCITRAL Model Law on International Commercial Arbitration regarding grounds for refusal of enforcing awards. On the one hand, while Omani law obliges the court not to enforce an award, if there is a ground to do so, the Model Law puts it at the discretion of the court to do so, by providing that it “may” refuse enforcement, if such grounds exist. Omani law, in this regard, can be criticised for being more restrictive in enforcement of arbitral awards than the Model law is. Moreover, a ground for refusing enforcement of awards that is not stipulated in the Model Law, but is provided for by Omani law, is where there is a conflict between the award and a court decision already made in Oman about the subject-matter of the dispute. Following the Egyptian model, almost all other GCC states have a similar provision. Conflict between an award and a court decision already made may appear in several forms. Such a conflict may be very obvious, for instance, when an award has already been vacated by the court,⁷⁶ or when there is a court decision about the same subject-matter. In these cases, refusing enforcement of the award is completely justified. However, when the conflict is not so straightforward, or is partial, the complications of the case render making a decision very difficult; and denying enforcement of the award may not be so easily justified.

On the other hand, the Model Law provides for a wider range of reasons for denying enforcement of an award.⁷⁷ For instance, it states that if a party to an arbitration agreement has been under some incapacity, or if the agreement is invalid under the applicable law, the award may not be enforced. Such a ground is not stipulated in Omani law. Under the Model Law, if the losing party was not given

⁷⁶ This possibility is stipulated under the Model Law on International Commercial Arbitration, Article 36(1)(a)(v).

⁷⁷ See Article 36, the UNCITRAL Model law on International Commercial Arbitration.

proper notice of the appointment of an arbitrator or of the tribunal proceedings or the party was not able to present his case, the award may not be enforced. Under Omani law, however, only if he was not properly notified of the award, the award must not be enforced. The Omani law should have adhered to the universally accepted practice of requiring compliance with due process, of which the proper notice of the award is just one condition. The right of defence, for instance, is a more important condition that unequivocally should have been required by the Omani law.

Also, the Model Law provides that if the dispute about which the award was made does not fall within the jurisdiction of the tribunal, or if the award contains decisions on matters beyond the scope of submission to arbitration, the award may be denied enforcement. Omani law, however, lacks such provisions on jurisdictional issues. Under the Model Law, if the composition of the tribunal was not according to the parties' agreement or, failing such agreement, it was not according to the law at the seat of arbitration, the award may not be enforced, whereas this is not the case under Omani law. In this procedural issue, too, the Omani law diverts from the universal arbitration practice.

Moreover, an award that is not yet binding or has been set aside or suspended by the court may not be enforced, under the Model Law, while there is no such provision in Omani law. The Model Law permits non-enforcement of an award, if the relevant dispute is not arbitrable under the law of enforcing country, but again Omani law does not contain such a provision. Lastly, the Model Law allows courts not to enforce an award if it is contrary to the public policy of the enforcing state, whereas, under Omani law, only if the award is contrary to the *public order*, it must be denied enforcement. As it will be seen, the term of public order denotes a more

limited concept. Grounds stated by the Model Law for non-enforcement of awards are similar to what is provided for under the New York Convention.

The reason that Omani law stipulates few grounds for non-enforcement of arbitral awards made under the law may be that many of the grounds provided for by the Model Law can be investigated by the Omani court, if a request for setting aside the award is made.⁷⁸ In other words, if the losing party believes that any of the grounds mentioned in the Model Law applies to the award, he will not wait until the winning party requests enforcement of the award, and before that he will ask the court to set aside the award. Limiting grounds for non-enforcement can expedite enforcement of an award. If the above reasoning is plausible, then the question might arise as to why Omani law does not provide for the automatic enforcement of awards made under Omani law, and leave all the investigations to the judicial review of awards, when an application for vacation of an award is made. Moreover, under Omani law, some grounds such as that of being contrary to public order can be investigated twice, when the setting aside as well as enforcement of the award are considered. This possibility flies in the face of the above reasoning, and may further delay enforcement of an award. Also, some grounds such as that of not yet being a binding award are not investigated even when considering vacation of an award. This is another drawback of the current Omani law of arbitration.

Unlike Omani law, laws of some other GCC states, following internationally accepted patterns and the Model Law, provide for a wider range of conditions to be met, if an arbitral award is to be enforced. For instance, in the UAE, the court may decline enforcement of an award, if there is no arbitration agreement, or an invalid or expired one. If the agreement is concluded by persons who did not have the capacity

⁷⁸ See Article 53, Decree 47/97.

to do so, if the arbitrators exceeded the jurisdiction of the tribunal, or if they were not appointed according to the agreement or the law, enforcement of the award may also be refused. If an arbitrator lacked legal requirements, or if the decision of the tribunal was not made in the way indicated by the agreement or the law, the court may decline enforcement of the award. This may also be the case, if the award is invalid, or if the conditions for due process are not satisfied.⁷⁹ The UAE court, however, like the Omani court, does not consider substantive issues of fact and law and, hence, does not investigate the merit of the arbitration tribunal's findings, but only procedural issues and formalities required by the law.⁸⁰

Omani law of arbitration has also been criticised for creating some confusions. For instance, it has been asked whether a court can enforce an award if it is proved that there is a ground for setting it aside, but it has not been set aside either because the period for applying to the court for vacating it has been expired or for whatever reason such application was not made or the court did not vacate the award.⁸¹ In theory, the enforcing court should not pay any attention to the grounds that may lead to the nullification of the award, but it seems untenable to assume that even if it is established that there is such a ground, the enforcing court can ignore it. The way out of this confusion is to follow the UNCITRAL Model Law,⁸² according to which the grounds for setting aside and enforcing an award are similar. Nevertheless, it can be argued that the Omani legislator has intended to facilitate arbitration and particularly enforcement of arbitral awards, by avoiding a delay that can be caused by requiring

⁷⁹ Article 216, the UAE Civil Procedures Law.

⁸⁰ Article 217, the UAE Civil Procedures Law. Also see Judgment 165 of the Year 18 (30/11/1996), UAE Supreme Court of Cassation; Judgment 371 of the Year 18 (30/6/1998), UAE Supreme Court of Cassation; and Judgment 157 of the Year 19 (25/4/1999), UAE Supreme Court of Cassation.

⁸¹ El-Ahdab, *Arbitration in Arab Countries*, at 502.

⁸² *Id.*

the enforcing court to do the same investigation that has been done by the court considering a request for vacating the award.

Whatever the rationale for restriction of grounds for non-enforcement of awards in Omani law is, as a practical recommendation, a losing party should not wait until a request for the enforcement of the award is made. It should challenge the award before the expiry of the ninety day period for making an application to set aside the award, if he thinks there are justifiable grounds to do so.⁸³

6 Public Policy under Omani Law

In various parts of this thesis, we have noticed that the concept of public policy plays an important part in arbitration, particularly when the court intervenes, whether in reviewing or enforcing an award. Hence, it is necessary to explore the issue of public policy, under Omani law, more closely. We have already seen that the legal concept of public policy indicates the existence of a general interest or a supreme value fundamental for a society. Generally, public policy is a complex and ambiguous legal issue. Various countries may adhere to different concepts of general interest and consequently public policy. The latter is closely related to mandatory rules of law, and, more specifically, to certain mandatory rules expressing fundamental values or interests in a country. In business law, public policy can be about issues such as trademarks, industrial property rights, bankruptcy, contract between a foreign company and a local distributor, certain construction contracts or public works, for instance, urbanisation or general utilities programmes. It may also contain economic mandatory prescriptions, such as exchange regulations and rules for protecting certain groups of people like the consumers, tenants, the employees, commercial agents or distributors. In arbitration, the arbitration procedure, such as

⁸³ See El-Ahdab, “The New Omani Act in Civil and Commercial Matters”, at 78-9.

the appointment of arbitrators, or the substance of an arbitration award, may be considered as public policy issues.

Under Omani law, the issue of public policy is usually referred to as public order, or *al-nizām al-‘āmm* in Arabic. The term public order, in general, implies a more limited concept than public policy does. The latter covers issues of general interest, while the former may only refer to those relating to public order. As will be seen, the term public policy can better denote what the Omani legislator intended by employing the term public order. So, we use the two terms interchangeably in this section. Notwithstanding this literal point, the term public order is not clearly defined, as there is no provision defining or enumerating matters considered as public order issues. Nor is sufficient case law to clarify it. There are, nevertheless, some cases to refer to. The BSCD, in a ruling, defined public order or public policy as a number of basic regulations without agreeing upon which the society cannot survive. These regulations that cannot be challenged by the individual cover a gamut of legal and economic issues. Nevertheless, public policy is thought as being subject to change from time to time and from one place to another.⁸⁴ In the following, some issues regarded as being matters of public policy by the Omani courts are considered. In general, public policy issues can be classified in four categories: those about the economic order of the country, those regarding the judicial order, those about individual liberties,⁸⁵ and Islamic moral principles.

Regarding the first category, for instance, the conditions of owning property in Oman are determined by public policy. So if selling properties in some areas is prohibited by the government, any contract for selling such properties would be

⁸⁴ Appeal Case No. 15/2000 (5/6/2000), BSCD Judgment.

⁸⁵ Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 23.

void, because of being against public policy.⁸⁶ Another instance of public policy, under Omani law, is Decree 102/94 relating to the Regulation of Foreign Capital Investment that repealed Decree 4/74 on Foreign Business and Investment Law. The BSCD in its verdict in the Case 43/84⁸⁷ stated that Decree 4/74 on Foreign Business and Investment Law was connected to public policy or public order. The law regulates the operation of foreign companies in Oman.⁸⁸ Public policy also determines the upper limit of interest rates.⁸⁹ Under Article 2-1.09(q) of the Sultani Decree 7/1974 on the Banking Law, the Central Bank of Oman is to set interest rates. Hence, the Court of Appeal held that an agreement between the parties for the payment of 10.5% interest, in case of any delay in paying a certain amount, was against public policy, since it was above the 10% authorised rate.⁹⁰

Many other Muslim countries forbid interest, as a matter of public policy. Saudi Arabia strictly prohibits interest. No award or judgment requiring a payment of interest can be enforced, in the country. A Saudi court may even order a deduction of all payments paid as interest from the total amount due to the lender. Nevertheless, there are some alternative ways to charge interest on borrowed money, in Saudi Arabia. Yemeni law, too, prohibits interest, but allow compensation for a loss of profit, due to late payment. In Kuwait and Bahrain, interest is allowed under the Commercial Code, but not under the Civil Code. There is no legislation on interest in Algeria, but courts calculate interest for late payments. In Libya, only legal entities are permitted to charge interest. Jordanian law allows interest in both commercial

⁸⁶ Case No. 216/1999, Court of First Instance.

⁸⁷ Case 43/1984, BSCD Judgment, *Majmou'a*, vol. I, *Majmou'at al-Qawa'id al-Qanuniyya*, 1984-85, at 170 *et seq.*

⁸⁸ See John McHugo, "Joint Ventures in Oman", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987).

⁸⁹ See Case 51/86, *Majmou'a*, vol. III, at 61; and Appeal Case 7/87, *Majmou'a*, vol. IV, at 44.

⁹⁰ Case 42/1998, Court of Appeal, and Case 832/1996, Court of Appeal.

and civil laws. The Dubai and Abu Dhabi courts do not allow compound interest, and respectively sets the ceiling of 9% and 12% simple interest rates. In Qatar, there is no legislation on interest, but contracts containing a charge of commercial interest are permitted, and courts may enforce them, unless unpaid interest exceeds the principal amount outstanding. Lebanon is the only Arab country allowing compound interest, for a period exceeding six months, and does not set a fix ceiling rate. Other Arab states such as Egypt, Syria, Iraq, Tunisia and Morocco deny payment of interest, if there is no agreement for such a payment between the parties, but prohibit compound interest, set a maximum rate, and do not allow the interest to be more than the principal amount.⁹¹

Working days and hours, holidays and wages are also regulated by public policy.⁹² Rights secured for a third party by the law is also considered as part of public policy. Hence, an insurance policy that purported to exclude cover for third party claims, despite such cover being compulsory by the law, was also ruled to be void on the ground of being contrary to public order.⁹³

In the second category, a violation of Omani Constitution would be considered as against public policy. It would also be against public policy to agree to settle disputes arisen in Oman or between Omani parties through foreign courts, though referral to foreign arbitration is allowed.⁹⁴ In other words, jurisdictional rules of the Omani court are also part of public order to the effect that the court has jurisdiction over Omani citizens, whether in Oman or abroad, and over foreigners, if they are domiciled or resident in the country, or if the dispute that has arisen relates to assets

⁹¹ Danny Kabbani, "Enforcement of Foreign Judgements Relative to Project Finance in Islamic Countries", *GCC Commercial Arbitration Centre Bulletin*, issue 19 (June 2001), at 17-18.

⁹² Case 312/1997, Commercial Court.

⁹³ Appeal Case 13/1988, *Majmou'a*, vol. IV, at 83.

⁹⁴ Case 181/1998, Commercial Court.

or an obligation performed or to be performed in Oman. Thus, for instance, it is authorised to bring an action before the Omani court against a bankruptcy declared in Oman, or against foreign nationals not resident in Oman under commercial agency agreements or bills of lading, if there is an element of performance in Oman, such as the delivery of goods in an Omani port. Such an action is allowed, although the relevant agreement contains a foreign jurisdiction clause.⁹⁵

As to the third category, rights guaranteed by the mandatory rules of law form a part of Omani public policy. Certain rights cannot even be waived by the individual or a party to a contract or dispute. For instance, Article 54(1) of Decree 47/97 provides that even if the party invoking nullity of an award by the court waived his right to do so before the issuance of the award, an action for nullity before the court is admissible. Also, the BSCD ruled that a joint venture agreement is void, if it binds the parties for ever.⁹⁶

Islamic moral principles form the fourth category of public policy issues in Oman. Hence, a breach of the *Shari'a* is considered as a violation of public policy in most Arab countries,⁹⁷ particularly those such as Oman that recognise the *Shari'a* as a source of law. However, the question arises as to whether all *Shari'a* rules are considered as a part of public policy. It has been said that fundamental rules of the *Shari'a* are regarded as public policy.⁹⁸ A rule is considered as fundamental, if it is absolute in the method in which it is proven and in the meaning that it purports. Therefore, a rule stated in the Quran, about whose meaning there is no disagreement

⁹⁵ Case 129/1984, BSCD Judgment, *Majmou'a*, vol. I, at 44. Also, see, Case 239/87, BSCD Judgment, *Majmou'a*, vol. V, at 139.

⁹⁶ Case 100/1985, *Majmou'a*, vol. II, at 32.

⁹⁷ See Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", at 26.

⁹⁸ Habib Mohd. Sharif al Mulla, "Conventions of Enforcement of Foreign Judgments in the Arab World", *Arab Law Quarterly*, vol. 14, issue 1 (Feb 1999), at 41.

among the *‘ulama*, is considered as a fundamental rule that cannot be violated. Prohibition of usury is an example of such a rule.⁹⁹ The difficulty is that, however, there are rules with Quranic origin about whose meaning there is no consensus, while being considered as fundamental. Moreover, many other fundamental rules have their source in the *hadith*, but there is disagreement about the authenticity of their source. It should also be added that, in practice, many fundamental rules of the *Shari’a*, including the prohibition of usury, are not adhered to, in contemporary Oman.

With regard to the impact of Omani public policy on arbitration and particularly international arbitration, two approaches may be followed. First, a broad interpretation of public policy may be adopted that limits arbitration, and particularly international arbitration. This approach has a tendency towards considering all matters falling within the exclusive jurisdiction of the Omani court as issues of public policy. Advocate of this approach, however, usually make a distinction between domestic and international arbitration, with the latter being more affected by public policy. For instance, whereas a broader category of disputes is regarded as arbitrable in Oman and under Omani law, fewer matters may be referred to foreign arbitration. Moreover, according to this approach, a violation of any mandatory rule of Omani law can result in the non-enforcement of a foreign award.

Second, a restrictive approach that distinguishes between domestic arbitration, on the one hand, and international and, particularly, foreign arbitration, on the other. According to this approach, the existence of a certain mandatory public law rule does not automatically entail an impact on various aspects of arbitration, particularly international and foreign arbitration. In other words, even when a general interest is

⁹⁹ Id.

involved, it does not follow that recourse to arbitration is limited by default. If this is the case, for instance, an award issued outside Oman by a tribunal consisting of an even number of arbitrators may be enforced, despite being contrary to Article 15(2) of Decree 47/97. Also, an award in which the reasoning behind the decision is not mentioned may also be enforced, in spite of being against Article 43(2) of Decree 47/97.

If the second approach is to be followed, it is necessary to distinguish between domestic and international public policy, both in procedural and substantive issues. International public policy is not only narrower than domestic public policy, but also distinct from it. The former reflects values fundamental for a national community, while the latter consists of universally held fundamental values and internationally approved decisions, such as the UN Security Council resolutions. An Egyptian case may clarify the need for making such a distinction. The Cairo Court of Appeal decided to enforce an award rendered in England partially. According to the award, an Egyptian company had to pay compensation to the British party, because of the breach of contract, plus an interest of 8% per annum from the date of the breach. It was the latter part that was not enforced by the Egyptian court, since it was above the ceiling of 5% permitted interest rate that was considered as part of Egyptian public policy.¹⁰⁰ Clearly in this case, the court should not have taken into account the domestic public policy, since there was no reason not to go beyond the 5% ceiling rate. This is particularly so, because the Egyptian government, itself or through its agencies, authorised and undertook financial banking transactions based on rates exceeding 5%.¹⁰¹

¹⁰⁰ Case No. 3755 of the 97th Judicial Year (21 January 1982).

¹⁰¹ Ahmed S. El-Kosheri, "Public Policy under Egyptian Law", *ICCA Congress Series no. 3* (New York: 1986), at 326. Also, see El-Kosheri, "Egypt": Supplement 11.

Omani public policy should be applicable to domestic awards, whereas international public policy should be applicable to foreign awards. Depending on the case, international awards made under Omani law should be subject to either set. A violation of international public policy of Oman may justify the vacation or non-enforcement of an award, although under the applicable law to the arbitration no violation may have occurred.

Finally, it should be mentioned that since, under Decree 47/97, the parties are permitted to choose procedural and substantive law applicable to their disputes, the Decree, as a whole, cannot be considered as of public policy nature, though some parts of it may be so.

7 Conclusion

In line with the international arbitration practice, the Omani law of arbitration provides for four categories of court intervention in arbitration. While in the first category, the court is required not to interfere with the settling of a dispute about which there is an arbitration agreement, in the other categories, court intervention is requested. In the second category, court interference is mainly intended to assist the tribunal in making a decision or securing some of the rights of the parties, during the arbitration process and before a final decision is rendered. In considering the vacation of the award, the integrity of the arbitration and its outcome, as well as safeguarding the legal rights of the parties, particularly those of the losing party, are guaranteed by the court. Enforcement, on the other hand, is the intervention of judicial bodies for securing the rights of the winning party and compliance with the outcome of arbitration.

Regarding court powers during the arbitration process, such as taking interim or conservatory measures, involving in taking evidence or fining an uncooperative

witness, appointing an arbitrator, extending the time limit for arbitration and the like, it can be said that such measures are of precautionary or procedural nature. They are primarily devised to remove anything that may hinder the arbitration process.

While Omani rules on setting aside an award, to a considerable extent, catch up with international standards, such as those set up by the UNCITRAL Model Law, such rules can be subject to some criticisms. Court investigation on the way that the applicable law has been applied in arbitration can be interpreted as allowing examination of the merit of the case, which is now outdated in the present practice of arbitration. Omani law is also unduly silent about the law that governs the legal capacity of the parties to an arbitration agreement. More importantly, it is not specific on whom the burden of proof is to establish grounds for setting aside an award. Omani law could have provided the tribunal with an opportunity to remove the grounds that may lead to the vacation of the award, as a token of respect for the contractual agreement of the parties.

As to enforcement, in the past, stringent examination of arbitration awards by the courts at the stage of enforcement was a feature of arbitration in most GCC states, including Oman. This led to a virtual re-examination or re-hearing of relevant cases. However, in the recent years, the situation has dramatically changed. From the discussions of this chapter, it can be concluded that regarding enforcement of arbitral awards, there has been a significant development in Omani law. A pro-enforcement bias can be identified in the new Omani law of arbitration. Whereas the old Law of 32/84 very briefly addressed the issue of enforcement, the intention in enacting the new law was to catch up with internationally established practices of enforcement of arbitral awards. It can also be said that, in general, Omani law is more than the Model Law and the New York Convention facilitative of enforcement of awards,

whether domestic or international, made under Omani law. Requesting enforcement of awards is made relatively straightforward by Decree 47/97. More importantly, the grounds for refusing enforcement of an award are limited to three possibilities: when the award is in conflict with a previously made decision by Omani courts, when it endangers the public order in Oman, or when some requirements of due process have not been observed. It should, however, be noted that such an awards is made according to Omani law, so the losing party has already had the opportunity to challenge it; and the grounds for vacating an award, under Omani law, are relatively extensive. A feature of Decree 47/97 is that while a request for enforcing an award can only be made after the expiry of the ninety day period for challenging it,¹⁰² it also permits the suspension of enforcing the award, if the award is being challenged in the court.¹⁰³

A lacuna in Omani law is that it does not contain a clear and comprehensive definition of public policy. Given the importance of the concept of public policy in various areas of arbitration law, ambiguity in the definition of the concept may easily be abused and create distrust among those, particularly foreign parties, who may wish to resort to arbitration in their disputes with Omani parties. Thus, an important step to be taken by the Omani legislator is to provide a clear definition of the concept. More importantly, it is necessary to make a clear distinction between domestic and international public policy, and respectively apply them to domestic and foreign awards. International awards rendered under Omani law may be subject to either type of public policy, depending on the case.

¹⁰² Article 58(1), Decree 47/97.

¹⁰³ Article 57, Decree 47/97.

Chapter Five: Enforcement of Foreign Arbitral Awards in Oman

1 Introduction

In international trade, arbitration, rather than litigation, is the preferred method of dispute resolution, since it is easier to enforce an arbitral award than a court decision, in a foreign country. From a practical point of view, this is because there are more multilateral conventions and bilateral treaties facilitating enforcement of foreign awards than there are for enforcement of court decisions. From a theoretical point of view, enforcement of arbitral awards is easier, because of the contractual nature of arbitration. An arbitral award is the outcome of a private dispute settlement procedure, while a court ruling represents the sovereignty of the state where they are issued. It is easier for a national court to enforce the outcome of a contractual agreement between two private parties, than a decision representing the sovereignty of a foreign state. Therefore, as seen, in the first chapter, the tendency in international and municipal laws is to facilitate enforcement of arbitral awards.

In this chapter, it is examined to what extent Omani law is facilitative of enforcement of foreign arbitral awards, so far as they are not covered by bilateral or multilateral treaties. As we have seen in the second chapter of this thesis, the law of

arbitration in Oman has gone through deep changes in recent decades. Regulations on enforcement of foreign awards have significantly improved in recent years. Previous Omani law did not make any distinction between domestic and foreign awards, and no definition of a foreign arbitral award was made. Therefore, it was assumed that foreign awards were subject to retrial and challenge, and that the same legal procedure and scrutiny were applied to foreign awards as those applied to domestic awards. New Omani law, however, in some aspects, goes beyond the New York Convention to facilitate enforcement of foreign awards.

In this chapter, after a brief review of the background to the issue of enforcing foreign arbitral awards in Oman, and legal developments in this regard, those parts of the present Omani law that address enforcement of foreign arbitral awards are examined. These parts of Omani law apply to foreign arbitral awards that cannot be enforced under international conventions or bilateral treaties to which Oman is a party. These include: Chapter VII of Decree 13/1997 and Chapter Four of Part One of Book Two of Sultani Decree 29/2002 on Execution of Foreign Judgments and Orders. Following an examination of general provisions of Omani law regarding enforcement of foreign awards, grounds for non-enforcement of such awards are considered. Then, the competence of the court regarding foreign awards is discussed.

2 Background of Enforcing Foreign Arbitral Awards in Oman

Before recent developments in Omani law and, particularly, the adoption of Sultani Decree 13/1997 on the Establishment of the Commercial Court and Sultani Decree 29/2002 on the Law of Procedures for Civil and Commercial Disputes, as well as the accession of Oman to the New York Convention, it was assumed that enforcement of foreign awards in Oman was difficult, if not impossible. It was also believed that the Board for the Settlement of Commercial Disputes (BSCD) or its

predecessor, the Committee for the Settlement of Commercial Disputes (CSCD), would enforce a foreign award only after the retrial of the dispute, according to the procedures set by Omani national law.¹ For example, Samir Saleh argued, ‘any award made outside Oman and involving any foreign element must be retried before the Committee for the Settlement of Commercial Disputes and, in practice, embodied in a CSCD Decision in order to be enforced in Oman.’² This was the same as some other Arab countries, such as Saudi Arabia and Yemen, where a foreign award was required to be retried, in order to be enforced. In some other Arab states, such as Jordan, Iraq and the UAE, a foreign award must be embodied in a foreign judgment, in order to be enforced.³

Julian D. M. Lew in an article, written before the accession of Oman to the New York Convention, made a similar claim, and pointed to the uncertainty surrounding enforcement of foreign awards in Oman. He remarked that the enforcement of a foreign award in Oman would involve a review of the merits of the case.⁴ This was probably because Decree 32/84 did not contain any provision regarding enforcement of judgements or awards made on disputes over which the Board for the Settlement of Commercial Arbitration did not have original jurisdiction. There was no other piece of legislation to authorise enforcement of foreign arbitral awards, without a retrial of the dispute. Similarly, there was no law prohibiting judicial authorities from considering the subject-matter of the award. More importantly, the concept of

¹ Terence M. Lane and William S. Morton, “Enforcement of a Foreign Award in Oman”, *Arbitration International*, vol. 2, no. 1 (1986), at 75.

² Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Sharī’a and Statute Law*, (London: Graham & Trotman, 1984), at 392.

³ *Id.*, at 439.

⁴ Julian D. M. Lew, “the Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East”, *Arbitration International*, vol. 1 (1985), the section on Oman.

foreign arbitral award was not defined in the municipal law of Oman.⁵ The main point is that no distinction was made between domestic and foreign awards, and since the former could be challenged in the court, the same was assumed to be true about the latter.

It has been said that, under previous Omani law, the Board for the Settlement of Commercial Disputes had exclusive jurisdiction over certain issues. This meant that although it might be permitted to refer these issues to arbitration, such arbitration must have been carried out under Omani law and under the auspice of the Board. In the case of foreign arbitration on these issues, in order to enforce the award, new proceedings before the BSCD had to be commenced. Such proceedings might entail considering the subject-matter of the dispute. An award on the similar issues, but made in Oman and under Omani law, would have been enforceable without such proceedings.⁶

Decree 32/84, despite being a significant step towards recognition of arbitration as a method of dispute resolution in Oman, did not address the issue of enforcement of foreign arbitral awards.⁷ Nevertheless, in practice, the BSCD did enforce foreign arbitral awards. As it will be seen later in this chapter, at least on one occasion, the BSCD refused to consider a dispute about which there was an agreement to refer to arbitration, and recognised the arbitration agreement. Later on, considering the case under the law applicable to its predecessor, the Board refused to review the merit of the award made through foreign arbitration, and enforced it.⁸

⁵ Saleh, *Commercial Arbitration in the Arab Middle East*, at 392.

⁶ Abdul Hamid El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries", *Arbitration International*, vol. 11, no. 2 (1995).

⁷ See, for instance, Ellen C. Kerrigan, "Comment on Decree 32/84", *Middle East Executive Reports* (August 1984), at 10.

⁸ See Lane and Morton, "Enforcement of a Foreign Award in Oman", at 75-6; Also Terence Lane and William Morton, "Enforcing a Foreign Arbitration Award in Oman", *International Financial Law*

A BSCD decision, in 1988, created a serious difficulty on the way of enforcement of foreign awards. It stated that a foreign arbitral award must be rendered in the name of the Supreme Authority in the country in whose name judgements are rendered, because the award is to have the effect of a judicial ruling.⁹ This might mean that, in order to enforce a foreign award in Oman, the court at the seat of arbitration must grant it leave to enforce in the country where the award has been made. In other words, for enforcing a foreign award, twice it must be granted leave to enforce, once at the seat of arbitration, and then in Oman.¹⁰

The regulations regarding enforcement of foreign arbitral awards were for the first time codified in Oman, under Chapter VII of Sultani Decree 13/1997 on the Establishment of the Commercial Court. The Decree replaced the BSCD by the Commercial Court, and modified the procedural rules for judicial and arbitral proceedings as set out in Decree 32/84. In 2002, Sultani Decree 29/2002 on the Law of Procedures for Civil and Commercial Disputes came to force, and replaced Decree 13/97 and any other law that contravenes its provisions.

3 General Provisions

Omani law recognises applying foreign laws in arbitration, whether in procedural or substantive issues. As we have already seen, under Decree 47/97, the parties to an arbitration agreement are permitted to choose the law applicable to the subject-

Review, vol. 4, issue 11 (November 1985), at 33-34; and Alastair Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, (London and Boston: Graham & Trotman, 1987), at 142.

⁹ Appeal Case 13/1988, *Majmou'a*, vol. IV, at 90.

¹⁰ Hirst's interpretation of the above judgment is different. He argues that it poses an obvious difficulty, since international arbitration is, by definition, a process independent of national courts or governmental authorities (Alastair Hirst, "Contemporary Mercantile Jurisdiction in Oman", *Arab Law Quarterly*, vol.7, no.1 (May 1992), at 30).

matter of their disputes. They can subject their legal relationships to any law, including foreign laws, international treaties or model-format contracts.¹¹

The most important provisions of Omani law regarding enforcement of foreign arbitral awards are Articles 352 and 353 of Sultani Decree 29/2002 on the Law of Procedures for Civil and Commercial Disputes, taken in conjunction with each other. Under Article 353, foreign arbitral awards are enforced in the same way that foreign sentences and orders are enforced in Oman. This points to the adherence of the Omani legislator to the fundamental attitude that does not consider international arbitral awards as distinct from international judgments, and is, thus, not very much favourable to international arbitration, in terms of enforcement. In this regard, too, Omani law follows the Egyptian legal pattern whereby Article 299 of the Egyptian Code of Civil and Commercial Procedures 13/1968 provides that legal provision relating to enforcement of foreign judgments apply to foreign awards, on the condition that the dispute is arbitrable under Egyptian law. The same is with Bahraini law.¹²

Article 352 of Omani Decree 29/2002 provides that ‘Sentences and orders made in a foreign country may be granted leave to enforce in the Sultanate of Oman on the same conditions that the concerned country enforces the sentences and orders issued in the Sultanate.’¹³ The above provisions indicate that there must be a mutual policy of the enforceability of foreign awards between Oman and the relevant foreign country. Also, Article 352(5) of the law states that a foreign sentence or order can only be enforced in Oman, if the country where it has been made enforces sentences or orders made in Oman. Given that Article 352 mentions that a foreign decision

¹¹ Article 6, Decree 47/97.

¹² Article 253, the Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures .

¹³ This is similar to Article 119(1) of Decree 13/97.

must be enforced according to the same terms applied to the enforcement of an Omani decision in the relevant foreign country, Article 352(5) seems redundant.

The principle of reciprocity in enforcing foreign awards is a reflection of Article I(3) of the New York Convention, where such a principle is emphasised. The principle is adopted by most countries, including some Arab and GCC countries such as Saudi Arabia, Kuwait, Bahrain,¹⁴ Qatar,¹⁵ and, most importantly, Egypt.¹⁶ For instance, in the case *the NINIVO v. the REDEC*¹⁷, a Saudi court refused to enforce an award that had been made and granted leave to enforce in Britain, because British courts did not enforce court decisions made in Saudi Arabia. In the UAE, while the reciprocity principle was formerly officially restricted to the Abu Dhabi Emirate, Article 235(1) of the recent UAE Civil Procedures Law provides that ‘Judgments and orders issued in a foreign country may be executed in the UAE in the same conditions prescribed in the law of that country to execute the judgments and orders issued in the state.’

Thus, when seized of a foreign award, in order to enforce it, it must be established that the rendering country allows enforcement of awards made in Oman, and apply the same conditions that are applied to the enforcement of Omani awards in that country. In other words, it must be proved that no more restrictive condition than those of Omani law applies to the enforcement of an Omani award in the said country. A refusal of enforcement of Omani awards in that country leads to the denial of enforcement of awards rendered there in Oman. Also, stricter conditions for enforcement of Omani awards in a country than those applied in Oman triggers

¹⁴ Husain M. Al-Bahama, “the Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain”, *Arab Law Quarterly*, vol. 4 (May 1989), at 338 and 340.

¹⁵ Article 379, The Qatari Law No. 13 of 1990 on Civil and Commercial Procedures.

¹⁶ Article 296, the Egyptian Code of Civil and Commercial Procedures 13/1968.

¹⁷ *The NINIVO v. the REDEC*, Case No. 185/2/Q/149.

similar restrictions for enforcement of awards made in that country, if they are to be enforced in Oman. There are two difficulties, however, with this requirement. First, the Omani provision does not specify what the conditions referred to are. Second, there is no mention of on whom the burden of proof for the existence of the reciprocity condition is: the requesting party or the court. Such vagueness in the language of the article can give rise to disputes over its interpretation. It has been argued that if Article 352 means that the Omani judge must take into consideration exactly the same conditions for enforcing a foreign award in Oman that are applied by the courts at the seat of arbitration when they enforce awards made in Oman, this imposes a difficult task on the judge. This is because it is difficult for a judge to know the conditions for enforcing a foreign award in another country. Furthermore, unless there is a precedent or specific provision of law in the other country, it is difficult to prove that there is such a mutual policy.¹⁸ Imposing such a condition may result in non-enforcement of an award.¹⁹ Such a difficulty was displayed in a case brought before the Court in Bahrain, where completely opposite views were put forward by two different courts. Article 252 of the Bahraini Law No. 12 of 1971, like Article 352 of the Omani Decree 29/2002, provides that the Bahraini Court enforces foreign judgments and awards on the same terms as laid down in the law of the issuing country for enforcing Bahraini awards.

In *Merrill Lynch v. Abdul Jalil Behbehani*, an award made in the UK by David B. Johnson, the English arbitrator required Behbehani to pay a sum of \$1, 314, 484.96 to Merrill Lynch. The award was enforced by the London Commercial Court in March 1984. The winning party successfully made a petition to the Kuwaiti Court of

¹⁸ For a similar discussion about the UAE, see Essam Al Tamimi, "The Status of Arbitration in the UAE", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 47.

¹⁹ See, for instance, Ibrahim Ahmed Ibrahim, *Al-Ikhtesas al-Qadhai ad-Dowali va-l Athar ad-Dowalia Lel Ahkam*, (Qairo: Dar al-Nahdha al-Arabia, 1996), at 221.

First Instance for the enforcement of the award in the country. As Behbehani had some assets in Bahrain, Merrill Lynch also requested the Bahraini Court to enforce the award. The request was rejected, because the Bahraini judge argued that ‘Britain is one of the countries that do not recognise the principle of reciprocity in the enforcement of judgments.’²⁰ The winning party lodged an appeal before the Bahraini Civil High Court, where the judge ruled that

there is agreement between English law and Bahraini law in terms of the manner of enforcing foreign judgments. A legal action seeking the issue of an order for enforcing a judgment in Bahraini law is equalled by a legal action for recognition of the right represented by the foreign judgment according to English law. The conditions contained in the Article 252 of the Bahraini Law of Civil and Commercial Procedures applicable to the admissibility of adopting an order for enforcing a foreign judgment are the same [as] conditions required by English law for recognising a foreign judgment.²¹

A similar case was brought before the Dubai Court of Cassation.²² In this case, the claimant requested the Court of First Instance to enforce an award made in England by two foreign arbitrators, on the basis of an arbitration agreement contained in its contract with the respondent. The English Act of 1996 governed the arbitration. The English Court granted an order for the enforcement of the award. The Dubai Court of First Instance, however, denied enforcement of the award, as did the Dubai Court of Appeal. The claimant, then, lodged an appeal before the Dubai Court of Cassation, which upheld the rulings of the two lower courts. The claimant argued that the English law permits the execution of awards made in the UAE, after fulfilling the conditions of reciprocal treatment. However, the Dubai Court of Cassation stated that the party who refers to the provisions of a foreign law must present the provisions of such law translated into Arabic as material evidence to

²⁰ In Bahrain, foreign awards are treated as if they were foreign judgments.

²¹ Bahraini Case No. 859/m/1985, Civil High Court of Appeal.

²² Case No. 17 of 2002 (10/8/2001), Dubai Court of Cassation Judgment, *GCC Commercial Arbitration Centre Bulletin*, issue 20/21 (Dec. 2001 and March 2002), at 16.

support his claim. Since the claimant did not present the English law to the Court, and also did not request a grace period to do so, the Court rejected his appeal.

The above two cases show how difficult the task of establishing the principle of reciprocity and the conditions for enforcement of a foreign award in another country can be. The first case shows two different courts may arrive at different views as to whether the conditions of reciprocity are met or not. The second case gives rise to the question as to who is responsible to prove or deny the existence of reciprocity.²³ In principle, a local judge should refer to the law of the seat of judgment or arbitration to acquaint himself with provisions relating to the enforcement of foreign judgments and awards in that country. This is known as legislative exchange. He should also refer to international conventions or treaties concluded between the country where the judgment or award is made and his own country. This is called diplomatic exchange.²⁴ More importantly, some formal procedures followed by a state in enforcing another country's judgments or awards are of little importance that neither are considered as an obstacle to the enforcement of these judgments and award in the first state,²⁵ nor are necessary to be followed in the second country exactly accordingly, in order to meet the condition of reciprocity. It should be noted, moreover, that international conventions usually function for the purpose of

²³ In another similar court case, the Abu Dhabi Supreme Court of Cassation enforced a judgment made in France, stating that it was evident, from the statements of the French Consulate in Abu Dhabi, that UAE judgments will be enforceable in France under Article 509 of the French Code of Civil Procedure, as it is confirmed by the French Court of Cassation ("Enforcement of Foreign Judgments [by the Abu Dhabi Court of Cassation]", *GCC Commercial Arbitration Centre Bulletin*, issue 14 (March/April 2000), at 7).

²⁴ Jalila Sayed Ahmed, "Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain", *Arab Law Quarterly*, vol. 14, no. 2 (May 1999), at 170.

²⁵ *Id.*, at 171. Sayed Ahmed's discussion, however, is focused on Bahrain.

relieving the courts of deciding on the conditions of reciprocity, as the conventions are reciprocal by their nature.²⁶

It would have been better, if Omani law had contained two different provisions regarding the enforcement of court rulings and arbitral awards. In that way, it would have been possible to address issues more relevant to enforcement of arbitral awards. For example, Article 352 can be interpreted as saying a foreign award may be enforced as if it was a domestic court decision in Oman, if the issuing country treats awards made in Oman as if they were court decisions in that country. However, Omani law could have been more explicit in this regard, in order to avoid any misinterpretation. Nevertheless, the principle of reciprocity expressed in Article 352 of Decree 29/2002 significantly paves the way for the facilitation of enforcing foreign arbitral awards in Oman.

In general, under Omani law, if enforcement of a foreign judgment or award is sought in Oman, it is Omani law that determines the enforcement procedure. This is in line with the general rule in most international conventions on enforcement of judgments, according to which the law of the enforcing country is applicable to enforcement procedure.²⁷

If no multilateral or bilateral treaty governs enforcement of a foreign award, its enforcement in Oman requires a court decision. This is the same as in other Arab countries, including the UAE. Under Article 352 of Omani Decree 29/2002, a request for the enforcement of foreign sentences and orders, and consequently foreign awards, must be made to the court of first instance in the area where the award is to be enforced. A panel of three judges decides about the request in the

²⁶ Habib Mohd. Sharif al Mulla, "Conventions of Enforcement of Foreign Judgments in the Arab World", *Arab Law Quarterly*, vol. 14, issue 1 (Feb 1999), at 34-35.

²⁷ For instance, Article III, the New York Convention.

same way as an ordinary case is dealt with. Also, Article 119 of Decree 13/97 provided that a request for enforcement of an award must be made to a court of first instance as a normal legal action. Taking a legal action in this way means that the other party must be informed and provided with the opportunity to be heard. It also means that hearings must take place before the court, the case must be pleaded, and the judges must arrive at their decision through legal reasoning. One may argue that since requests for the enforcement of international awards issued under Omani law are made to the Muscat Court of Appeal, it would have been better if requests for enforcement of foreign awards were also made to the same court. In such a case, jurisprudential consistency in enforcement of awards would have been better observed.

By contrast, in Bahrain, application for an order of enforcement must be made through ordinary procedures for filing lawsuits, but only to the Civil High Court and subject to the payment of a prescribed fee.²⁸ The prescribed fee for an application for enforcement of foreign judgments and awards as well as domestic awards is one percent of the value of the amount of the judgment or award.²⁹ The reason that, in Bahrain, only a specific court is authorised to consider requests for an enforcement order may be the relative small size of the country.

4 Grounds for Non-Enforcement of Foreign Arbitral Awards

Sultani Decree 29/2002 provides for certain grounds for refusing enforcement of foreign arbitral awards. In this respect, Omani law generally follows the New York Convention. Nevertheless, there are some significant differences that are discussed in the following sections. The main difference is that while, under the Convention,

²⁸ Article 252(2), the Bahraini Civil and Commercial Procedures Law.

²⁹ Article 12, Bahraini Legislative Decree No. 9 of 1983 with respect to amending Schedules of Judicial Fees.

these grounds may, but not must, result in non-enforcement of a foreign award, under Omani law, they shall have such a legal impact. In other words, if there exists such a ground, the Convention provides judges with the discretion to or not to enforce the award, but Omani law prohibits them from enforcing such an award.

4-1 Not Being Issued by a Competent Body

Article 352(1) of Sultani Decree 29/2002 provides that a foreign sentence or order cannot be enforced, if it has not been issued by a competent judicial authority, according to the international jurisdiction rules of the country where it has been made. As we already know, under Article 353, the rules applying to foreign sentences also apply to foreign awards.³⁰ It can be argued that the extension of the above rule to foreign arbitral awards means that such an award cannot be enforced in Oman, if it is not issued by a competent arbitration tribunal according to the law of the country where it is made. If this interpretation is plausible, Omani law is more restrictive of the New York Convention and most other internationally established rules, which do not explicitly refer to such a condition.

Some countries go beyond the requirement that a foreign judgment may be enforced, if the issuing authority is competent according to the international jurisdiction rules set out at the seat of judgment. They also require that, if a foreign judgment is to be enforced in their territory, their domestic court must not have jurisdiction to hear the case, according to their own rules of private international law, which is considered as part of their public order. In other words, joint jurisdiction between the issuing and enforcing countries results in non-enforcement of a foreign judgment. This is so, for instance, under Article 298(1) of the Egyptian Code of

³⁰ Article 380(a) of the Qatari Law of Civil and Commercial Procedures contains a similar provision, but does not mention which law determines the competent court.

Civil and Commercial Procedure 13/1968 and Article 252 of the Bahraini Law No. 12. Such countries may also broaden the scope of their jurisdiction, by providing that most disputes of a foreign nature fall within their jurisdiction. In the UAE, adhering to a similar doctrine, the Dubai Court of Cassation ruled that if the Dubai Court has jurisdiction over a dispute, a judgment rendered by a foreign court on the dispute would not be regarded as *res judicata*, and would not be enforced.³¹

If such a requirement is extended to foreign arbitral awards, as the law in the above two countries entails, the enforcement of foreign awards will seriously be hindered. Two different opinions can be found, in Egypt, regarding the extension of the above requirement to arbitral awards. First, Professor Abul Wafa argues that the rule on foreign sentences extends to arbitration. Thus, enforcement of a foreign arbitral award is permitted, if the relevant dispute does not fall within the jurisdiction of the Egyptian court.³² Second, rejecting the aforementioned argument, Professor Rashid remarks that the purpose of the above requirement on foreign judgments is to protect the mandatory jurisdiction of national courts vis-à-vis foreign courts. The extension of this rule to foreign arbitral awards is to provide for the notion of non-arbitrability and the denial of enforcement of foreign awards on disputes that are not arbitrable, under the law of enforcing country. However, since the requirement of non-arbitrability is covered by another provision in Egyptian law, the requirement stipulated under Article 298(1) of the Egyptian Law 13/1968 becomes immaterial and thus implicitly deleted, when extended to foreign arbitral awards.³³

³¹ Danny Kabbani, "Enforcement of Foreign Judgements Relative to Project Finance in Islamic Countries", *GCC Commercial Arbitration Centre Bulletin*, issue 19 (June 2001), at 17.

³² Ahmad Abul-Wafa, *Al-Tahkim al-Ikhtiyari wa al-Ijabari*, 5th ed., (Cairo: Mansha'at al-Ma'arif, 1988), at 81.

³³ Samiya Rashid, *Al-Tahkim fi 'Alaqat al-Dowaliyya al-Khasa*, Kitab al-Awwal: *Ittifaq al-Tahkim*, (Cairo: Dar al-Nihdha al-'Arabiyya, 1984), at 414 *et seq.* This view is supported by the Egyptian

Also, in 1991, the Bahrain Court of Cassation ruled that a judgment made by a foreign court on a dispute over which the Bahraini court has joint jurisdiction can be enforced in Bahrain. The Court referred to the Explanatory Memorandum to the Egyptian Code of Civil and Commercial Procedures that contains a provision identical to the above Bahraini provision. The Memorandum states that the legislator intended to enforce a foreign judgment, though the dispute in question is subject to the jurisdiction of the enforcing state, that is, Egypt. The Bahraini Court of Cassation held that it is only contradiction with a previous judgment or order rendered by Bahraini courts, and not the fact that the Bahraini court has joint jurisdiction over the dispute, that may lead to non-enforcement of a foreign judgment. Hence, for convenience and the requirements of international business, the judgment of a competent foreign court may be enforced in Bahrain.³⁴

It can be argued, then, what is determining is whether domestic courts have the exclusive jurisdiction to rule on a dispute or not, according to the principles of private international law. Having exclusive jurisdiction results in non-enforcement of a judgment or award made abroad. In such cases, a new legal action must be made before the domestic court having exclusive jurisdiction. Under the Egyptian Code, arbitration abroad is precluded in disputes in which the Egyptian Court has sole jurisdiction. This is because arbitration in such disputes places them within the jurisdiction of a foreign court.³⁵ In Egypt and Bahrain, disputes arisen from events occurred in their own territory, such as proceedings relating to the liquidation or distribution of the estate of a deceased person, fall within the exclusive jurisdiction

Court of Cassation in several cases (see Ahmed S. El-Kosheri, "Egypt": Supplement 11, in J. Paulsson, *International Handbook on Commercial Arbitration*, (The Hague: Kluwer, 1990).

³⁴ Judgment No. 34/1990 (12/5/1991), Bahraini Court of Cassation; and Judgment No. 1136 of the 54th Judicial Year (28/11/1990), Bahraini Court of Cassation.

³⁵ W. M. Ballantyne, "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", *Essays and Addresses on Arab Laws*, (Richmond: RoutledgeCurzon, 2000), at 48.

of local courts.³⁶ The wider the scope of the exclusive jurisdiction of the domestic courts, the more limited the scope of reference to foreign arbitration. Despite several legal precedents and expert views that matters falling within the exclusive jurisdiction of Egypt can only be subject to arbitration in Egypt and not to international arbitration, some Egyptian lawyers drawing upon legal texts and case law deny such an argument. The latter group refer to the fact that the Egyptian government has concluded and still concluding hundreds of contracts with foreign parties providing for international arbitration on disputes falling within the exclusive jurisdiction of the Egyptian court. They also deny the argument that the governmental or general interests are sacrificed as a result of submission to local or international arbitration.³⁷

Although, unlike the New York Convention,³⁸ Omani law does not explicitly consider the invalidity of arbitration agreement, the incapacity of the parties to conclude the arbitration agreement, the wrong composition of the tribunal or the excess of the jurisdiction of the tribunal, as grounds for refusing enforcement of a foreign arbitral award, the above provision can be interpreted to the same effect. In a dispute between a company incorporated in Oman and a company incorporated in England in 1985, the BSCD, the former legal authority in Oman competent for considering commercial disputes, did consider whether the arbitral tribunal had exceeded its jurisdiction or not. It ruled, however, that this had not been the case.³⁹ One reason that Omani law is not explicit about the invalidity of an arbitral agreement as a ground for non-enforcement is that its relevant provisions are mainly

³⁶ Article 16, the Bahraini Civil and Commercial Procedures Law, and Article 31, the Egyptian Civil Procedures Law.

³⁷ For an extensive argument for and against this point, see El-Kosheri, "Egypt": Supplement 11).

³⁸ Articles V(1)(a) to V(1)(c), the New York Convention.

³⁹ Sigvard Jarvin, "Enforcement of an Arbitration Award in Oman", *Journal of International Arbitration*, vol. 2, no. 4 (1985), at 84-6.

written to address foreign court decisions rather than foreign awards. The latter, under Article 353 of Decree 29/2002, are enforced in the same way that foreign sentences and orders are enforced in Oman.

Since the above provision of Omani law does not directly address the issue of the jurisdiction of the rendering body, it does not deal with the possibility of an award being issued on a dispute which is partially within the jurisdiction of the tribunal. Under most legal systems, recognition and enforcement may be granted to those parts of the award in which the tribunal has acted within its jurisdiction, if such parts can be separated from the other parts. There is no reason not attribute the same view to the Omani law. The difficulties and ambiguities raised by the above provision of Omani law once again indicate that it would have been better, if Omani law had addressed foreign awards differently from foreign court judgments and orders.

4-2 Non-Compliance with Omani Law or a Court Decision

Article 352(3) of Decree 29/2002 provides that a foreign sentence and award that entails a breach of a rule of the laws practiced in Oman shall not be enforced. The problem with this provision is that it does not specify which types of rules cannot be breached by the judgment or award. It can be interpreted that they must not be against the ordinary law of Oman. This, however, goes beyond the internationally established rules and particularly the New York Convention, which require a foreign award not to be against the mandatory rules of law in the enforcing country. Omani law even goes further, and requires that a foreign sentence or award the enforcement of which is sought in Oman must not contradict a sentence or an order already issued in Oman.⁴⁰ This implies the priority of an Omani court decision over a foreign judgment or award, in term of their execution in Oman. Such a situation arises in the

⁴⁰ Article 352 (d), Decree 29/2002.

case of joint jurisdiction, when both the Omani and foreign courts have jurisdiction to hear a dispute. As seen before, the exclusive jurisdiction of a domestic court leads to non-enforcement of a foreign award or judgment, even if no domestic decision has yet been made. On the other hand, it can be said that, if the judgment is made by the Omani court lacking jurisdiction to hear the case, and the defendant did not make any objection to the competence of the court, the judgment is considered as if it were made by the court having jurisdiction. Such a judgment consequently has priority of enforcement over foreign sentences and awards regarding the same dispute.⁴¹ Nevertheless, in other cases of lack of jurisdiction or joint jurisdiction, there is no reason for the priority of a decision made by the Omani court over a foreign arbitration award.

Article 298(4) of the Egyptian Code of Civil and Commercial Procedures 13/1968 and Article 252 of the Bahraini Law No. 12 have a similar effect as to that of the above Omani law provision. Also, some other Arab countries, such as Qatar and Libya, too, require that the foreign arbitral award not be contrary to a decision made by their national court.⁴² Under Article 235 of the UAE Civil Procedures Law, a foreign judgment may be ratified, if UAE courts did not have jurisdiction over the subject-matter of the dispute, and the foreign court had jurisdiction, according to the rules of international legal jurisdiction in the country where the judgment is made. Such a judgment must also not conflict with a court judgment previously made in the UAE.

Under the above provision of Omani law, filing a lawsuit with the Omani court does not bar the enforcement of a foreign award, because enforcement of such an

⁴¹ A similar point is made about Bahrain in Sayed Ahmed, "Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain", at 175.

⁴² See El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries".

award may be barred only if a contradicting Omani court sentence has already been made. The provision does not also require denying enforcement of an award, if court proceedings on the same or a related subject pending in Oman have begun before the foreign arbitral proceedings. Under many legal systems, such as the English law, the losing party may request a stay of the order for enforcement, pending determination of any application to set aside the award before the competent foreign authority.⁴³ It may also be asked whether the Omani court would enforce the foreign award, if a court judgment has already been rendered, or court proceedings are pending in a third country? Oman may or may not have a contract with the latter country for enforcing court judgments. Oman is under obligation to enforce court judgments rendered in countries with which it has a bilateral or multilateral treaty. Oman is a party to several conventions for enforcement of foreign judgments, of which the Convention on the Enforcement of Judgments, Delegations and Judicial Notices in the Arab Gulf Co-operative Council States of 1995 is an important one. It has also signed the Riyadh Convention on the Judicial Cooperation between the States of the Arab League of 1983. The Riyadh Convention provides that a foreign court judgment on a dispute which is the subject of a judgment rendered in the enforcing state or a third contracting state must be denied recognition.⁴⁴

4-3 Improper Summons and Legal Representation

Under Article 352(2) of Decree 29/2002, a foreign sentence or award can be enforced, only if both parties have been summoned to appear and legally represented. This provision of Omani law is a reflection of Article V(1)(b) of the

⁴³ Section 103(2), English Arbitration Act 1996, and David Altaras, "Enforcement of Foreign Award: *Dardana Ltd v. Yukos OIL Co.*", *Arbitration*, vol. 68, no. 3 (2002), at 316. If the losing party seeks the adjournment of the enforcement proceedings pending the settlement of a foreign court decision, an order for security may be made by the enforcing court (*ibid.*, at 317).

⁴⁴ Article 30(d), the Riyadh Convention.

New York Convention. The previous Omani law was more restrictive, as it required that the parties have been called on to present their case in the proceedings and that they did so accordingly and properly.⁴⁵ The provision could be interpreted that if a party, for whatever reason, did not present his case, the award could not be enforced. This might provide an opportunity for exploitation by a party expecting to lose his case. Such a party might avoid attending the proceedings, and in this way block enforcement of the award in Oman. The new Omani law, however, requires the availability of the opportunity for a party to present his case rather than using the opportunity in practice.

Although Article 352(2) of Decree 29/2002 does not explicitly express equal treatment, fair hearing, full and proper opportunity for the parties to present their case and having access to the other party's documents as conditions for the enforcement of a foreign award, it can be interpreted as to prohibiting most types of failure to comply with fairness in arbitration proceedings. For instance, the arbitral tribunal's refusal to hold a hearing requested by one of the parties may be regarded as a violation of due process, and thus a ground for denying enforcement of the award.

Article 298(2) of the Egyptian Code of Civil and Commercial Procedures 13/1968, Article 380(b) of the Qatari Law No. 13 of 1990 on Civil and Commercial Procedures as well as Article 252 of the Bahraini Law No. 12 have the same effect as the above-mentioned Omani provision regarding the right of defence. Saudi law is more specific, and requires that a foreign judgment must have been passed according to the principles of fair trial set out under the *Shari'a*.⁴⁶ Also, Article 235(2)(c) of the

⁴⁵ Article 120, Decree 13/97.

⁴⁶ Al-Bahama, at 339.

UAE Civil Procedures Law uses the same wording as that of the above Omani law provision. Since regarding issues such as arbitrability of a dispute, finality of an award or competence of the issuing authority, the UAE law requires that only the law of the seat of arbitration to be followed,⁴⁷ it may be concluded that the same is with regard to procedural rules. This is confirmed by the UAE Supreme Court of Cassation that upheld a ruling by the Sharjah Court of Appeal that itself upheld a decision by the Sharjah Court to enforce a judgment made in France. The Court of Cassation ruled that the procedural law of the country where a case is heard must govern the court proceedings, unless such a law is contrary to public policy in the enforcing state.⁴⁸ It has been said, nevertheless, that on occasions the UAE courts went beyond this, and required that the UAE law of procedure must also be complied with in making an award that is going to be enforced in the UAE.⁴⁹ This is also what can be expected of an Omani court, that is, compliance with Omani law on due process.

4-4 Non-Arbitrability of the Dispute

Article 353 of Sultani Decree 29/2002 provides that the dispute about which a foreign award is made must be arbitrable under Omani law. This is equivalent of Article V(2)(a) of the New York Convention. As we have seen in chapter three of this thesis, Article 1 of Decree 47/97 implies that almost any dispute arising from legal relationships between private and public entities can be resolved by arbitration. However, disputes that cannot be subject to reconciliation or compromise cannot be settled through arbitration.⁵⁰ A BSCD Judgment stated only issues of public order,

⁴⁷ Articles 235 and 236, the UAE Civil Procedures Law.

⁴⁸ “Enforcement of Foreign Judgments [by the Abu Dhabi Court of Cassation]”, *GCC Commercial Arbitration Centre Bulletin*, issue 14 (March/April 2000), at 7.

⁴⁹ Al Tamimi, at 46.

⁵⁰ Article 11, Decree 47/97.

such as the statutory rules about expropriation of private property, foreign businesses or foreign investment, could not be referred to arbitration.⁵¹ However, new Omani Foreign Capital Investment Law, Sultani Decree 102/94, allows referring foreign investment disputes to arbitration. Article 14 of the law provides that it may be agreed to refer any dispute between foreign investment projects and third parties to a local or international arbitration tribunal. Foreign business issues, too, can now be settled through arbitration.

The ground of non-arbitrability for non-enforcement of a foreign award is also provided for under the law in Egypt,⁵² Kuwait and Bahrain.

4-5 Non-Enforceability of the Foreign Award in the Country Where It Is

Made

Article 353 of Sultani Decree 29/2002 provides that a foreign award whose enforcement is sought in Oman must be enforceable in the country where it has been made. As we have seen in chapter one, under Article V(1)(e) of the New York Convention, a foreign award may not be enforced, if it has not yet become binding on the parties, or has been set aside or suspended in the country where it is made. The above Omani provision is probably intended to reflect the restriction expressed in the New York Convention, as the requirement of enforceability entails, among other things, that an award has not been set aside or suspended, and is binding. However, Omani law is more restrictive than the Convention. The latter requires the award to be binding, under the law at the seat of arbitration or under the applicable law, but Omani law requires it to be enforceable under the law at the seat of arbitration. This means that if the award is made in another country under the law of

⁵¹ Case No. 465/1984, BSCD Judgment (30/10/1985), *Majmou'a*, vol. II, at 47..

⁵² Article 299, the Egyptian Code of Civil and Commercial Procedures 13/1968.

a third country, it cannot be enforced in Oman, unless it is enforceable in the country where it is made. This imposes an extra restriction on enforcement of foreign awards in Oman. The enforceability condition may amount to the need for double enforcement, at the seat of arbitration as well as in the enforcing country.

It should be mentioned that some other Arab countries, including Qatar,⁵³ Libya and Yemen, have a similar regulation. Some others, such as the United Arab Emirate, even go further than the need for the enforceability of a foreign award,⁵⁴ and require that the foreign award must have been granted leave to enforce at the seat of arbitration.⁵⁵ As touched upon earlier, the Omani former commercial judicial authority, the BSCD, in an appeal case, pointed to a requirement that may be interpreted as the need for a foreign award to obtain leave to enforce in the country where it is made. It stated that an arbitral award must be made in the name of the highest authority in the country in whose name judgements are made, because the award is to have the force of a judicial ruling.⁵⁶ Similar situation exists in the UAE, where the evidence required by the UAE court must be produced by a strong judicial authority, and an affidavit or advice from legal counsel is not acceptable by the court.⁵⁷ Saudi Arabia even requires that the foreign award whose enforcement is sought be embodied in a judgment for enforcement.⁵⁸ This is while it has been a main purpose of the New York Convention to abolish the need for obtaining leave to enforce twice, once in the country where it is made, and then in the country where its enforcement is sought.

⁵³ Article 380(c), The Qatari Law of Civil and Commercial Procedures.

⁵⁴ For the requirement of enforceability of a foreign award, see Judgment 267/99 (November 1999), Dubai Court of Cassation and Judgment 17/2001 (10/3/2001), Dubai Court of Cassation.

⁵⁵ El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries".

⁵⁶ Appeal Case 13/1988, *Majmou'a*, vol. IV, at 90.

⁵⁷ Al Tamimi, at 47.

⁵⁸ Al-Baharna, at 339. Such a foreign judgment must be authenticated by the Saudi Ministry of Foreign Affairs, the Ministry of Justice and the Saudi Consul at the seat of arbitration. It must also be translated into Arabic by a sworn translator (id.).

On the other hand, Bahraini law does not specify enforceability under the law of the seat of arbitration as a condition for enforcing the award in Bahrain. In this respect, Bahraini law is more than Omani law facilitative of enforcement of foreign awards. Moreover, there are some countries, including two Arab countries, namely, Lebanon and Algeria, whose law is more facilitative of arbitration than the New York Convention is. The national laws of these countries provide that an award defective under the law at the seat of arbitration or under the applicable law can still be enforced.⁵⁹ The arbitration law of these two Arab countries is influenced by French law. We have already seen, in chapter one, that a French court decided to enforce an award set aside in Switzerland.⁶⁰

Non-Final Awards

Under Article 352 (a) of Decree 29/2002, a foreign award in order to be enforced in Oman must be final according to the law of the country where it is made. This provision, too, reflects Article V(1)(e) of the New York Convention. The difference, however, is that, under Omani law, an award must be final in order to be enforced, whereas the New York Convention provides that the award must merely be binding. This means that some types of interim awards, particularly conservatory measures, if they are considered to be binding, can be enforced under the Convention, but not under Omani law. Awards that are not yet final may be revoked later, so their enforcement may create practical difficulties. Thus, requiring awards to be final, under Omani law, puts an extra condition for enforcing foreign awards, compared to what is required by the New York Convention. A provision similar to the above

⁵⁹ El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries".

⁶⁰ *Hilmarton Ltd. v. Omnium de traitement et de valorisation (OTV)* *Revue de l'arbitrage* 1994, 327, English excerpts in A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XX, (Kluwer: London, 1995), at 663.

Omani provision can be found in Egyptian⁶¹ and Bahraini laws.⁶² Also, under Article 235(2)(d) of the UAE Civil Procedures Law, a foreign award or judgment, in case of litigation, in order to be enforced, must be final, under the law of the country where it is issued.⁶³

4-6 Being against Public Policy and Rules of Morality

Under Article 532(4) of Decree 29/2002, a foreign sentence or award the enforcement of which is sought in Oman must not contain anything against public policy or rules of conduct and morality.⁶⁴ Article 298(4) of the Egyptian Code of Civil and Commercial Procedures 13/1968, Article 252 of the Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures, and Article 380(d) of the Qatari Law of Civil and Commercial Procedures provide for an identical condition. Also, Article 235(1)(e) of the UAE Civil Procedures Law⁶⁵ requires that the award must not violate the rules of public morals or public order in the country. Public policy is usually interpreted in a broad sense, in the UAE.⁶⁶ An important feature of the above provision of Omani law, as well as its equivalents in most other GCC states, is that they emphasises the rules of morality and conduct as separate from public policy. Under most other national laws, on the other hand, public policy is taken as including the rules of morality. The New York Convention provides for the non-enforcement of awards, if they contravene public policy of the enforcing country, without specifying ethical rules.⁶⁷ The problem with the above Omani provision is that no distinction is made between Omani public policy and international public

⁶¹ Article 298(3), the Egyptian Code of Civil and Commercial Procedure 13/1968.

⁶² Article 252, Bahraini Civil and Commercial Procedures Law.

⁶³ See Judgment 267/99 (November 1999), Dubai Court of Cassation and Judgment 17/2001 (10/3/2001), Dubai Court of Cassation.

⁶⁴ A similar condition was required, under Article 120 of Decree 13/97.

⁶⁵ In conjunction with Article 236 of the same law.

⁶⁶ Kabbani, at 17.

⁶⁷ Article V(2)(b), the New York Convention.

policy. Moreover, it is not clear whether the Omani court, when considering enforcement of a foreign award, takes into account international public policy or otherwise. For instance, may a breach of a sanction regime imposed by the UN result in the non-enforcement of an award made outside Oman? Such a distinction is made by the municipal laws of some Arab countries, including Lebanon, Algeria and Tunisia, with the effect of non-enforcement of those foreign awards that are against international public policy.⁶⁸ In Egypt, the Court of Cassation has distinguished between international and domestic public policy. When considering enforcement of foreign awards, courts apply international public policy, which is narrower than domestic public policy, and is concerned with the broader public interest of honesty and fair dealing, and prohibition of universally repugnant activities such as drug smuggling, child pornography, bribery and corruption.⁶⁹

More importantly, the above provision of Omani law does not specify which types of moral rules must be complied with. Are awards assessed against fundamental moral rules or moral rules in general? Also, it is not clear whether internationally accepted moral standards are the criteria for refusing enforcement of foreign awards or moral standards prevalent in Omani society. Omani society, as a traditional Muslim society, has moral standards many of which do not correspond with the moral values accepted in the secular West. Although Omani law does not explicitly refer to Islamic teachings as standards of morality, such teachings are embedded in Omani culture. This problem can be seen in a more acute form in a country like Yemen, where the law explicitly requires that an award must not be

⁶⁸ See El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries".

⁶⁹ M. I. M. Aboul-Enein, "Egypt", in J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, Supplement 36 (The Hague: Kluwer, November 2002).

contrary to *Shari'a* law.⁷⁰ As an example, under *Shari'a* law, interest is prohibited. As part of their public policy and rules of morality, some Islamic states prohibit interests completely, while some others permit it in civil, but not commercial matters, or up to a certain limit.⁷¹ On the other hand, interest is an indispensable part of the capitalist economic system. Ambiguity in interpretation of public policy can lead to serious controversies.

Unfortunately, so far there has not been sufficient case law to clarify the above ambiguous and complex issues in Omani law, and it is expected that when such questions arise in the context of a legal case, there will not be an easy solution. Such ambiguities might dissuade foreign parties from recourse to arbitration to settle their prospective disputes with Omani parties. Probably, it would have been safer if the phrase “rules of morality” were not in the provision, in order to avoid any controversy over its interpretation.

5 Court's Competence

Not Considering the Merit of the Case

Most countries do not allow a substantive review of foreign awards. However, as discussed before, under Omani Decree 32/84, a foreign arbitral award might have been reviewed on the basis of its merits, or more probably its proceedings might have been reviewed, in order to ensure that procedural requirements, mandatory rules of Omani law, public order and good morals were observed.⁷² The point is that from a strictly legal perspective, there was no text of law or any international convention prohibiting the BSCD from examining the subject-matter of the

⁷⁰ See El-Ahdab, “Enforcement of Arbitral Awards in the Arab Countries”.

⁷¹ See Id.

⁷² Hirst, “Settlement of Dispute through Arbitration: Sultanate of Oman”, at 144.

dispute.⁷³ Nevertheless, in practice, the BSCD recognised and granted leave to enforce awards made outside Oman, even if they were made in favour of the foreign party, without reviewing the subject-matter of the dispute.⁷⁴ On one occasion, an Omani party to a foreign award requested the BSCD to set aside the award entirely or partially, including deadlines set for the completion of the works, and to reassess the damages to which it was entitled. The BSCD stated, however, that it was not a court of appeal, and could not review an award made outside Oman, and ordered its enforcement. The BSCD ruling followed an earlier decision by the CSCD, the BSCD's predecessor, that refused to consider the dispute, because there was an arbitration agreement between the parties.⁷⁵

Recent Omani laws are more explicit that Omani courts are not competent for the substantive review of foreign judgments and awards. This was first stated in Article 120 of Decree 13/97. Decree 29/2002, too, does not include issues of fact and law in the list of grounds for declining enforcement of such judgments or awards. However, there are some provisions of Omani law that might be interpreted as authorising Omani courts to investigate some of types of substantive matters of fact with regard to foreign awards. For instance, under Article 352(1) of Decree 29/2002, a foreign sentence or order cannot be enforced in Oman, if it is based on deception.⁷⁶ The same rule applies to foreign awards, under Article 353.

Ordering Interim Measures

Omani judicial bodies, even before new and more arbitration-friendly legislation, have been ready to order interim or conservatory measures in disputes referred to

⁷³ El-Ahdab, "Enforcement of Arbitral Awards in the Arab Countries".

⁷⁴ Garfen, "Arbitration in Oman", Conference on Arbitration, Cairo, 1986.

⁷⁵ Hirst, "Settlement of Dispute through Arbitration: Sultanate of Oman", at 143.

⁷⁶ A similar requirement was mentioned in Article 120 of Decree 13/97.

international arbitration.⁷⁷ For instance, in a dispute between an Omani company and a company incorporated in Britain in 1981, the CSCD, the former legal authority in Oman that was competent to consider commercial disputes, permitted interim, and specifically precautionary, measures. The claimant requested the Promissory Notes that had not yet matured to be attached by the CSCD. These Notes were part of the payment due to the defendant for providing goods and services. In this case, although the Committee rejected the request to consider the dispute about which there was an agreement to refer to arbitration, the CSCD ruled to freeze the proceeds from the maturing Promissory Notes, and to deposit them in the Union Bank of Oman, as a precautionary measure.⁷⁸ The decision of the CSCD, in this case, however, has been contradictory, as it accepted some requests of the claimant for the attachment of Promissory Notes, while rejecting some others.⁷⁹

Similar types of decisions can be found in other GCC states case law. The Dubai Court of Cassation ruled that an attachment order can be obtained in the UAE as a security for arbitration proceedings outside the country. The Dubai court, then, could uphold the attachment, suspending any more decision pending the outcome of arbitration. The main action, arbitration, must be requested within eight days of the attachment.⁸⁰

6 The Procedure for Executing Enforcement Orders for a Foreign Award

As we have seen, under Article 353 of Decree 29/2002, foreign arbitral awards are enforced in the same way that foreign sentences and orders are enforced in Oman. Also, under Article 352 of the Decree, foreign sentences and orders may be enforced in Oman in the same way that the concerned country enforces the sentences

⁷⁷ Hirst, "Contemporary Mercantile Jurisdiction in Oman", at 31.

⁷⁸ Jarvin, "Enforcement of an Arbitration Award in Oman", at 81-3.

⁷⁹ As another example, see Case 330/87, BSCD Judgment, *Majmou'a*, vol. IV, at 215.

⁸⁰ Al-Tamimi & Company, *Law Update News*, May 1996, at 2.

and orders made in Oman. We have already seen that under Article III of the New York Convention, a state where the enforcement of an award is sought must enforce the award according to its local law, without imposing more onerous conditions or higher fees than are required in the enforcement of its own domestic awards. Oman has joined the Convention. Therefore, if another country enforces foreign awards, including those made in Oman, in the same way that it enforces its domestic awards, awards made in that country are enforced in Oman as if they were awards made in Oman. As a matter of law, most countries, particularly those joined the New York Convention, treat foreign awards as if they were domestic awards. If this is so, the procedure for the enforcement of domestic awards and sentences would also be applicable to the enforcement of foreign awards in Oman. The procedure is explored in Appendix A in some length.

Similar situation exists in the UAE, where the procedure for executing enforcement orders of an award, whether domestic or foreign, is the same as that of court judgments, for which the execution department of the court is responsible. Also under the Saudi rule, the Grievances Board, or *Diwan al-Matmalim*, has the jurisdiction to consider a petition for the enforcement of foreign judgments and awards. The Board is an independent administrative and judicial body established under secular law in Saudi Arabia.⁸¹ While considering enforcement of foreign awards by a centralised authority in Saudi Arabia can have the advantage of specialised treatment of such awards, it can be argued that Omani law by allowing local courts to consider enforcement of foreign awards treats them as if they were domestic ones.

7 Conclusion

⁸¹ Al-Bahama, at 339.

As we have seen in this chapter, it was assumed that, under old Omani law, foreign awards were open to retrial and challenge. This was because, in previous Omani laws, there were no rules and regulation on enforcement of award rendered outside Oman. Nevertheless, the case examined in this chapter showed that Omani legal authorities tended to grant leave to enforce such awards.⁸²

Recent legal developments have shown the intention of the Omani legislator to move significantly towards recognition of foreign arbitration and enforcement of foreign arbitral awards. There has been a serious attempt to catch up with advanced legal systems in the world, and to enact internationally recognised regulations and standards for facilitating enforcement of foreign awards. Decrees 47/97 and 29/2002, in particular, have made a significant contribution in this regard. Recourse to foreign arbitration is allowed under Decree 47/97, while Decree 29/2002 explicitly permits enforcement of foreign arbitral awards. The Decree does not require considering the merit of a foreign award that is sought to be enforced in Oman, and enforces them on the same conditions that Omani awards are enforced at the seat of arbitration.

Despite being a big step towards facilitation of enforcement of foreign arbitral awards, Decree 29/2002, in some aspects, is more restrictive than the New York Convention. For instance, the grounds mentioned in the Convention *may* result in the non-enforcement of an award, but under Omani law, they *shall* have such an impact. As another example, under Omani law, non-compliance with the rules of morality leads to the denial of enforcement of an award, but the Convention does not contain such provision that is susceptible to interpretation and controversy.

An important problem with Omani law, and specifically Decree 29/2002, is that, regarding enforcement, it treats foreign arbitral awards and foreign court decisions

⁸² Jarvin, "Enforcement of an Arbitration Award in Oman", at 86.

similarly. Hence, some features of foreign sentences, such as enforceability, are required from foreign awards. The condition of enforceability of an award at the seat of arbitration may be interpreted as the need for double enforcement of an award, what the New York Convention is deliberately intended to avoid. Moreover, because of not making a distinction between foreign awards and court decisions, issues particular to foreign awards are not properly addressed in Omani law. Consequently, facilities reserved for enforcing foreign awards in most advanced legal systems are not provided for under Omani law.

In a nutshell, it can be argued that Omani legal system has significantly moved towards creating a facilitative environment for enforcing foreign arbitral awards. Nevertheless, some improvements are necessary to bring Oman in line with advanced legal systems in the world and to provide for the needs of international arbitration. The first step, in this regard, should be enacting legislation directly addressing foreign arbitration as distinct from foreign court decisions and orders.

Chapter Six: Multilateral Treaties for the Enforcement of Foreign Arbitral Awards Joined by Oman

1 Introduction

With the substantial growth of international trade in recent decades, the number of disputes with an international nature has dramatically increased. These are those disputes in which the parties belong to different nations, or as mentioned in chapter one, in which the interests of international trade is involved. This has required, more than ever before, an independent adjudicatory body to settle such disputes. In the absence of such a body, international arbitration seems the best way forward. Effective arbitration, particularly at the level of enforcement, where an award is to be enforced in a country other than the state where it has been made, requires multilateral or bilateral agreements between the two countries. In this chapter, specifically those treaties relating to arbitration to which Oman is a party are examined.

As pointed out before, the New York Convention of 1958 is the single most important convention on international arbitration. Oman's accession to the Convention in 1999, on the basis of Sultani Decree 36/98, ended a long period of

uncertainty about the possibility of the enforcement of foreign arbitral awards in Oman. The country's accession to the Convention has been without the two reservations of "reciprocity" and "commerciality", which in turn reflects the extent of interest in international arbitration in Oman. In other words, the Convention applies to any foreign award in Oman, irrespective of whether the seat of arbitration is a party to the Convention or not, and also irrespective of whether the relationship from which the dispute has arisen is commercial or not, under Omani law. The New York Convention provisions, however, are not discussed in this chapter, since they are examined in details in chapter one. All GCC states have acceded to the New York Convention. The Washington Convention is another important convention governing the important issue of foreign investment disputes through a specialist centre established for this purpose. Oman and 142 other countries are parties to this convention.

At the regional level, since the establishment of the Gulf Co-operation Council (GCC), there has been a strong tendency towards creating legal frameworks and institutions facilitating co-operation between the member states in various areas of activity. The purpose of such legal frameworks and institutions is regulating the relations between the countries and their public and private sectors. Growth of commercial and financial relations among the GCC states has added to the need for such regulations, particularly because of the increase in the number of disputes between private persons and companies. Given the diversity of legal systems in the GCC states, it has been necessary to have a private and independent adjudicatory institution for the referral of disputes in which nationals of more than one GCC state are involved. The establishment of the GCC Arbitration Centre is one of the most significant steps taken by the countries to settle commercial disputes through

arbitration. The functioning of the centre is of paramount importance, particularly because of facilitating enforcement in a GCC state of awards made in another member state, under the auspices of the Centre.

The Washington Convention of 1965 and its implications for international arbitration in Oman, as well as regional arrangements in the Arab world and the GCC are discussed in this chapter. Particularly, GCC arbitration arrangement and GCC Arbitration Centre are extensively examined. Under Sultani Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes, rules of Omani law on the issue of enforcement of foreign awards, as well as foreign sentences and orders are without prejudice to the rules of enforcement provided for by the conventions and treaties to which Oman is a party.¹ This means that a foreign award rendered in a country that is party to a convention or treaty on enforcement of awards joined by Oman can be enforced, under the treaty conditions, even if the conditions required by the Omani law on enforcement of foreign awards² are not met.³ Hence, international or regional conventions on enforcement of foreign awards enjoy a privileged position within the Omani legal system, and prevail over any contradictory national rule.

2 The Washington Convention of 1965

In 1995, Oman joined the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other GCC states, including Saudi Arabia, the UAE, Kuwait and Bahrain, except Qatar have

¹ Article 355, Decree 29/2002.

² Mainly Articles 352 and 353, Sultani Decree 29/2002 on the Law of Procedures for Civil and Commercial Disputes.

³ In Case No. 17 of 2002 (10/8/2001), Dubai Court of Cassation Judgment ruled that, when there is a treaty or convention between the UAE and the country that is the seat of arbitration, the treaty is applicable to the enforcement of the award, in spite of the non-existence of the conditions required for enforcement of foreign awards, under the UAE Civil Procedures Law, in the award (*GCC Commercial Arbitration Centre Bulletin*, issue 20/21 (Dec. 2001 and March 2002), at 16-17).

also acceded to the Convention. By 1997, four ICSID cases involved three Arab State parties, that is, Egypt, Tunisia and Morocco. At least, one Arab national, a Saudi investor, was also involved in such disputes. More importantly, a number of ICSID cases involving non-Arab parties have been petroleum disputes.⁴ It is an important feature of the Washington Convention that it provides for a comprehensive and mainly self-contained institutional system of dispute settlement,⁵ covering both the arbitral procedure and its enforcement. The Washington Convention provides for its own enforcement regime, which is somehow different from those of the New York Convention and other international and municipal laws. Arbitration under the Convention is facilitated through the International Centre for the Settlement of Investment Disputes (ICSID), and carried out by Arbitral Tribunals. In a study of enforcement of foreign awards in Oman, Washington Convention deserves a rather detailed examination. This is because not only as many as 143 countries have joined the Convention, but also the Convention covers an important aspect of economic relations in our world, which is the crucial area of investment disputes, such as expropriation, termination or violation of an agreement, as well as the application of tax and customs provisions.⁶ With the process of globalisation, more cases are being referred to ICSID arbitration.⁷

The ICSID is a specialist arbitration institution that settles only investment disputes between countries that have joined the Washington Convention. Hence, since the time of drafting the Convention, an important question has been as to what

⁴ Ibrahim F. I. Shihata, "the Contribution of ICSID to the Settlement of Investment Disputes with a Particular Reference to Arab Countries", *GCC Commercial Arbitration Centre Bulletin*, issue 6 (August 1997), at 16.

⁵ Shihata, at 16.

⁶ W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, (Durham, USA: Duke University Press, 1992), at 46-47.

⁷ Indira Carr, *International Trade Law*, 3rd ed., (London: Cavendish Publishing Ltd., 2005), at 622.

investment means, and the controversy remains. Deliberately, there is no definition of investment in the Convention, in order to prevent the creation of jurisdictional difficulties.⁸ Thus, in Article 25 of the Convention, a broad approach to the interpretation of the term, “investment”, is warranted.⁹ In order to determine whether what is at issue is investment, some factors may be relevant, namely, the duration of the agreement, the regularity of profit, and the surrounding circumstances of the agreement. Any transfer of resources including money, goods or services can be considered as investment, taking into account the above factors. For instance, a loan,¹⁰ a supplier’s credit made at interest, a consultants’ contract which is part of a larger production contract covering a lengthy period of time, or a construction contract involving a considerable length of time as well as the transfer of capital resources for return,¹¹ operation of hotels, the mining of minerals, the construction and operation of a factory, tourism resort project, transport of goods, and the construction of a cable TV system may be classified as investment.¹² Finally, it should be mentioned that, under Article 25(4) of the Convention, any Contracting State may determine ‘the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre.’ This provision allows each individual Contracting Party to determine which disputes they consider as investment disputes, and consequently capable of being settled by the ICSID.¹³

⁸ Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge, New York, Port Melbourne: Cambridge University Press, 2001), at 121-125.

⁹ C. F. Amerasinghe, “The Jurisdiction of the International Centre for the Settlement of Investment Disputes”, *Indian Journal of International Law*, vol. 19 (1979), at 166, 177-81.

¹⁰ *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction of 11 July 1997, 37 I.L.M. 1378, 1383 (1998). Also, *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Award of 24 May 1999, Decision on Jurisdiction, *ICSID Review: Foreign Investment Law Journal*, vol. 14 (1999), at 251, 276-77.

¹¹ Amerasinghe, 177-81.

¹² Schreuer, at 138-41.

¹³ Paul C. Szasz, “A Practical Guide to the Convention on Settlement of Investment Disputes”, *Cornell International Law Journal*, vol. 1 (1968), at 1 and 14-15. Also see *Tradex v. Albania*

Oman has not specified any class of disputes that is not to be considered by the ICSID. However, it may be said that a broad definition of investment unnecessarily expands the type of protection provided by the ICSID for direct investment to other types of trade transactions, which do not have the same benefit for the host state and are not at the same types of risk.¹⁴

Only disputes to which a state or state entity is a party can be settled through the ICSID. The other party must be a national of another Contracting State, whether a natural or a juridical person, or a juridical person that has the nationality of the Contracting State party to the dispute, but because of foreign control, the parties have agreed to be treated as a national of another Contracting State.¹⁵ It is emphasised, in the Preamble, that the mere ratification of the Convention does not mean that any particular dispute must be referred to arbitration under the auspice of the ICSID. Hence, a further consent by the parties is necessary for doing so, under Article 25(1) of the Washington Convention.¹⁶ Such consent is deemed to exclude seeking any other remedy, though a Contracting State may subject its consent to the exhaustion of local administrative or judicial remedies.¹⁷ Thus, the Contracting State cannot make an international claim for its nationals against another Contracting

Hellas S.A., ICSID Case no. ARB/94/2, Decision on Jurisdiction of 24 December 1996, *ICSID Review: Foreign Investment Law Journal*, vol. 14 (1999), at 197, 225-26.

¹⁴ See, for instance, R. Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, (The Hague: Kluwer Law International, 2005), at 344.

¹⁵ Articles 25(1) and 25(3), the Washington Convention.

¹⁶ For instance, see *American Mfg. & Trading, Inc. v. Zaire*, ICSID Case no. ARB/93/1, Award of 21 February 1997, 36 I.L.M. 1531, 1544-46, 1548 (1997). In this case, the Tribunal held that any two Contracting States cannot compel their nationals to appear before the Centre. In other words, the acceptance of the jurisdiction of the ICSID by the Contracting States is not automatic for all disputes, and the parties to a dispute remain masters of the procedure of their choice which they may deem appropriate. See also *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999, *ICSID Review: Foreign Investment Law Journal*, vol. 14 (1999), at 251, 263-72. In this case the Tribunal ruled that, under the system created by the Washington Convention, consent by both parties is an indispensable condition for the exercise of the ICSID jurisdiction under Article 25(1).

¹⁷ Article 26, the Washington Convention.

State, or provide them with diplomatic protection,¹⁸ but within the framework of the ICSID. The consent only indicates the parties' agreement to refer their disputes to ICSID arbitration, and other details about the procedure or enforcement are not needed to be mentioned.¹⁹ Nevertheless, the consent needs not to be in the form of *ad hoc* expression of consent by the parties to establish the jurisdiction of the ICSID. The drafters of the Washington Convention contemplated that a written consent to the jurisdiction of the ICSID might be given by a state unilaterally through investment legislation, or through bilateral or multilateral investment promotion treaties.²⁰ By 1997, there were at least 20 investment laws, 4 multilateral investment treaties²¹ and more than 900 bilateral investment treaties (of about 1100 such treaties) contemplating the consent of the state or state parties to refer covered disputes to ICSID arbitration.²² The consent of the investor, on the other hand, can be given by initiating arbitration proceedings before the ICSID, under most investment laws or treaties.²³ In *Southern Pacific Prop., Ltd. v. Egypt*, the ICSID Tribunal ruled that the consent of the state party can be in the form of a statute of a mandatory nature.²⁴ The Egyptian party in the case unsuccessfully insisted that Article 25(1) of the Convention requires a further consent and the relevant statute was not sufficient to imply such consent. The Paris Cour d'appel nullified an ICC

¹⁸ Shihata, at 17.

¹⁹ G. R., Delaume, "How to Draft an ICSID Arbitration Clause", *ICSID Review: Foreign Investment Law Journal*, vol. 7 (1992), at 163 and 193.

²⁰ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (March 18, 1965), paragraph 24.

²¹ These multilateral agreements include the North American Free Trade Agreement of 1992 (NAFTA) between Canada, the US and Mexico, the Free Trade Agreement of 1994 between Colombia, Mexico and Venezuela, and the Energy Charter Treaty of 1994 among 49 countries and the European Community. See Shihata, at 17.

²² Oman is a party to eight such treaties. See International Centre for the Settlement of Investment Disputes, *Bilateral Investment Treaties: 1959-1996*, UNCTAD/ITE/IIA/2, United Nations: New York and Geneva, 2000.

²³ Shihata, at 17.

²⁴ *Southern Pacific Prop., Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction of 27 November 1985, *ICSID Reports*, vol. 3 (1995), at 112, 137-45, 149-162.

award on the same dispute, for lack of ICC jurisdiction, since there was no consent by the parties to refer the dispute to the ICC Court of Arbitration.²⁵

It should be mentioned that in order to conduct certain proceedings that does not fall within the jurisdiction of the ICSID, its Administrative Council has adopted Additional Facility Rules covering fact-finding proceedings, conciliation and arbitration rules for the settlement of investment disputes, when one of the parties is not a Contracting State or a national of such States, as well as disputes that do not arise directly out of an investment.²⁶ Decisions made under Additional Facility Rules do not enjoy the status of ICSID awards. For instance, they may be reviewed by national courts.²⁷

The ICSID structure includes: an Administrative Council, composed of representatives of Contracting States, a Secretariat, consisting of a Secretary-General and a Deputy Secretary-General appointed by the Administrative Council, a Panel of Conciliators and a Panel of Arbitrators designated by the Contracting States and the Chairman of the Council.²⁸ Article 14 of the Washington Convention requires that designated persons for the Panels must be of ‘high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement’.

A request for arbitration must be made in writing to the Secretary-General, indicating the dispute, the identity of the party, and its consent to arbitration. Unless the request is manifestly outside the jurisdiction of the ICSID, the Secretary-General

²⁵ Id.

²⁶ ICSID Additional Facility Rules of 2006, ICSID/11, 2006.

²⁷ Shihata, at 16.

²⁸ The ICSID administrative expenses are covered by the World Bank, not the Contracting States (Shihata, at 15).

must register the request.²⁹ This is intended to avoid any waste of time and effort, if the ICSID is clearly not competent to decide upon a dispute. Nevertheless, ICSID arbitration Tribunals decide upon their own competence, Article 41 provides.

The arbitration Tribunal will consist of a sole arbitrator or an uneven number of arbitrators, as the parties agree. In the absence of such agreement, the Tribunal will be formed of three arbitrators, each party appointing one and the third appointed by the agreement of the parties.³⁰ Under Article 38 of the Washington Convention, if within 90 days of notifying the parties of the registration of their request, or a different time period agreed upon by the parties, the Tribunal has not yet been constituted, the Chairman may, after consultation with the parties, appoint those arbitrators not yet appointed from nationals of other countries. The majority of the arbitrators must not be nationals of Contracting States involved in the dispute, unless there is only one arbitrator, or with the agreement of both parties.³¹ In this way, the likelihood of the Tribunal's bias in favour of a fellow countryman is reduced.

Under Article 56, upon death, incapacitation or resignation of an arbitrator, he will be replaced according to the same method as he was appointed. Any party may request the Tribunal to disqualify any of its members, if there is a manifest lack of qualities required under Article 14. The most important of these qualities is the ability to exercise independent judgment.³² The decision on the disqualification of an arbitrator must be taken by the majority vote of the other members of the Tribunal, as appropriate. If it was not possible to arrive at such a majority, the decision must be taken by Chairman.³³

²⁹ Article 36, the Washington Convention.

³⁰ Article 37, the Washington Convention.

³¹ Article 39, the Washington Convention.

³² Article 57, the Washington Convention.

³³ Article 58, the Washington Convention.

Following the universally accepted practice, the parties agree upon the substantive law of arbitration. They can tailor to their needs the substantive applicable law. The Washington Convention itself does not contain any substantive rule.³⁴ If there is no agreement between the parties to this effect, the Tribunal may apply to the dispute the law of the Contracting State party to the dispute, including its rules of the conflict of laws, as well as such rules of international law.³⁵ Applying the law of the state party to a dispute, rather than the law of the state whose nationals are the party to the dispute, indicate the pro-state tendency of the Washington Convention. This may be encouraging to the countries that are recipient of investment, but is not so to the private parties making investment. Article 42 of the Convention provides: ‘The Tribunal may not bring in a Finding of *non liquet* on the ground of silence or obscurity of the law’; and the Tribunal may decide the dispute *ex aequo et bono*, should both parties give their consent. These provisions are stipulated to provide the Tribunal with sufficient sources of the applicable law to dispose of the dispute.

The Washington Convention provides for procedural rules applying to ICSID arbitration, such as the power of the Tribunal to call upon the parties to produce documents or other evidence, to visit the scene connected to the dispute, and to conduct necessary inquiries.³⁶ Unless the parties agree otherwise, the ICSID Arbitration Rules would also be applicable. Under Article 45, failure of a party to appear or to present his case neither is deemed as accepting the other party’s claim, nor does prevent the Tribunal from rendering its award. Hence, the proceedings can go on, leading to an award, without a party being able to frustrate the process.

³⁴ Bishop, Crawford and Reisman, at 209.

³⁵ Article 42, the Washington Convention.

³⁶ Article 43, the Washington Convention.

ICSID rules are not applicable, if the parties agree on a different set of rules. Imperative or mandatory provisions, such as the need for the award to be reasoned or an uneven number of arbitrators, must be complied with, however.³⁷

The place of arbitration will be the seat of the ICSID, but if the parties agree, it can be the seat of the Permanent Court of Arbitration or any institution with which the Centre has made arrangements for such a purpose. The Tribunal may choose another place, after consultation with the Secretary-General.³⁸ Article 61 provides that, unless the parties agree otherwise, the Tribunal assesses the expenses incurred by the parties relating to the proceedings, the fees of the arbitrators and the expenses of ICSID facilities used, and decides how and by whom those expenses must be paid.

Deciding by a majority of the votes, the Tribunal must make its award in writing, signed by all those who voted for it, while dissenting arbitrators can attach their opinion. The award must deal with all questions submitted to arbitration, and contain the reasons for the decision.³⁹ Such a requirement not only guarantees a deliberated decision, but also provides the authorities involving in the later stages of arbitration, such as review or enforcement, with some material to examine various aspects of the award. Under Article 47 of the Washington Convention, the Tribunal may recommend provisional measures for preserving the parties' rights, at any time during the proceeding, whether at the request of a party, or on its own initiative. The consideration of a request for provisional measures must be given priority by the Tribunal, which may modify or revoke its recommendations, at any time.⁴⁰ Rule

³⁷ Shihata, at 17.

³⁸ Articles 62 and 63, the Washington Convention.

³⁹ Article 48, the Washington Convention.

⁴⁰ Rule 39, ICSID Rules of Procedure for Arbitration Proceedings. Provisional measures were taken by ICSID Tribunals in *MINE v. Guinea*, ICSID Case No. ARB/84/4.

39(6) of ICSID Rules of Procedure for Arbitration Proceedings, further, provides that, if stipulated in the parties' agreement, they may request 'any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding'. It is a drawback of the Washington Convention that the Tribunal cannot order, but merely recommend, such provisional measures. The Convention, in this regard, is weak, and only morally binding.⁴¹ Conservatory and precautionary measures, such as providing appropriate security or the attachment of the debtor's assets may be necessary in certain circumstances. Hence, a Tribunal should be empowered to order such measures.

As to formal requirements of an award, under ICSID Arbitration Rules, an award must cover: a precise designation of all parties, a statement confirming that the Tribunal was established under the Convention, and a description of the method of its constitution, the name and the appointing authority of all arbitrators, the names of the parties, the parties' representatives and counsels, the dates and places of the Tribunal's sittings, a summary of the proceeding, the facts of the dispute, the parties' claims and defence, a reasoned decision, and decisions about the costs of the process.⁴² Mandatory details required by the ICSID cover issues that are reasonably necessary to appear on the face of the award, without imposing an arduous demand on the tribunal.

ISCID awards are not subject to any remedy, such as its vacation at the seat of arbitration, other than those provided for under the Washington Convention. This

⁴¹ Charles N. Brower and Ronald E. M. Goodman, "Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity against Municipal Proceedings", *ICSID Review: Foreign Investment Law Journal*, vol. 6 (1991), at 431. For the drafting history of Article 47 of the Convention, and various arguments for and against "recommending" or "prescribing" provisional measures by the delegates in the drafting process, see *id.*, 440-61.

⁴² Rule 47, ICSID Rules of Procedure for Arbitration Proceedings. Also, see Gunther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award", *Journal of International Arbitration*, vol. 18, (2001), at 144.

means that a Contracting State's obligations under the ICSID are incorporated in its internal legal order. Article 49 provides that within 45 days of the issuance of the award, a party may request the Tribunal to decide any issue that was not dealt with in the award, or to rectify clerical, arithmetical or similar errors in the award. Upon the written request of either party addressed to the Secretary-General, the original Tribunal may interpret the award, otherwise a new Tribunal formed according to the rules constituting the original Tribunal will do so.⁴³ On such occasion, the enforcement of the award may be stayed, if the Tribunal finds it appropriate.

Article 51 of the Washington Convention allows a party to request revision of the award, by a written application to the Secretary-General of the ICSID. But the ground for such a request is limited to the discovery of 'some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.' Hence, *pace* some commentators,⁴⁴ strictly speaking, we cannot talk of the right of appeal, under the Washington Convention. Since, such a right is not similar to the ordinary right of appeal, where a revision of issues of law and fact, as it was already known, can be requested by either party. Some other conventions such as the Amman Convention provide for revision of arbitral awards in similar terms as the Washington Convention does. Under Article 51(2) of the latter Convention, a request for revision of the award must be made within 90 days of the discovery of relevant facts and, in any case, not after three years from the issuance of the award. In such circumstances, enforcement of the award may be stayed, if it is decided by the Tribunal.

⁴³ Article 50, the Washington Convention.

⁴⁴ Horvath, at 151.

While under most international conventions and municipal laws, annulment of an award is possible by applying to the court at the seat of arbitration, an interesting feature of arbitration under the ICSID is that either party may request annulment of the award by writing to the Secretary-General. The annulment procedure is of paramount importance, since it works as an internal safeguard mechanism for ICSID arbitration. Annulment is permitted, if any of the following applies:

- (a) the Tribunal was not properly constituted;
- (b) the Tribunal has manifestly exceeded its powers;
- (c) there was corruption on the part of a member of the Tribunal;
- (d) there has been a serious departure from a fundamental rule of procedure; or
- (e) the award has failed to state the reasons on which it is based.⁴⁵

An interesting point is that the ground of public policy cannot be invoked for the annulment of an ICSID award. Under Article 52, a request for annulment must be made within 120 days of rendering the award or discovering the corruption, and not more than three years after the issuance of the award. An *ad hoc* Committee of three persons appointed by the Chairman from the Panel of Arbitrators considers the application for annulment, and, upon its own motion or either party's request, may stay enforcement of the award. Members of the Committee must not be a national of the states involved, or appointed by them to the Panel of Arbitrators, or have acted as a conciliator in the same dispute. In practice, the Committee is another Tribunal with a mandate more limited than that of the original Tribunal.⁴⁶ If the award is annulled in whole or in part, the dispute shall, at the request of either party, can be submitted to a new Tribunal.

⁴⁵ Article 52(1), the Washington Convention.

⁴⁶ Reisman, at 48-50.

The drafters of the Convention did not intend to allow a review of law and fact.⁴⁷ Arguments of ICSID *ad hoc* Committees in two cases, *Klöckner Industrie – Anlagen GmbH v. Republic of Cameroon*⁴⁸ and *Amco Asia v. Indonesia*,⁴⁹ were criticised by some authors as going as far as establishing a form of appeal within the ICSID arbitration framework.⁵⁰ These cases, though not totally in agreement with each other, were designed to shape ICSID annulment procedure. In the cases, referring to Article 52(1)(e), the Committees held that the reasons for the awards were not “sufficiently relevant” or “reasonably adequate”. However, the above article only requires the statement of reasons, without any discussion of the substance of these reasons or their validity. In other words, if the above article is interpreted as to requiring reasons that support the conclusion of a decision, it will amount to the review of the merit of the award, and is against the principle of the finality of arbitral awards. Another difficulty with *Klöckner Industrie* was that Article 52(3) that ‘the Committee shall have the authority to annul the award’ was interpreted as the Committee being obliged to annul the award, if a defect was found. However, it will be more in line with international practice, if it is interpreted that the Committee has the discretion to nullify the award.⁵¹ Moreover, the Committee decided to go beyond the grounds specified in Article 52(1), and consider all standards set out in the whole of the Convention.⁵² Such an interpretation cannot, however, be considered as facilitating arbitration.

⁴⁷ Mark B. Feldman, “the Annulment Proceedings and the Finality of ICSID Arbitral Awards”, *ICSID Review: Foreign Investment Law Journal*, vol. 2 (1987), at 85 and 103-09.

⁴⁸ *Klöckner Industrie – Anlagen GmbH v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Award of 21 October 1983, *ICSID Reports*, vol. 2 (1994), at 3-163.

⁴⁹ *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, *ICSID Reports*, vol. 1 (1993), at 376-638.

⁵⁰ Feldman, “at 85 and 103-09.

⁵¹ Reisman, at 57-61.

⁵² *Id.*

Under Article 53 of the Convention, the award will be binding on the parties, and will not be subject to any appeal. Article 54, which is on recognition and enforcement of awards, is one of the most important articles in the Convention. Article 54(1) provides that ‘Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.’ Moreover, under Article 54(3), an award is executed according to the law for the execution of court judgments in the country where enforcement of the award is sought. The applicant must provide the competent court with a copy of the award certified by the Secretary-General of the ICSID. Given the internal review system of the ICSID, the drafters of the Convention did not find it necessary to mention the grounds for the refusal of enforcement contained in the New York Convention. Thus, the Washington Convention is more than the New York Convention facilitative of enforcement of awards.⁵³ As a matter of fact, no international arbitration system provides for such a privileged treatment of its awards, as does the ICSID.⁵⁴ No Contracting State is allowed to make recognition and enforcement of ICSID awards subject to conditions not provided for by the Convention. For instance, such awards must not be subject to review, when their enforcement is sought. The competent court in the country must only consider the authenticity of the award. It is a drawback that the Washington Convention does not contain any provision for the enforcement of non-pecuniary obligations, such as the restitution of a situation or ceasing a course of action. Hence, it is suggested that such obligations should be carried out by analogy to Additional Facility awards.⁵⁵

⁵³ Schreuer.

⁵⁴ Shihata, at 17.

⁵⁵ Schreuer.

Although Contracting States are not obliged to enforce non-pecuniary obligations, they must be recognised, under Article 54(1).

Given that the Washington Convention applies to disputes to which a state is a party, the Convention recognises state immunity from execution as it is stipulated under the law of a Contracting State.⁵⁶ Such immunity is, however, restricted to enforcement, that is, awards can be recognised, despite sovereign immunity. The immunity also does not affect the *res judicata* feature of ICSID awards.⁵⁷ The issue of sovereign immunity was raised in *Benvenuti et Bonfant SRL v. the Government of the People's Republic of the Congo*.⁵⁸ The winning party, Benvenuti et Bonfant SRL, requested the *Tribunal de grande instance* of Paris to issue an order of *exequatur* for the award. The authority did so, but added that “no measure of execution, or even conservatory measure, shall be taken pursuant to the said award, on any asset located in France without the prior authorization of this Court.” This reservation was objected by Benvenuti et Bonfant SRL, which argued that it makes the enforcement of the award practically impossible. The Company added that, under Article 54(2) of the Washington Convention, the competent authority in a Contracting State can only consider the authenticity of the award. The French appellant body deleted the above quotation from the award, arguing that the order granting an *exequatur* is merely a preliminary measure of enforcement, and not a measure of enforcement itself, to which the issue of state immunity applies.

3 The Riyadh Convention of 1983

⁵⁶ Article 55, the Washington Convention.

⁵⁷ Bishop, Crawford and Reisman, at 1520.

⁵⁸ *Benvenuti et Bonfant SRL v. the Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/2, Judgment of 26 June 1981, French *Cour d'appel*, *ICSID Reports*, vol. 1 (1993), at 368. State immunity was also invoked in *Liberian Eastern Timber Co (LETCO) v. Gouvernement de la République du Libéria*. See also Mauro Rubino-Sammartano, *International Arbitration Law*, (Deventer, Boston: Kluwer Law and Taxation Publishers, 1990), at 490.

An important regional treaty for enforcement of arbitral awards is the Riyadh Convention on the Judicial Cooperation between the States of the Arab League of 1983. This Convention, which is usually referred to as the Riyadh Convention, was signed in Riyadh on 8 April 1983. Although the Convention has not been ratified by any GCC state, including Oman, it has been signed by all of them. Therefore, it is necessary to examine the Convention very briefly. The Riyadh Convention is the successor to the Arab League Convention on the Enforcement of Foreign Judgments and Awards of 1952. Oman was not, however, a party to the Convention.⁵⁹ The regime of enforcement provided for under the 1952 Convention was outdated, being derived from the 1927 Geneva Convention.⁶⁰ Under Article 2 of the Arab League Convention of 1952, contracting states are required to enforce foreign arbitral awards, without considering the merits of the case, while investigating some procedural issues. The latter include classical conditions, that is, the validity of the arbitration agreement, jurisdiction of the tribunal, proper summon of the parties to appear before the tribunal, arbitrability of the dispute, the finality of the award, and its not being contrary to public policy or the moral order of the enforcing state. Article 5 of the Convention provides that the party seeking enforcement of a foreign award must produce an authenticated official copy of the award, duly endorsed with an enforcement order issued by the court at the seat of arbitration, and an official certificate by the competent authorities indicating that the award is final and enforceable. The 1952 Convention does not provide for recognition of awards as distinct from their enforcement.

⁵⁹ Egypt, Iraq, Jordan, Kuwait, Libya, Syria, Saudi Arabia and the United Arab Emirate were parties to the 1952 Arab League Convention (Husain M. Al-Bahama, "the Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain", *Arab Law Quarterly*, vol. 4 (May 1989), at 336).

⁶⁰ Samir Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", *Arab Quarterly Law*, vol. 1, no. 1 (1985), at 23.

As to the Riyadh Convention, it provides for the enforcement of court judgments⁶¹ as well as arbitral awards made in contracting states, without the need for a retrial.⁶² The Convention simplified the procedure for the enforcement of foreign awards, and also updated the conditions for such enforcement.⁶³ Under Article 37, foreign arbitral awards made in a contracting state must be enforced, if the following conditions are met: (i) the dispute is arbitrable, (ii) the arbitration agreement is valid, (iii) the subject-matter of the dispute falls within the scope of a reference to arbitration, under the arbitration agreement, (iv) the parties are properly summoned, and (v) the award does not contravene the *Shari'a* as well as the constitution, public order or moral of the country where enforcement of the award is sought. The condition that an award must not contravene Islamic *Shari'a* and the moral principles of the Muslim member states distinguishes the Convention from its equivalent multilateral treaties in other parts of the world.⁶⁴

The claimant must furnish the enforcing court with an authenticated copy of the award, an authenticated copy of the arbitration agreement, and a certificate made by the judicial authority at the seat of arbitration granting enforcement to the award. This means that the award need to granted enforcement twice, once at the seat of arbitration and then, in the enforcing country. Such a regime of enforcement, however, will delay enforcement of awards.

4 Regional Arrangements: the GCC Arbitration Centre

⁶¹ Article 30, the Riyadh Convention.

⁶² Article 37, the Riyadh Convention.

⁶³ Al-Baharna, at 336.

⁶⁴ Saleh, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", at 25.

The Commercial Arbitration Centre for the Co-operation Council for the Arab States of the Gulf (GCAC) was created to address the need for an independent dispute settlement body with enforceable decisions in the GCC region, where six separate jurisdictions increasingly co-operate with each other in various areas. The Centre was established, in 1995, through the Charter of the GCC Commercial Arbitration Centre of 1993, adopted in the Fourteenth GCC Summit. Later, Arbitral Rules of Procedure for the GCC Commercial Arbitration Centre of 1994 was adopted by the GCC Commercial Co-operation Committee consisting of Ministers of Commerce of the GCC states. On 5 October 1999, The Committee in its UAE meeting amended the Rules of Procedure, making it more responsive to party autonomy in choosing the venue and language of arbitration and to multi-party arbitration.⁶⁵ Such changes were made on the basis of comments from Arab and foreign jurists.⁶⁶ The Centre has established a network of cooperation with various other relevant organizations within and without the GCC states, for providing and receiving assistance, training and professional activities.

Following Decision No. 10 of 2000 by the Omani Council of Ministers, Omani Ministerial Decree No. 88 of 2000 Regarding the GCC Commercial Arbitration Centre Based in the State of Bahrain permitted referring arbitration in the Centre, according to its Charter and Rules. It is worthy of mention that there are some overlap, and even some inconsistencies, between the GCAC Charter and its Arbitral Rules of Procedure.⁶⁷ The GCC Commercial Arbitration Centre (GCAC) is located

⁶⁵ “18th Meeting of the Centre’s Board of Directors”, *GCC Commercial Arbitration Centre Bulletin*, issue 13 (Dec. 1999), at 4.

⁶⁶ “[Commentary:] Ammendment to the Arbitral Rules of Procedure of the Centre”, *GCC Commercial Arbitration Centre Bulletin*, issue 13 (Dec. 1999), at 14.

⁶⁷ For instance, Articles 14 of the GCAC Charter and 2(1) of the GCAC Arbitral Rules of Procedure, Articles 10 of the Charter and 8 of the Rules, Articles 13 of the Charter and 4 of the Rules, as well as Articles 23 of the Charter and 41 of the Rules provide for the same things, wholly or partially.

in Bahrain. Despite its slow beginning,⁶⁸ the Centre is attracting more and more attention within the region.

Although the focus of this thesis is on enforcement, it is necessary to examine rules of the GCAC in other areas of arbitration in so far as they might have an impact on the enforcement of awards rendered through the Centre.

Article 2 of the GCAC Charter reads:

The Centre shall have the power to examine commercial disputes between GCC nationals, or between them and others, whether they are natural or juristic persons, and commercial disputes arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions issued for implementation thereof if the two parties agree in a written contract or in a subsequent agreement on arbitration within the framework of this Centre.

As can be seen, the GCAC has a narrower coverage than the New York Convention does, and, like the ICSID, tends to be a more specialist arbitration centre, as it deals only with commercial disputes between nationals GCC state, as well as disputes arising from the implementation of the GCC Unified Economic Agreement. The Charter is not specific whether the definition of juristic persons includes public bodies or not. However, there is no reason not to interpret the provision as such. Therefore, it can be said that both private and state entities can be a party to disputes referred to the GCAC. States or any entity that is partially or wholly owned by the states can incorporate the GCAC Standard Arbitration Clause into their contracts.⁶⁹ An important feature of the GCAC is that, under Article 2 of its Charter, it can consider not only international disputes between citizens of more

For a similar argument, see Richard H. Kreindler, "Arbitration under the GCC Commercial Arbitration Centre Rules in the Context of Banking and Finance Disputes", *the Lebanese Revue of Arbitration*, No. 8.

⁶⁸ While the Centre provided various arbitration services, such the provision or appointment of accredited arbitrators, in the first three years, only one arbitration case has been registered according to the Centre's rules ("Message from the Secretary General", *GCC Commercial Arbitration Centre Bulletin*, issue 7 (December 1997), at 18).

⁶⁹ See "26th Meeting of the [GCAC] Board of Directors – 24th & 25th April 2002, State of Kuwait", *GCC Commercial Arbitration Centre Bulletin*, issue 22/23 (June 2002), at 10.

than one GCC state, but also those between nationals of one GCC country. Hence, it works as both a local and a regional arbitration centre. Nevertheless, as it will be seen, its awards can be enforced in all GCC states. On the other hand, only disputes to which a GCC national is a party can be considered by the Centre. That is to say, the GCAC is not an international arbitration institution, like the ICC or London Court of Arbitration, to which every dispute can be referred. Article 13 of the GCAC Arbitral Rules, which is added to the Rules after the amendments of 1999, raises the possibility of multi-party arbitration under the GCAC.

Disputes arising out of the Unified Economic Agreement are also to be referred to the GCAC. The Unified Economic Agreement, which is intended to unify, support and co-ordinate the policies and laws of the GCC states in the areas of finance, monetary policy, industry, tariffs and other economic issues, was adopted by the GCC Supreme Council in its Second Summit, in 1981. For implementing the Unified Economic Agreement, the GCC states have adopted a series of Resolutions. In 2002, the New Unified Economic Agreement was adopted, stressing the Centre's role in resolving disputes arising out of its implementation.⁷⁰ Thus, it can be said that the Centre has jurisdiction over two types of disputes, namely, those between individuals and undertakings in their contractual relationships, and those arising out of the Unified Economic Agreement. The Centre's jurisdiction regarding the latter types of disputes is exclusive.⁷¹

Given the importance of the GCAC structure in its functioning, it is essential to examine such a structure. Under Article 5 of the GCAC Charter, the Board of

⁷⁰ "25th Meeting of the [GCC Arbitration] Centre's Board of Directors – 7th & 8th January 2002, Muscat, Sultanate of Oman", *GCC Commercial Arbitration Centre Bulletin*, issue 20/21 (Dec. 2001 and March 2002), at 6.

⁷¹ "Message from the Chairman of the Centre's Board of Directors", *GCC Commercial Arbitration Centre Bulletin*, issue 19 (June 2001), at 4.

Directors of the Centre consists of six members, each appointed by the chamber of commerce and industry in one GCC state. Thus, the Centre, as a legal body, is run by the private sector in the GCC states; and this is considered an advantage of the Centre adding to its credibility among non-GCC parties. The Board members are appointed for a three year period that is renewable only once. The Board's Chairman is appointed from the members, on the basis of a rotation system. A Deputy Chairman is also appointed. The Board decides by a majority vote, and in case of an equality of votes, the Chairman casts the deciding vote.⁷² Article 7 of the Charter provides that the Board of Directors supervises the realisation of the Centre's objectives, approves financial and administrative regulations of the Centre, its annual budget and annual report, and appoints the Secretary General of the Centre. The duties and entitlements of the Secretary General, who must be a GCC national, are determined by the Board.⁷³ The Board can also interpret the Centre's Arbitral Rules of Procedure.⁷⁴

Under Article 8 of the Charter, the Secretary General, who supervises all arbitration activities,⁷⁵ represents the GCAC before all other public and private bodies, including the law courts. He will be supported, in his tasks, by the Arbitral Tribunal Secretariat, which is part of the Centre's General Secretariat and works under the supervision of the Secretary General.⁷⁶ The Secretariat is in charge of receiving applications for arbitration, and all other papers, correspondence and documents submitted by the parties, recording minutes of hearings, and implementing resolutions adopted in the course of hearing the case prior to the final

⁷² Article 6, the GCAC Charter.

⁷³ Article 8, the GCAC Charter.

⁷⁴ Article 42, the GCAC Arbitral Rules of Procedure.

⁷⁵ For instance, see Articles 9 and 10 of the GCAC Arbitral Rules of Procedure.

⁷⁶ Article 17, the GCAC Charter.

award.⁷⁷ This gives rise to the question as to whether this means that the Secretariat has a role in enforcing interim measures, taken under Article 27 of the Arbitral Rules of Procedure. Article 21(a) of the GCAC Charter provides that the Secretary General selects the arbitrators, if the Centre is authorised to do so. If the parties do not wish to settle their dispute through the Centre, but request its help, the Secretary General may provide or arrange the necessary facilities, such as the place of arbitration, secretarial requirements, translation services and the filing of documents.⁷⁸ The Secretary General also provides the parties with a statement of arbitration costs.⁷⁹

Under Article 11 of the Charter, 'The Centre shall maintain a panel of arbitrators to be prepared by the Chambers of Commerce and Industry in the GCC States.' This provision, too, reaffirms the private nature of the Centre's structure. Article 24 of the Charter provides that the Centre's Chairman, Board Members, Secretary General, as well as members of the Arbitral Tribunal and members of the Tribunal Secretariat enjoy certain immunities. The first is immunity against any legal action taken because of the exercise of their job duties, unless the Board of Directors decides to relinquish such immunity. The second type is diplomatic immunities and prerogatives, when they are travelling, save for the nationals of the host state.⁸⁰ Immunities granted to the GCAC officials are wider than those of the ICSID's, though the Washington Convention is more detailed with regard to the range of immunities and privileges allocated to those involved in ICSID arbitration.⁸¹ Such

⁷⁷ Article 18, the GCAC Charter.

⁷⁸ Article 22, the GCAC Charter.

⁷⁹ Article 23, the GCAC Charter and Article 41, the GCAC Arbitral Rules of Procedure. It is, however, the arbitral tribunal that determines the party who shall undertake, partially or wholly, the costs and remunerations (Article 4(9), GCAC Rules Regulating the Costs of Arbitration of 1995, Annex No. 1 (1995) to Arbitral Rules of Procedure for the GCC Commercial Arbitration Centre).

⁸⁰ Also, the Centre and its properties, funds, documents and papers enjoy immunity against any legal or administrative action upon carrying out the GCAC's duties (Articles 25 and 26, the GCAC Charter).

⁸¹ See Articles 18-24, the Washington Convention.

activities provide peace of mind particularly for the arbitrators in their assigned activities.

Arbitration Agreements

Article 2 of the GCAC Charter provides that the GCAC has jurisdiction over a dispute, only if the parties have a written arbitration agreement to refer their disputes to the Centre. Thus, it is not enough that a dispute has occurred between nationals of more than one GCC state. In this regard, the GCAC rules resemble those of the ICSID. So, it may be concluded that if a state party is involved, the consent may come in the form of a statute. On the basis of Article 2 of the Charter, GCC states have individually or jointly provided for a reference to GCAC arbitration of certain disputes, for instance, disputes between the Company and the Head Office state, Bahrain, or between the Company and its shareholders, or between its shareholders.⁸²

Under Article 2 of the GCAC Charter, both arbitration clauses and submission agreements are valid for the Centre. In this way, the Charter is in harmony with the new tendency in most Arab countries to regard as valid not only submission agreements but also arbitration clauses. As mentioned earlier, before the modernisation of their legal systems, most Arab countries that their arbitration laws were inspired by *Shari'a* law or the French legal system provided that an arbitration agreement is void, unless the disputes referred to arbitration are specified in the agreement. This practically meant that arbitration clauses were not valid. Most Arab

⁸² "Gulf International Bank Refers to the GCC Arbitration Centre to Settle Disputes", *GCC Commercial Arbitration Centre Bulletin*, issue 11 (April 1999), at 15.

legal systems, including the GCAC, have now distanced themselves from such a requirement.⁸³

It is important to notice that, under the GCAC Charter, the arbitration agreement is deemed as independent from the main contract, unless otherwise is agreed by the parties. Hence, in the case of the invalidity or termination of the contract, the arbitration clause will remain valid and effective.⁸⁴ It is a distinctive feature of the GCAC that it provides the parties with both options: the autonomy as well as subordination of the arbitration clause to the main contract. The arbitration tribunal decides on the lack or nullity of the arbitration agreement, its lapse, or its non-applicability to the issues in the dispute, as well as its own jurisdiction.⁸⁵ This is an affirmation of the principle of *kompetenz-kompetenz*. In line with the accepted international practice, Article 20 of the GCAC Rules requires any objection to the jurisdiction of the tribunal must be raised ‘at the first hearing prior to examining the merits’.

Article 3 of the GCAC Rules provides that ‘All agreements and stipulations referred to arbitration before the Centre shall be presumed valid unless evidence is provided establishing the invalidity thereof.’ The provision means that the Centre will consider any dispute, when it is satisfied about the *prima facie* existence of an agreement to refer such a dispute to the GCAC. However, the GCAC Charter or Rules do not specify on whom the burden of proof is to prove the invalidity of the agreement, in later stages; is it on the defendant or the tribunal? It can be presumed that that it is the defendant who may challenge the validity of the agreement and has to prove his claim.

⁸³ This is confirmed in Article 2(2) of the GCAC Arbitral Rules of Procedure, which proposes the standard clause for referring disputes to the GCAC.

⁸⁴ Article 19, the GCAC Arbitral Rules of Procedure.

⁸⁵ Article 20, the GCAC Arbitral Rules of Procedure.

Under Article 14 of the Charter of the GCC Commercial Arbitration Centre, an agreement to refer a dispute to arbitration through the Centre precludes litigation about the case in any state.⁸⁶ The wording of the article that such an agreement ‘shall preclude the reference of the dispute or any action pursued upon hearing it before any other judicial authority in any state’ may cause the worry that even interim and conservatory measures cannot be sought from a judicial authority. Most international arbitration regimes and institutions allow requesting such measures from a judicial authority.⁸⁷ This provision should, therefore, be interpreted in such a way as protecting the right of a disputant to request a court for interim or conservatory measures, before and during arbitration proceedings.⁸⁸

Arbitration Tribunal

Article 10 of the GCAC Charter provides that the arbitration tribunal must be formed of one or three arbitrators, as may be agreed by the parties. If there is no such agreement, the GCAC Arbitral Rules of Procedure is applicable. Article 8 of the Rules reads, ‘In case there is no agreement, the Secretary General shall form the Tribunal with one arbitrator, unless he finds that the nature of the dispute requires to be formed by three arbitrators.’ Before amendment, absent parties’ agreement, a panel of three arbitrators was to be formed, and it was not clear who would be responsible to form the tribunal. Both deficiencies are addressed in the amendment, which requires the Secretary General to choose a sole arbitrator, in order to expedite the arbitration process, unless the nature of the dispute demands three arbitrators.

⁸⁶ This is also confirmed in Article 2(1) of the GCAC Arbitral Rules of Procedure.

⁸⁷ See, for instance, Article 23(2) of the ICC Rules of Arbitration of 1998, Article 9 of the UNCITRAL Model Law on International Commercial Arbitration, and Article 39(6) of ICSID Arbitration Rules. Also, since most municipal laws allow the competent court to issue such interim measures, there is no justification for the arbitral rules of an institution to limit such a right (Kreindler, at 14).

⁸⁸ *Id.*, at 12.

If a party fails to appoint the arbitrator he has to appoint, or if the arbitrators chosen by the parties fail to appoint the third arbitrator within the fixed period of time,⁸⁹ the Secretary General will do so, within two weeks from the expiry of such period.⁹⁰ The amendment to the Rules extended the “one week” period for appointing the arbitrators whom have not been appointed by the relevant parties or arbitrators to “two weeks”, making it more practicable. Under Article 13 of the Rules, in multi-party arbitration, if disputes are to be referred to three arbitrators, all the claimants jointly must choose one arbitrator, as do all respondents jointly. If either party fails to appoint its arbitrators, the Secretary General will do so. Any dispute on the validity of the appointment of an arbitrator is settled by the Secretary General, provided that this dispute is presented before holding the hearing fixed for considering the dispute.⁹¹ The GCAC Arbitral Rules of Procedure also provides for a challenge to the appointment of an arbitrator to be submitted to, and decided upon by, the Secretary General.⁹² The extent of powers conferred on the Secretary General is not unusual in institutional arbitration.

An arbitrator must be a legal practitioner, a judge or a person with wide experience and knowledge in commerce, industry and finance. He must also have good reputation, high integrity and independent views. It can be said that the GCAC does not impose strict requirements for qualifying an arbitrator.⁹³ Under Article 11

⁸⁹ The claimant must nominate his arbitrator when submitting his application for arbitration. For the defendant, the fixed period is twenty days from the date of being notified of the application. This period can be extended by the Secretary General, up to twenty more days. The same is with regard to the sole arbitrator. For the third arbitrator, it is twenty days after the date that the arbitrators nominated by the two parties are invited by the Secretary General to elect the third arbitrator (Article 12 of the GCAC Arbitral Rules of Procedure).

⁹⁰ Article 12, the GCAC Arbitral Rules of Procedure.

⁹¹ Article 14, the GCAC Arbitral Rules of Procedure.

⁹² Articles 17 and 18, the GCAC Arbitral Rules of Procedure.

⁹³ Kreindler, at 10.

of the GCAC Charter, the parties can select the arbitrators from the panel provided by the Centre, though they are under no obligation to do so.

The Applicable Law

Under the GCAC regulations, in principle, the parties may choose the applicable law to their disputes, including the procedural law governing the arbitration. Article 13 of the GCAC Charter provides that the procedural law of the arbitration is the GCAC Arbitral Rules of Procedure, unless otherwise agreed by the parties. Also, Article 4 of the Arbitral Rules of Procedure reads: ‘The parties may select further procedural rules for arbitration before the Centre, provided that such rules shall not affect the powers of the Centre or [the] Arbitral Tribunal provided for in these Rules.’ As can be seen, the latter provision requires that the parties may not select any additional or different rules that affect the powers of the Centre and the Tribunal. It seems that there is an inconsistency between the relevant provisions in the Charter and the Arbitral Rules of Procedure, unless we accept that the authors of the Rules deliberately wanted to restrict the power of the parties in choosing the applicable procedural law. It can be argued that those powers of the Centre and the tribunal that prevail are issues such as the investigative powers of the tribunal⁹⁴ as well as the requirements of due process.⁹⁵ Hence, it can be said that while the provisions about these powers and requirements must be complied with, the parties or the tribunal can choose additional procedural regulations applicable to the arbitration. In other words, derogation from the arbitral rules of the GCAC is permitted, though the scope of

⁹⁴ About the investigative powers of the tribunal, Article 24 of the Rules reads:

The Tribunal may at any stage of the arbitration request the parties to produce other documents or evidence, conduct an inspection of the premises subject to the dispute, and make investigations it deems fit, including assistance by experts.

⁹⁵ Article 5 of the Rules provides for the requirements of due process, namely, the parties’ right of defence and their opportunity to present their case, as well as the equal treatment of the parties by the tribunal.

such derogation is limited.⁹⁶ The question, however, arises as to if the arbitration agreement does not specify the more detailed applicable procedural law, what law will be applicable. The most likely option is the law of the forum state. The procedural flexibility offered by the GCAC makes it attractive to various specialist trade activities.⁹⁷

The place of arbitration is agreed by the parties, and, absent such agreement, by the tribunal. Unless otherwise is agreed by the parties, the tribunal may conduct hearings and meetings at any place that it deems appropriate, upon consultation with the parties. In the case of deliberation, there is no need for such consultations with, and agreement of, the parties.⁹⁸ Before the amendment of the Rules, the place of arbitration was Bahrain, unless the parties agreed otherwise, upon the approval of the tribunal, in consultation with the Secretary General. The new provision does not restrict the place of arbitration to Bahrain, and is more detailed. It is very similar to Article 14 of the ICC Rules of Arbitration of 1998, except that, under the latter, the ICC International Court determines the place of arbitration. The GCAC Arbitral Rules provision allows the arbitrators to choose a country that is a party to a bilateral or multilateral treaty for enforcement of awards to which the country where the enforcement of the award is likely to be sought has also joined.⁹⁹ Though not expressly mentioned, the provision allows a change of venue for hearings, meetings and deliberations.

⁹⁶ For a short discussion, in this regard, see Kreindler, at 11.

⁹⁷ With regard to the importance of such flexibility for those involved in information and communication technology and e-commerce, see Arif Hyder Ali, "Resolving Information and Communication Technology Disputes under the GCC Centre's Arbitration Rules", *GCC Commercial Arbitration Centre Bulletin*, issue 20/21 (Dec. 2001 and March 2002), at 13.

⁹⁸ Article 6, the GCAC Arbitral Rules of Procedure.

⁹⁹ Graham Lovett, "Arbitration in the GCC – A Practical Approach", *Clifford Chance LLP* (25 May 2004), at 2.

The language of arbitration proceedings is to be agreed by the parties; otherwise, the tribunal determines it, taking into account the conditions of arbitration.¹⁰⁰ Before amendment, permitting no choice for the parties, the language of arbitration proceedings and the award was Arabic; and all foreign verbal statements, memoranda or submission were to be translated into the language. The new provision does not restrict the parties, in this regard. Article 22(3) of the Rules provides that the tribunal must make the necessary arrangements for the translation of foreign statements and documents into Arabic. The question may arise as to whether the tribunal has an obligation to arrange for the translation of necessary documents and statements, if the language of arbitration is not Arabic. Article 22(3) should have also been modified, following the amendment of the Rules, requiring the translation into the language of arbitration proceedings those documents that are not in this language.

Statements of claim and defence must be submitted to the tribunal.¹⁰¹ The respondent has twenty days from the date of being notified of the application for arbitration to prepare his defence. The Secretary General can extend this period for another twenty days.¹⁰² This is a shorter time compared to the thirty days period given by some other arbitration institutions, such as the ICC or the London Court of International Arbitration. This shorter period might not necessarily be considered as an advantage of the GCAC over other arbitration institutions, since the respondent might not be able to prepare a defence in such a short time.¹⁰³

Under Article 13(c) of the GCAC Charter, the arbitral proceedings are confidential, unless the parties expressly agree to the contrary, or the tribunal decides

¹⁰⁰ Article 7, the GCAC Arbitral Rules of Procedure.

¹⁰¹ Articles 9 and 11, the GCAC Arbitral Rules of Procedure.

¹⁰² Article 11, the GCAC Arbitral Rules of Procedure.

¹⁰³ See, for instance, Lovett, at 2.

that the contrary is necessary for making a ruling in respect of the dispute. Such a ruling may be a court decision for enforcement of an order or interim or conservatory measure issued by the tribunal or by the court itself,¹⁰⁴ or a court decision on a request for challenging or enforcing the final award. Compared to some other reputed international arbitration institutions, the GCAC deals with the issue of confidentiality in more details. For instance, Rule 15 of the ICSID Rules of Arbitration only states that ‘The deliberations of the Tribunal shall take place in private and remain secret.’

The GCAC Rules allows both hearings for verbal pleadings or for hearing testimonies from witnesses or experts, as well as the proceedings on the basis of papers and documents, provided that at least one hearing has already been held.¹⁰⁵ The parties must produce any other document or evidence, if requested by the tribunal at any stage of the arbitration. The tribunal may also conduct an inspection of the premises, and make investigations that it deems appropriate. It may also seek the assistance of experts.¹⁰⁶ It is important to notice, however, that it is the tribunal that decides ‘whether to accept or reject evidence and the existence of a link between the evidence and the issue of the case or lack of such linkage and the significance of the evidence provided.’¹⁰⁷

Under Article 31 of the Rules, if there are several arbitrators, after the completion of the pleadings and before passing the award, there must be deliberations. The award must be passed by a unanimous or a majority vote. The dissenting arbitrator

¹⁰⁴ Kreindler, at 12.

¹⁰⁵ Article 21, the GCAC Arbitral Rules of Procedure.

¹⁰⁶ Article 24, the GCAC Arbitral Rules of Procedure. The GCAC itself keeps a list experts, with various specialization, registered with the Centre (see “Panel of Experts”, *GCC Commercial Arbitration Centre Bulletin*, issue 2 (April 1996), at 8).

¹⁰⁷ Article 22(5), the GCAC Arbitral Rules of Procedure.

shall note down his opinion in a separate paper to be attached to the award.¹⁰⁸ The emphasis on the need for deliberations before rendering the award, and the attachment of dissenting opinions works towards the transparency of arbitration for those involved in it, and reinforces the tribunal's compliance with due process.

As to the substantive law applicable to the dispute, in principle, the parties are at liberty to choose such a law. However, if there is no agreement to this effect,

the arbitrators shall apply the law determined by the rules of the conflict of laws which they deem appropriate whether it is the law of the place where the contract was made, the law of the place where it is to be performed, the law of the place where it must be implemented or any other law subject always to complying with the terms of the contract and rules and practices of international law.¹⁰⁹

This is also confirmed in the GCAC Arbitral Rules of Procedure, where four types of applicable substantive regulations are mentioned: the parties' contract and other subsequent agreements, the law chosen by them, the law having most relevance to the subject-matter of the dispute according to the rules of the conflict of laws, and local and international business practices.¹¹⁰ Permitting the parties and the tribunal to choose the appropriate substantive law is significant for specialist areas of commerce, for instance, information and communication technology and e-commerce.¹¹¹ Providing for the four types of substantive applicable law appears to impose a priority list, which some commentators have described as being unnecessary. This is because when there is a written contract between the parties, the provisions of the contract, alongside any agreed upon law will be applicable. Only in the absence of such a contract, a conflict of laws analysis and international business practice will be applicable.¹¹²

¹⁰⁸ Article 32, the GCAC Arbitral Rules of Procedure.

¹⁰⁹ Article 12, the GCAC Charter.

¹¹⁰ Article 29, the GCAC Arbitral Rules of Procedure.

¹¹¹ Ali, at 14.

¹¹² Kreindler, at 18.

With regard to those disputes arising out of the execution of the GCC regulations and resolutions as well as the provisions of the GCC Unified Economic Agreement, these enactments and their interpretations are applicable.¹¹³ Under Article 25 of the Rules, the parties may authorise the tribunal to settle their dispute by means of reconciliation. This is an important provision that allows the tribunal not to be restricted by the rules of the applicable law, and resolve their dispute on the basis of fairness or even through reconciliation, if the parties agree.

The Award

Under the GCAC regulations, issuing both interim and final awards is allowed. Article 28 of the Arbitral Rules of Procedure provides that the tribunal may take interim measures such as those for the preservation of some goods, the deposit of the goods with third parties or sale of perishable items. These measures, however, must be taken in compliance with the procedural rules in the country where the interim measure is adopted. This is because provisional measures are often regarded as interfering with national court jurisdictions.¹¹⁴ Provisional measures usually address urgent issues, and are intended to secure a successful outcome for the proceedings, when the outcome is not known. Hence, it is important to strike a balance between the urgency of provisional measures and a conscious effort not to prejudge the merit of the dispute.¹¹⁵

Under Article 15 of the GCAC Charter, an award delivered by the arbitral tribunal pursuant to the proceedings referred to in the Charter ‘shall be binding and final upon the two parties after the issuance of an order for enforcement by the

¹¹³ Article 30, the GCAC Arbitral Rules of Procedure.

¹¹⁴ Such conflict was seen in *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1.

¹¹⁵ Schreuer, at 745-46. In his discussion of the Washington Convention, Schreuer argues that provisional measures are aimed at issues such as “securing discovery of evidence, preserving the parties’ rights, preventing self-help, safeguarding the awards’ eventual implementation, and generally keeping the peace.”

competent judicial authority in the states that are parties to this Charter.’ This can be regarded as a serious disadvantage of the GCAC that provides an award is final and binding after an order for enforcement is made by the relevant court. This is contrary to the accepted international practice according to which an award is final and binding as soon as it is issued by the tribunal and various stages of appeal, if there is any, are passed. Probably, by Article 36(1) of the GCAC Arbitral Rules of Procedure, the drafters of the Rules intended to remove the above disadvantage. The Article provides: ‘An award passed by the Tribunal pursuant to these Rules shall be binding and final.’ Correction and interpretation of an award are also authorised.¹¹⁶

The GCAC Rules allows the annulment of the award.¹¹⁷ However, this is different from the annulment provided for under the ICSID, where the annulment is more of an internal mechanism, safeguarding the integrity of the arbitration process. Hence, an *ad hoc* Committee formed by the ICSID Chairman does the job, while, under the GCAC, the competent judicial authority may annul the award. Therefore, it is more of a judicial review, for GCAC arbitration. The court may annul the award, when considering its enforcement.¹¹⁸ Compared to the ICSID, a disadvantage of the GCAC is that there is no timetable for submitting and considering an annulment request, nor is a partial annulment of the award expressly allowed. Interestingly, all these issues were addressed in the GCAC Rules, before the amendment, with minor differences with the Washington Convention. Neither the original nor the amended Rules do provide for a stay of enforcement of an award whose annulment is requested. Also, there is no indication of how to constitute a new tribunal for

¹¹⁶ Articles 37 and 38, the GCAC Arbitral Rules of Procedure.

¹¹⁷ Articles 36(2), the GCAC Arbitral Rules of Procedure.

¹¹⁸ Articles 36(2), the GCAC Arbitral Rules of Procedure.

considering the dispute. These can be considered as other deficiencies of the GCAC Rules of Arbitral Procedure.

In order to prevent dilatory tactics by the losing party, the grounds for requesting the annulment of the award are very limited. Under Article 36(2) of the GCAC Arbitral Rules of Procedure, either party may request the relevant court to annul the award for one of the following reasons:

- (A) If it is passed in the absence of an Arbitration Agreement or in pursuance of a null Agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the Agreement.
- (B) If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed by some of them without being authorized to hand down a ruling in the absence of others, or if it is passed pursuant to an Arbitration Agreement in which the issue of the dispute is not specified, or if it is passed by a person who is not legally qualified to issue such award.

Reasons specified by the GCAC for annulling an award are mostly the same as those stated under the ICSID, though not very neatly categorised. The ICSID's stress is on tribunal's violations, while the GCAC Rules emphasises breaches relating to arbitration agreements. The reason for such a shift of focus may be that under the GCAC rules, annulment and enforcement are dealt with simultaneously, so there has been a tendency to insert into the provision some grounds for non-enforcement of awards, such as an invalid arbitration agreement. The ICSID drafters, however, did not have this problem. A ground for annulling an award that is mentioned by the Washington Convention, but not by the GCAC, is when the face of the award does not contain the reasons on which it is based. Lack of such a ground, under the GCAC, does not seem to create any serious difficulty.

On the other hand, not only do the GCAC rules preclude any action for hearing the dispute before any court, including an appeal against the award to the judicial authorities, but also the parties to a dispute waive their right to challenge the award

in the court.¹¹⁹ In other words, the GCAC Charter constitutes an "exclusion agreement". This is again another distinctive feature of the GCAC. The question may arise as to whether the parties can agree on derogating from this provision. Moreover, there is no mechanism for lodging an appeal against an award before the Centre. Lack of such an institutional mechanism within the GCAC has been criticised by some commentators who believe such a mechanism insures consistency with legal principles and precedent.¹²⁰ The criticism is not plausible, since the possibility of a review within an arbitration institution delays arbitration process unduly. Nevertheless, as seen above, the GCAC Arbitral Rules of Procedure allows the losing party to request the annulment of the award, when the judicial authority is considering the issuance of an order for the enforcement of the award. This opens the way for a kind of judicial review. It is, however, very unusual that the annulment, rather than non-enforcement, of an award is possible, when its enforcement is considered by the court. As we have already seen, annulment of an award puts its enforcement in other countries at risk, while non-enforcement does not have such an impact.

Enforcement

With regard to enforcement, an award made by the Centre is enforceable in all GCC states. Under Article 15 of the GCAC Charter, an award made through CGAC proceedings is "binding" and "final" 'after the issuance of an order for enforcement by the competent judicial authority in the states that are parties to this Charter.' As said before, it was probably because of the oddity of tying finality of an award with its enforcement, in the Charter, that the GCAC Arbitral Rules of Procedure treats the

¹¹⁹ Article 14 of the GCA C Charter, and Article 2(1), the GCA C Arbitral Rules of Procedure.

¹²⁰ Liz Hall, "Arbitration in Insurance and Reinsurance: [A Report on the Two-day Seminar Held in Bahrain on March 3rd and 4th, 1998]", *GCC Commercial Arbitration Centre Bulletin*, issue 8 (April 1998), at 8.

finality of the award and its enforcement as different issues.¹²¹ Article 36(1) of the GCAC Rules provides that an award ‘shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.’ This means that an award upon which an order for enforcement is issued in any GCC state, is enforceable in other GCC states, without the need for another court order in those states.

Under Article 36(2) of the Rules, the court orders the enforcement of an award, unless its annulment is requested by one of the litigants, as described above. If the reasons for annulling the award are established, ‘the relevant judicial authority shall verify the validity of the annulment petition and shall pass a ruling for non-enforcement of the arbitration award.’¹²² Again, it is one of the oddities of the GCAC system that it considers non-enforcement and annulment of an award simultaneously. One and the same court is authorised to decide upon the enforceability and annulment of the award; and there are only one set of reasons for both types of decision. Under the GCAC, non-enforcement of awards amounts to its annulment, while international arbitration practice distinguishes between the two issues. Most credited international arbitration institutions, such as the ICSID, deal with the two issues separately. Probably, it would have been better, if, following the ICSID, the GCAC itself considered an annulment request, while enforcement applications were dealt with by the court.

The tying of enforcement and annulment, Under the GCAC Rules is a reflection of tying finality and enforcement of the award, under the GCAC Charter. While the drafters of the Rules by adopting Article 36(1) have loosened the latter of tie, they

¹²¹ Article 36(1), the GCAC Arbitral Rules of Procedure.

¹²² Article 36, the GCAC Arbitral Rules of Procedure.

have reinforced it in another way, by adopting Article 36(2), linking the enforcement and annulment.

What distinguishes the GCAC from other international or regional arbitration centres is that it restricts the reasons for non-enforcement, as well as annulment, of an award to mainly the following grounds: absence of a proper arbitration agreement, the tribunal's going beyond its jurisdiction, as specified in the arbitration agreement, improper appointment of the arbitrators, and inappropriate decision making process by the arbitrators. The GCAC Arbitral Rules of Procedure, unlike the New York Convention, does not allow the courts to consider issues such as public policy or due process as a ground for refusing enforcement of an award issued by the Centre. Hence, it can be concluded that the GCAC Arbitral Rules of Procedure is more than the New York Convention facilitative of enforcement of arbitral awards. Nevertheless, the GCAC Rules significantly reduces the power of judicial authorities to prevent any substantial violation of the principles of justice and fairness as well as the requirements of public policy, respected nationally and internationally. This is particularly so, if we note that under the Centre's rules, the parties also waive their right to challenge the award in the court. Such a considerable restriction of the supervisory role of the courts might be regarded as a drawback of the Centre's rules. Nevertheless, such an approach might have been taken on the basis of the presumption that the GCC states are confident that due process and public policy requirements are observed in the decision making process of the Centre.

Article 36(2) of the GCAC Arbitral Rules may be interpreted so as the court *must* decline enforcement of the award, where any of the grounds for refusing enforcement of an award exists. If this is so, this will be another difference between

the GCC Arbitration Centre Rules and the New York Convention, under which, it is at the discretion of the courts to refuse enforcement, should such a ground exist. A worrying issue is, moreover, that under Article 36(2)(b) of the GCAC Arbitral Rules of Procedure, an award is refused enforcement, 'if it is passed pursuant to an Arbitration Agreement in which the issue of the dispute is not specified'. The question might arise as to whether this provision is not a return to the old arbitration practice in some Arab countries according to which unless the subject-matter of a dispute is specified, it cannot be referred to arbitration. We have already seen that such a requirement practically amounts to a rejection of the validity of arbitration clauses. If this is so, there is a tension in the GCAC Arbitral Rules of Procedure between Articles 2 and 36(2)(b).

Another shortcoming of the GCAC arbitration is that, unlike well recognised conventions such as the New York Convention and the Washington Convention, there is no mention of recognition of arbitral awards in its rules. When no liability exists in an award, recognition, rather than enforcement, is sought. The same is with declaratory awards. As seen in the first chapter, a party, mostly a winning defendant, may seek recognition of an award, in order to block any new proceeding, whether litigation or arbitration, based on similar claims. On the other hand, recognition of an award denying the jurisdiction of the GCC Arbitration Centre allows embarking on other types of action. When a request for the execution of an award is postponed, due to the losing party's lack of sufficient property, the winning party may apply for the recognition of the award. This makes its enforcement quicker, when sufficient property is available. It seems that not only domestic laws of most Arab states but also their multilateral treaties do not make a distinction between recognition and enforcement. It may be because the Arab League Convention on the Enforcement of

Foreign Judgments and Awards of 1952, which was the first of such inter-Arab treaties on arbitration and has served as a model for the others, was only concerned with enforcement.¹²³

5 Conclusion

Oman is a party to several international and regional arrangement for facilitating arbitration and particularly enforcement of arbitration awards. At the international level, the New York Convention is the most important convention to which Oman has joined. Accession to the Convention has been a turning point in the area of international arbitration in Oman. Joining the Washington Convention has also opened the important area of investment to arbitration, and provided for enforcement of awards rendered by the ICSID. Adoption of these conventions has brought confidence to foreign businesses and investors wishing to recourse to arbitration, and has, in particular, paved the way for attracting a greater flow of foreign investment.

At the regional level, the most important initiative, taken by Oman, among others, is the establishment of the GCC Arbitration Centre. Given the increasing extent of relationship between the GCC states in the areas of trade, finance and investment, the establishment of the Centre was a necessity. The most important feature of the GCC Arbitration Centre is that its awards can be enforced in all GCC states. Moreover, with regard to the awards made in the Centre, the GCAC Charter more than other international and regional conventions is facilitative of their enforcement. Modifications made to the GCAC Arbitral Rules of procedure have rendered GCAC arbitration easier and speedier.¹²⁴ Nevertheless, the GCAC rules

¹²³ Saleh, “the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East”, at 20.

¹²⁴ For instance, before the amendment, an application for arbitration must have contained, among others, ‘a copy of the Arbitration Agreement and all the documents relating to the dispute’ (Article

some other drawbacks that must be dealt with, if a reference to arbitration is to be encouraged within the GCC framework.

Alongside multilateral attempts at creating regional bodies for arbitration, various GCC states have unilaterally facilitated enforcement of arbitral awards made in other GCC countries. This has been part of a trend towards favourable treatment for the enforcement in one GCC country of judgments made in another. For instance, Bahraini courts have usually been tolerant and flexible towards application for orders for enforcement of judgments rendered in other GCC States.¹²⁵ Oman is expected to follow the same road.

9(5) of the GCAC Arbitral Rules of Procedure). The new phrase lacks the word *all*, making it easier to request a reference to arbitration.

¹²⁵ Jalila Sayed Ahmed, "Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain", *Arab Law Quarterly*, vol 14, no. 2 (May 1999), at 176.

Conclusion

In recent years, Oman has taken long steps towards facilitating enforcement of arbitral awards, whether domestic or foreign. This has been achieved through adoption of new legislations as well as accession to international and regional conventions. In 1995, Oman acceded to the Washington Convention of 1965, which provides for settling investment disputes by recourse to arbitration. In 1999, it joined the New York Convention of 1958, as the single most important convention on the recognition and enforcement of foreign awards. It has been a breakthrough that erased the uncertainties and suspicions that marred an interest to resort to arbitration with Omani parties. At the regional level, Oman has signed, though not yet ratified, the Riyadh Convention of 1983, which provides for the enforcement of arbitration awards in the states of the Arab League. Within the framework of the GCC, Oman adopted the Charter of the GCC Commercial Arbitration Centre, co-founding the Centre, in 1993. The awards made in the Centre are enforceable in all GCC states. Given the ever-expanding relations among GCC countries, the establishment of GCC Arbitration Centre whose awards enjoy a special status in these countries, is of paramount importance.

Oman should, however, accelerate the process of considering accession to, and ratification of, international and regional conventions on enforcement of international arbitration awards in order of their priority for its commercial relationships with the outside world. At the regional level, given that it is one of the objectives of the GCC to unify the regulations of the member states,¹ unification or approximation of arbitration laws of these countries will facilitate arbitration as a method of dispute resolution in the commercial relations among these states as well as between them and the outside world. It will also have a significant impact on the volume of regional and international trade within the GCC countries. At the international level, it has been said the '[c]onvergence of legal systems or harmonization of commercial law will, in the long run, stabilize and strengthen national economies and will create a healthy competitive environment.'² The Omani legal system, along with that of other GCC states, cannot afford to be indifferent in such a process.

As to arbitration legislation, alongside the modernisation of the Omani legal system, its law of arbitration has also been significantly improved since 1970. While arbitration practice used to be regulated according to the Ibadi version of the *Shari'a*, since then there has been a trend towards codification and institutionalisation of the practice. It can be said that the legal structure required for modern arbitration is now in place in the country. The *Shari'a*, and the Ibadi doctrine, have not been major impediments on the way towards modernisation of arbitration, save for foreign arbitration. Nevertheless, the existing Omani law of arbitration law has departed, to a large extent, from *Shari'a* law. It can be said that the Omani law of arbitration,

¹ Article 4, the Charter of the Gulf Co-operation Council of 1981.

² Loukas A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations", *International Lawyer*, vol. 34, no. 3 (2000), at 1068.

though being formed against the backdrop of *Shari'a* law, is primarily influenced by modern internationally accepted patterns of arbitration, such as the Model Law. Such influence is mainly conveyed through Arab states' legal systems, particularly that of Egypt. This is an advantage of the type of legal transplant experienced with regard to the Omani law of arbitration that it has been made possible through the Egyptian legal system, whose background in *Shari'a* is very much similar to that of Oman. Egypt has been the pioneers of Arab states to adopt modern laws.³ The long history of its legal system, the magnitude of the cases brought before its courts, and the insightfulness of many of its legal writers have made it into a relatively reliable authority for the adoption new laws. As touched upon before, many other pieces of legislation in Oman have been inspired by the Egyptian model. Hence, the adoption of an arbitration law identical to the Egyptian arbitration law guarantees some degrees of compatibility with the rest of the legal body in Oman.

The modernisation of the Omani arbitration law can be better understood within the wider context of the Gulf region, where all GCC states, in recent decades, have adopted new arbitration laws conforming to international standards, and established modern arbitration centres. They have intended to enhance their domestic arbitration practice, as demanded by their business communities, and to attract international arbitration. A common enterprise, in this regard, has been the establishment of the GCC Arbitration Centre.

New Omani law of arbitration is an achievement realised in a relatively short period of time. Nevertheless, there are some difficulties and lacunae that need to be dealt with. The Omani legal system provides for a comprehensive set of rules

³ Egypt was the first Arab country to establish a modern legal system and to codify its law, more than a hundred years ago. It was a civil law system inspired by French and Italian models (Ahmed S. El-Kosheri, "Egypt": Supplement 11, in J. Paulsson, *International Handbook on Commercial Arbitration*, (The Hague: Kluwer, 1990)).

governing commercial arbitration. Most of these rules are provided for in a statute, separate from other sets of laws, that is, Sultani Decree 47/1997 on the Law of Arbitration in Civil and Commercial Disputes, while the rest are integrated in other statutes such as Sultani Decree 29/2002 on the Law of Procedures for Civil and Commercial Disputes. The Omani legislator has intended to encourage and facilitate arbitration. Under the law, arbitration is a regulated and reliable method of dispute resolution, with binding and enforceable outcomes.

New Omani law of arbitration allows both institutional and *ad hoc* types of arbitration. There are several bodies engaged in international arbitration in Oman, such as Oman's Chamber of Commerce and Industry. The law is, however, particularly in favour of *ad hoc* arbitration, where the parties can freely choose arbitrators as well as procedural and substantive rules of arbitration. This is primarily marked by the replacement of the CSCD system, which provided for a compulsory quasi-arbitral method of dispute resolution, by the BSCD, whose judicial and arbitral functions were totally distinct from each other. The substitution of the Commercial Court for the BSCD completed this process.

The process of the development of the Omani law of arbitration indicates a move towards strengthening the contractual features of arbitration, at the expense of its judicial features. Such a move can bolster the confidence of foreign businesses. The extent of court intervention in the arbitration process is now limited. Nevertheless, safeguarding arrangements are stipulated to guarantee a healthy arbitration process and, more importantly, compliance with its outcome. For instance, an arbitration tribunal decides on its own jurisdiction; and only after the issuance of the award, the competence of the tribunal can be challenged at a court. On the other hand, dilatory

tactics such as a challenge to the appointment of an arbitrator cannot obstruct the proceedings, unless either the tribunal or the court grants such a challenge.

The move towards emphasise on the contractual feature of arbitration has, however, been undermined by giving too much power to the court, in case of disagreement between the parties. Under Article 53(1)(4) of Decree 47/97, the court has the power to set aside an award made under the Decree, if the applicable law has not been applied. This may be interpreted as allowing the substantive review of awards, which is contrary to what is accepted in many advanced legal systems. Moreover, specifying too many formal requirements for an arbitral agreement or award, in order to be valid, might frighten foreign parties from resort to arbitration in Oman.

An important issue, in this regard, is the power of the court to set aside an award, which is to secure a just and rightful solution for the dispute. Internationally, however, the tendency is towards restricting the power, in order to prevent its abuse by a reluctant party. Omani law, too, should move in this direction, without compromising the rights of the parties to have an effective judicial control. This can be achieved by limiting the grounds for setting aside an award. Particularly, the ground of failure to apply the applicable law to the dispute⁴ should be removed, as it unnecessarily opens the way for the substantive review of awards. Similarly, the provision allowing the court to set aside an award, if there is a defect in the arbitration award or in the proceedings to the extent that it affects the terms of the award,⁵ should be removed, as it does not provide a clear definition of such defects. Moreover, Omani law should allow the parties to agree on a waiver of their right to

⁴ Article 53(1)(4), Decree 47/97.

⁵ Article 53(1)(7), Decree 47/97.

bring before the court a request for vacating the award, what is not permitted under the current law.⁶

Unlike the previous Omani law, the new Omani law of arbitration recognises international commercial arbitration, and somehow treats it differently from domestic arbitration, as different courts have jurisdiction to deal with the issues relating to the two types of arbitration. Nevertheless, the distinction between domestic and international arbitration is not sufficiently taken into consideration, as international arbitration should be subject to less restrictions and scrutiny, and be provided with a more favourable treatment. The grounds for vacating an international award can be fewer than those leading to setting aside a domestic award. For instance, a clear distinction should be made between domestic public policy, which is applied to domestic awards, and international public policy, which in certain circumstances is applied to international awards issued under Omani law. More importantly, the new Omani law of arbitration recognises recourse to foreign arbitration. It also contains a definition of foreign arbitral awards, and makes a distinction between domestic and foreign awards. Under the previous law, it was assumed that foreign awards must be treated as if they were domestic ones, that is, they were subject to the legal procedure and scrutiny applicable to domestic awards and, more importantly, subject to judicial review. This is no longer the case. However, again, lack of a definition of international public policy applicable to foreign awards is a deficiency of Omani law that needs to be addressed.

The old Omani law of arbitration addressed the issue of enforcement very briefly; and the Omani court was assumed to have the power to examine meticulously an award, when considering its enforcement. Since there was no rule

⁶ Art 54(1), Decree 47/97.

on the enforcement of foreign awards, they, too, were assumed to be subject to retrial and to the similar extent of legal scrutiny. There was, however, at least one case indicating that the Omani legal system tended to enforce foreign awards.⁷

By enacting Decree 47/97, the Omani arbitration law has shifted towards a pro-enforcement position, to the extent that it can also be said that the law is generally more than the Model Law facilitative of enforcement of arbitral awards. It is relatively straightforward to apply for the enforcement of awards made under Decree 47/97, whether in Oman or outside it. Since it has already been possible to challenge such awards at the Omani court by drawing upon the relatively extensive grounds for vacating them, the grounds for refusing enforcement of an award are restricted. Awards can be denied enforcement, only if they are: (a) against a decision already made by Omani courts, (b) contrary to the public order in Oman, or (c) if the requirements of due process have not been observed in making them. A feature of Decree 47/97 is that while a request for enforcing an award can only be made after the expiry of the ninety day period for challenging the award,⁸ the suspension of enforcing the award is also permitted, if the award is being challenged in the court.⁹

Making a distinction between domestic and foreign awards, Decree 47/97 even more facilitates the enforcement of foreign and international awards. Also, Decree 29/2002 allows enforcement of foreign arbitral awards, without requiring a review of their merit. While Omani law recognises the effect of multilateral conventions or bilateral treaties,¹⁰ if they are applicable to a foreign award, under the New York Convention, the most favourable law or convention can be applied, when enforcing a

⁷ Sigvard Jarvin, "Enforcement of an Arbitration Award in Oman", *Journal of International Arbitration*, vol. 2, no. 4 (1985), at 86.

⁸ Article 58(1), Decree 47/97.

⁹ Article 57, Decree 47/97.

¹⁰ Article 1, Decree 47/97 and Article 355, Decree 29/2002.

foreign award.¹¹ Hence, it is possible to go for the “most favourable regime” of enforcement available within the Omani legal system and treaties joined by Oman.

As a matter of fact, in many aspects, the current Omani law is more than the New York Convention facilitative of enforcement of foreign and international awards. In certain aspects, however, the Omani law lags behinds the Convention and universally accepted standards. For instance, while the grounds expressed in Article V of the Convention *may* result in the non-enforcement of an award, Omani law obliges the court to refuse enforcement of an award, if such grounds exist. The latter also mentions non-compliance with the rules of morality as a ground for the refusal of enforcement of an award, whereas no such a ground is recognised under the Convention. Such a requirement may lead to broad or conflicting interpretations, undermining the required uniformity.

In general, it is suggested that Omani municipal law should be amended in such a way that the court has a wider flexibility in dealing with international and foreign awards. For instance, such awards should be enforced by merely fulfilling basic procedural conditions, such as appearance of the parties at the court and their having the opportunity to submit their defence or claim, as well as non-violation of international public policy by the award.¹² Such amendments will respond to the existing worry that, when enforcement of foreign awards is being considered, ‘procedural technicalities can be exploited in the [GCC] Courts’,¹³ including Omani ones. The Omani legislation on enforcement or non-enforcement of international and foreign awards should follow internationally accepted standards, rather than merely

¹¹ Article VII(1), the New York Convention.

¹² See, for instance, Habib Al Mulla, “International Commercial Arbitration”, *DIAC Journal*, vol. 1, no. 1 (March 2004), at 33.

¹³ Nigel Truscott, “The Character of Oil and Gas Arbitrations”, *DIAC Journal*, vol. 1, no. 1 (March 2004), at 14.

being based on local ones, while Omani's national interests and international reputation are taken into account. Nevertheless, a distinction between foreign awards and international awards made under Omani law is in point. The latter awards are subject to judicial review by Omani courts, but the former ones are not. Enforcement of the international awards may only require a brief control, whereas more control, though still procedural, may be necessary for enforcement of foreign awards, similar to those provided for under Article V of the New York Convention. Foreign awards could be made any where in the world, and the rights of the parties involved must be safeguarded.

The Omani law of arbitration should be amended with a view to removing the difficulties mentioned above. An important problem with Omani law is that, regarding enforcement, it treats foreign arbitral awards and foreign court decisions similarly.¹⁴ Hence, some features of foreign sentences, such as enforceability, are required from foreign awards. The condition of enforceability of an award at the seat of arbitration may be interpreted as the need for double enforcement of an award, what the New York Convention is deliberately intended to avoid. Moreover, because of not making a distinction between foreign awards and court decisions, issues particular to foreign awards are not properly addressed in Omani law. Consequently, facilities reserved for enforcing foreign awards in most advanced legal systems are not provided for under Omani law. Uniform treatment of foreign arbitral awards and court judgments, with regard to enforcement, should give way to a regime of enforcement specific to arbitral awards.

Omani arbitration legislation should allow a wider range of disputes to be capable of a reference to arbitration than it is permitted now. Limitation of

¹⁴ Article 353, Decree 29/2002.

arbitration to those disputes that can be subject to compromise is no longer in tune with new developments in arbitration globally. More and more areas that have traditionally been considered as non-arbitrable are now gradually opened to arbitration. Certain stock market,¹⁵ bankruptcy,¹⁶ anti-trust and public law¹⁷ as well as patent and intellectual property law¹⁸ disputes have been allowed settlement through arbitration in the jurisprudence of some Western countries.

It is important that any attempt at improving the arbitration practice in Oman is made through enactment, and not left to the local or international custom, to the *Shari'a*, of which several versions exist, or even to contractual agreements between the parties. Without the infrastructure of the statute, any trend in misapplication or misinterpretation of the local or international custom or the *Shari'a* may run counter to the intention of promoting arbitration and particularly facilitating enforcement of arbitral awards. Alongside the adoption of modern legislation in the area of arbitration, an attempt should be made in legal thinking circles to develop Islamic basic principles into a more detailed set of arbitration rules. Such an attempt guarantees continuity of the legal tradition and practice in Oman, and the consistency of the existing legislation with its background in the *Shari'a*. This is particularly important in our era, when there is a tendency throughout the Muslim world for the reassertion of the Islamic jurisprudence. Development of Islamic principles also enriches and complements modern legal thinking in Oman, as well as other Muslim and Arab countries. In general, there is nothing inherent in the *Shari'a* that is fundamentally contrary to the modern arbitration practice. As seen in this thesis,

¹⁵ *Fritz Scherk v. Alberto-Culver Co.*, 417 US, 1974.

¹⁶ *Sonatrach v. Distrigas*, Civil Action no. 86-2014-Y (D.C.D.M. March 17, 1987).

¹⁷ *Mitsubishi Motors Corporation v. Solor Chrysler-Plymouth Inc. (1985)*, *Columbia Journal of Transnational Law*, vol. 23 (1985), at 655-678.

¹⁸ See Michael F. Hoellering, "Arbitration of Patent Disputes", in *AAA General Counsel's Annual Reports Arbitration & the Law*, 1987-8, at 166.

issues such as the incapacity of non-Muslims to function as arbitrators in disputes in which a party is Muslim is far from being accepted by all Islamic jurists. There is no reason that we cannot interpret certain *Shari'a* rules in such a way that they are congruent with the requirements of international arbitration. More importantly, *Shari'a* law provides a rich source of inspiration specially regarding procedural rules of arbitration, requiring strict equal treatment of the disputants, their right to be heard, to submit claims, defences and evidence, and adherence to the fundamental principle of substantive truth, which should prevail over judicial technicalities.¹⁹

Adoption of various legislations regulating arbitration, including international arbitration, setting up several bodies engaged in arbitration, whether domestic or international, and accession to international and regional conventions and treaties should be accomplished while an attempt is made at co-ordination between them. Lack of such co-ordination leads to confusion, and undermines the very rationale of resort to arbitration, which is simplicity and saving of time. Careful regional or international convergence and legal transplants in the area of international commercial arbitration may be useful, if they are compatible with the rest of legal body in Oman.²⁰

¹⁹ Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law*, (London: Graham & Trotman, 1984), at 439.

²⁰ Mistelis, at 1069.

Appendix A: The Procedure for Executing the Enforcement Order for an Award

Chapters One to Three of Part One of Book Two of Sultani Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes govern the procedure for the execution of enforcement orders, after a decision is made to enforce an award by the Omani court. Though being primarily for domestic judgements and awards, this procedure is also applicable to foreign ones, subject to the condition of reciprocity. Discussing the procedure for enforcement of arbitral awards, under Omani law, is of paramount importance, since international conventions, including the New York Convention, provides that foreign awards must be recognised and enforced according to the rules of procedure of the country where it is relied on.¹ In the following, the procedure for executing enforcement orders in Oman is considered. This procedure is mainly about more practical issues of enforcement, after an award is granted leave to enforce by an Omani competent court.

Request for Enforcement

Article 340 of Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes provides that enforcement of court sentences and orders must be requested by applying to the court that has made the sentence or the court of the area where it will be enforced, according to Article 336. With regard to arbitral awards, they will be enforced by requesting the court of the area where it will be enforced, that is, the court within the precinct of which the property of the debtor is located, under Article 336 of this law. Article 340 of Decree 29/2002 also provides

¹ Article III, the New York Convention.

that the enforceable copy of the sentence, order or award must be enclosed to the request for enforcement. The request must contain the full names (three names as well as the surname of both parties, as it is customary in Oman), occupations, origins and addresses of both parties to the dispute, full details of the properties sought, their locations and the name of the person who is in charge of the properties, if there is such a person. If the winning party does not know about the losing party's property, he can ask the enforcement judge to communicate with relevant state departments about such properties. These departments must provide the judge with the concerned information. As it is clear, the Omani legislator has made a request for executing enforcement orders of arbitral awards quite simple.

Enforcement Courts and Judges

Under Article 334 of the 29/2002 Decree, enforcement will be carried out under the supervision of a judge selected from the judges of each court of first instance, assisted by sufficient number of bailiffs. The judge must be informed of the procedure of enforcement as decided by the court. Article 12 of Sultani Decree 90/99 on the Judicial System Law (Qanoon al-Solta al-Qadhaiyya) provides that enforcement judges of courts of first instance are appointed by judges of courts of first instance and those of appeal courts in each district in their general meetings, for a fixed period of time.

Disputes over the subject-matter or timing of execution of an enforcement order, whatever the value involved in the dispute, can only be settled by the enforcement judge, as required by Article 335 of Decree 29/2002. The judge settles all such disputes as urgent issues, in his capacity as the judge of summary proceedings, who has more power to deal with urgent issues. Such a mandate expedites the process of enforcement.

Under Article 336 of the Decree, the enforcement regarding the moveable and unmovable property of a debtor can only be carried out under the supervision of the enforcement court in whose jurisdiction the property is located. In order to attach the debtor's property that is held by a third party, enforcement must be carried out by the court in whose jurisdiction the third party is domiciled. If the debtor's properties are located in several areas, the court of one of these areas that the creditor chooses has the authority to carry out enforcement.

Article 337 of Decree 20002/29 governs cases where the enforcement judge appoints another enforcement judge for part of enforcement procedure. It provides that the enforcement judge in the area chosen by the claimant requests the local court where a specific property is located to act on his behalf. The same may also happen when executing an enforcement order is conditional on a time proceeding or announcement that must be carried out in another area. If several courts try to enforce sentences or awards with regard to a specific property, the court that has made the first move has the authority to do so, and to distribute the sale proceeds among creditors.

If a court requests another court to enforce an award on its behalf, it shall send the relevant legal documents to the second court, which will decide on the request, solve the problems of enforcement, enforces the award, transfer any property or sale proceeds that it receives, and send a report to the first court. If the second court finds some legal reason not to carry out the enforcement or could not execute the enforcement for any other reason, it must notify the first court.²

Under Article 339 of Decree 29/2002, a decision made by the enforcement judge about the merit of a dispute regarding enforcement can be appealed to a panel of

² Article 338, Decree 29/2002.

three judges of the court of first instance, if the worth of the subject is more than 1000 Omani Riyals, but does not exceed 3000 Riyals. Appeal in the cases that worth more than 3000 Riyals must be made to the Court of Appeal. Appeal against decisions on urgent issues can also be made to a panel of three judges of the court of first instance. An appeal must be made within seven days of making a decision by the enforcement judge. This period begins from the date of judgment, if it is announced in the presence of the respondent, or the date that he has been notified of the judgment, if he was absent.

Under Article 342, enforcement is carried out by court bailiffs, who are required to execute the award based on the request of the winning party, when he provides them with enforcement documents. If the bailiffs refuse to execute the award, the winning party can refer it to the enforcement judge. If the bailiffs face a quarrel or assault that causes a delay in enforcement, they can take provisional measures, and ask for police assistance.

Enforcement by Force

Article 343 of Decree 29/2002 provides that execution by force is not permitted, unless there is an enforcement document. In such a case, there must be a matured entitlement that is specific and exists. Its amount must be known, and payable at the time of execution. Enforcement documents are: a) sentences and orders, b) approved documents and mediation awards approved by the court, c) other papers that are enforceable by law. Although not explicitly mentioned, arbitration awards are among the third category of enforcement documents. Enforcement is not permitted, unless the copy of enforcement document contains this phrase: "All the authorities and departments that have enforcement power must use their power of enforcement, when they are asked to, and the Royal Omani Police must assist to proceed with the

enforcement even by force, if required.” The law may exempt certain enforcement documents from containing this phrase.

Under Article 344, in urgent cases or in circumstances where any delay is detrimental, the court that has issued the sentence may order to enforce the sentence in the form of a first draft, even before official announcement, and even without the enforcement phrase mentioned above. In such cases, the draft must be given to court bailiffs, who must return the draft after executing it. Again, although the Article does not say anything about arbitral awards, it is applicable to them too.

Self-Enforcement

Compulsory self-execution of judgments and awards is not allowed, so long as they can be appealed against, unless self-execution is provided for by the law or in the judgment. If, for legal reasons, self-execution is not carried out, provisional measures may be taken, as it is appropriate.³ Under Article 346 of Decree 29/2002, self-enforcement is compulsory in two cases: first, judgments made through summary proceedings, and, second, orders issued on statements of claim. Compulsory self-enforcement cannot be delayed upon financial guarantee, unless authorised by the judgment or order.

Article 347 provides that, upon the request of the creditor, the court may make a judgment for compulsory self-enforcement, with or without the authorisation of financial guarantee for delay, in the certain circumstances. A judgment for compulsory self-enforcement can be appealed against by filing a suit to the Court of Appeal, within three days. Appeal against compulsory self-enforcement may also be requested during the hearing for the appeal against the subject-matter of the dispute.

³ Article 345, Decree 29/2002.

In such a case, a ruling, separate from the one made on the subject-matter, will be issued about compulsory self-enforcement.⁴

Under Article 349 of Decree 29/2002, a court before which an appeal against self-enforcement is lodged may, upon the request of the concerned party, suspend self-enforcement, if enforcement can result in enormous damage, and if it is most likely that the request for appeal succeeds. When the court suspends self-enforcement, it may order submission of a guarantee, or any other measure that it deems appropriate for safeguarding the debtor's entitlements.

Article 350 provides that if submission of a guarantee for enforcement is authorised by the court, the losing party must either introduce a guarantor, or deposit with the court's treasury a sufficient amount of financial guarantee, or to hand over the subject to a trustee. Under Article 351, the party that is required to pay the guarantee must announce his decision through enforcement bailiffs either in enforcement document or in a separate document or in the order for payment. Such an announcement must contain the address of the losing party's home or business place, or an address related to him, in Oman. Such address is necessary for notifying him of any potential dispute over the guarantee. Within three days of the announcement, the winning party may file a suit before the enforcement judge about the incapability of the guarantor, the untrustworthiness of the trustee, or the insufficiency of the deposit. The ruling made on this complaint is deemed as final. In case that the suit is not filed, or does not succeed, the enforcement judge must order the guarantor to undertake the payment, or the trustee to accept receivership. Minutes of the undertaking of the guarantor or of the trustee constitute an

⁴ Article 348, Decree 29/2002.

enforcement document for the obligations of the guarantor's or the trustee's undertaking.

Appendix B: *Rotana Hotel Management Corporation Limited (Channel Islands) v. Gulf Hotels (Oman) Limited (SAGG)*

In *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, the dispute was arisen in the context of a management agreement signed in Muscat on 14/6/1993 between Al-Sawadi Holiday Resort Company, incorporated in Oman, and Rotana Hotel Management Company, under incorporation in Abu Dhabi, for the management of a Hotel in Oman. The contract may be terminated by either party in case of gross negligence or wilful misconduct by the other party, sixty days after a notice of termination, if the breach is not cured during this period, or in case of bankruptcy or equivalent procedure by the other party. The agreement contained an arbitration clause, that is, Article 14.06, according to which the parties agree to refer all disputes arising in connection with their agreement to local arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce of 1988. The number of arbitrators was decided to be three, each party appointing one, within 30 days, and the third being appointed according to the ICC Rules of Conciliation and Arbitration. Article 14.13 of the contract provided that ‘This Agreement and the rights and obligations of the parties hereto shall be governed by and construed and given effect to in all respects in accordance with the local law’.¹ The award was regarded as final and enforceable by any competent court. It was also agreed that if any of the parties failed to proceed with arbitration, the dispute would be referred to the BSCD in Muscat.

¹ In this case, the arbitrators not only applied the relevant provisions of Omani law, but also when there was no provision relating to the dispute, they referred to the jurisprudence of the Omani Court. For instance, the arbitration tribunal referred to Omani Court decisions on the termination or rescission of contracts.

Al-Sawadi Holiday Resort Company merged with Gulf Hotels (Oman) on 25/4/1996. Thereby, the latter succeeded the former in its Management Contract. The Gulf Hotel Company, on 15/6/1997, sent a ninety days termination notice to the Rotana Hotel Management, because of its unsatisfactory performance. The latter's services ended on 15/9/1997, ninety nine days before the expiry of the contract. Rotana Hotel Management took the dispute to the ICC Court of Arbitration, on 4/11/1997 through request no. 9740 and then on 14/6/1999 through request no. 1051. English was chosen as the language of arbitration, while the place of arbitration was Muscat, the Capital city of Oman, and the arbitrators met for deliberation in Cairo.

The claimant, Rotana Hotel Management, claimed the termination of the contract by the respondent was unlawful. This was because its management performance was satisfactory; and, moreover, unsatisfactory performance could not be a ground for the termination of services, under the contract. Hence, the claimant requested to be compensated for the cost incurred, its loss of profits and the moral damage to its reputation. Objecting to the claimant's due representation, the respondent argued that the former was not a party to the contract, so he did not have the right to initiate arbitration. The signatory to the contract and its arbitration clause was Rotana Hotel Management Company incorporated in Abu Dhabi, while the request for arbitration was filed by Rotana Hotel Management Corporation incorporated in Guernsey. The respondent also argued that the manager, despite several warnings, had breached the contract in many respects, failed to accomplish its duties, and consequently the losses of the hotel increased. Since the grounds for termination was not restricted to gross negligence or wilful misconduct, but extended to all types of breach or non-performance, the termination of the contract was valid and lawful, without

compensation and with the right to reimbursement of the amount paid to the manager under the contract.²

The tribunal issued its award in Muscat, on 17/12/2000. The tribunal rejected the respondent's plea of inadmissibility of the dispute for lack of authority by the signatories who made the request for arbitration,³ and ruled that the claimant has a valid *locus standi* in the arbitration. The tribunal also held that it has jurisdiction over the dispute.⁴ It decided that the termination of the contract was for the convenience of the respondent, and, hence, invalid.⁵ The tribunal finally awarded the claimant compensation for its lost income, unpaid management fees, legal professional fees, and allocated it 6% per annum interest on the above amounts. It rejected the plaintiff's claim based on the alleged damages to its reputation as well as the respondent's counterclaim, and hold the latter responsible for paying the arbitration fee.

In 10/3/2001, Gulf Hotels Limited, the losing party to the above case, requested the Appellate Division of the Omani Commercial Court to annul the arbitral award, and to oblige the other party to pay the expenses. It also requested the court to suspend the enforcement of the award, under Article 57 of Decree 47/97, until a decision is reached by the court regarding the annulment of the award. The reason for requesting the suspension of enforcement of the award was that the Rotana Hotel Management was a foreign company based in Guernsey with no address in Oman. Hence, it would have been very difficult to retrieve any amount paid through enforcement, if the award had been annulled. Gulf Hotels Limited claimed that there

² *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, (2000) Case No. 10521/OL/ESR (2), ICC International Court of Arbitration, at 4-5.

³ *Id.*, at 10.

⁴ *Id.*, at 17.

⁵ *Id.*, at 33.

was no arbitral agreement between the parties, as there was no contract between them at all. Rotana Hotel Management incorporated in Guernsey was established three years after the signing of the main contract. It also claimed that the arbitral tribunal has ignored Omani law, and, instead, has applied French and Egyptian laws. Moreover, the award was issued after the authorised period of time.

In response, the Rotana Hotel Management's representative argued that the award was, under Omani law, final, and not subject to annulment. He rejected the claim that there was no relationship between the parties, as the parties were dealing with each other in the business for a long time, and his client was even sued by the other party. He stated that Omani law was not applied, because there was no statutory contract or civil law in Oman. Hence, general principles of law, which were acceptable to the Omani Commercial Court, were applied. As to the date of the issuance of the award, it was within the time period allowed, under the ICC Rules of Conciliation and Arbitration. The respondent also regarded the suspension of the enforcement of the award as against Article 57 of Decree 47/97. The claimant rejoined that what matters is that there is no arbitration agreement between the parties, that suing the respondent was a precautionary action, rather than affirming the existence of relationship between the parties, and that the respondent's answer confirms the non-implementation of Omani law. The Appellate Division of the Commercial Court rejected all the claimant's arguments, save his claim of not being a party to the concerned contract and its arbitration clause. In Case No. 18/2001,⁶ the Court annulled the award and ordered the respondent to pay the expenses, while announcing the suspension of the enforcement of the award as being no longer necessary.

⁶ Case No. 18/2001 (22/10/2001), Appellate Division, Commercial Court.

Rotana Hotel Management Corporation appealed against the decision before the Commercial and Tax Department of the Omani Supreme Court, which in 22/10/2003 ruled against the annulment of the award by the previous court, and referred the dispute to the court for a new ruling.⁷ The Appellate Division of the Commercial Court considered the case again. In response to the claim that the claimant to the arbitral award, that is, Rotana Hotel Management Corporation was not a party to the main contract and its arbitration clause and therefore incompetent to refer the dispute to arbitration, the court referred to various documents indicating the company's being a party to the contract, including letters exchanged between the parties. More importantly, the competence of both parties was confirmed in another case by the Omani Commercial Court (Judgment No. 97/508, 18/4/2000) and its Appellate Division (Judgment 2000/35, 11/12/2000).⁸ As to the allegation that Egyptian and French laws, rather than Omani law, were applied by the arbitral tribunal to the case, the court ruled that the general principles of law applied by the commercial courts of other countries are considered as part of Omani law. Moreover, the Gulf Hotel Company has not specified which law applied to the dispute is contrary to Omani law. In 21/4/2004, the Appellate Division of the Commercial Court held that the ICC award can be enforced, and ordered its enforcement.⁹

⁷ *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, Case No. 5/2001 (22/10/2003), Commercial Department, Supreme Court.

⁸ *Id.*, at 4-5.

⁹ *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, Appeal No. 18/2001 (21/4/2004), Commercial Department, Appeal Court.

In 5/6/2004, however, the Supreme Court suspended enforcement of the award, under Article 245¹⁰ of Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes.¹¹ The final decision is yet to be made.

¹⁰ “Cassation before the Supreme Court shall not stop execution of the appealed judgment. However, the court may temporarily suspend execution, if the petition contains a relief to this effect and a massive inevitable damage is expected due to execution”.

¹¹ *Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited*, Case No. 29/2004 (5/6/2004), Commercial Department, Supreme Court.

Glossary

'adāla: the quality of not committing significant sins in Islam.

al-nizām al-‘āmm: Arabic term for public order.

amāna: the quality of reliability in Arabic.

bida': any illegitimate innovation in Islam; bringing alien ideas into the religion.

dar al-Islam: the territory under Muslim control.

faqih: an expert in Islamic jurisprudence.

fiqh: Islamic jurisprudence.

gharar: Arabic legal term for uncertainty or risk.

hadith: Prophet Mohammad's remarks.

haq Allah: divine rights, or what is due to God. It is usually used in contrast with rights of private individuals, or haq al-nās.

haq al-nās: rights of private individuals.

hodoood: the term used in Islamic legal terminology for punishment of what is the subject of Islamic criminal law.

Ibadi: a Muslim sect dominant in Oman. The Ibadis, as a minority, can also be found in some North African countries, such as Algeria and Morocco.

ijma': the consensus of Islamic scholars, or the 'ulama, on a doctrinal proposition.

Māliki: a Sunni school of fiqh.

mielkiyyat: ownership

qadi: the Arabic term for a judge, Islamic judge.

qadi tahkim: arbitration judge, in the Shari'a

qisās: punishment for inflicting bodily injuries or committing murder.

qiyās: utilising analogy in order to arrive at Islamic instructions regarding a specific issue.

Shari'a: classic Islamic law.

Shi'a: a Muslim sect.

sulh: compromise, in Islamic legal terminology.

Sunna: the deeds and words of the Prophet Mohammad.

Sunni: the majority sect in Islam.

tahkeem: the Arabic term for arbitration.

ta'zīrāt: judicially determined offences. Unlike *hodoos* which are the punishments fixed by Islamic texts for certain offences, *ta'zīrāt* are at the discretion of the Islamic judge for offences about which no punishment is specified in the text.

‘ulama: religious scholars, or experts in *fiqh*.

Table of Abbreviations

ADR	Alternative Dispute Resolution
BSCD	The Board for the Settlement of Commercial Disputes
CSCD	The Committee for the Settlement of Commercial Disputes
DIAC	Dubai International Arbitration Centre
GCAC	The Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf
GCC	The Gulf Cooperation Council
ICC	The International Chamber of Commerce
ICSID	The International Centre for the Settlement of Investment Disputes

Table of Cases¹

<i>AB Götaverken (Sweden) v. General National Maritime Transport Company – GNMIC (Libya)</i>	74
<i>Amco Asia v. Indonesia</i> , ICSID Case No. ARB/81/1	291
<i>American Mfg. & Trading, Inc. v. Zaire</i> , ICSID Case no. ARB/93/1	282
Appeal Case 13/1988, <i>Majmou'a</i> , vol. IV	237, 248, 267
Appeal Case 7/87, <i>Majmou'a</i> , vol. IV	236
Appeal Case No. 15/2000 (5/6/2000), BSCD Judgment	235
<i>Audi-NSU Auto-Union AG (Germany) v. Adelin Petit & Cie (Belgium)</i>	69
<i>Benvenuti et Bonfant SRL v. the Government of the People's Republic of the Congo</i> , ICSID Case No. ARB/77/2	293
<i>Bergesen v. Joseph Muller Corporation</i>	44
<i>Bobbie Brooks Inc. (USA) v. Lanificio Walter Banci s.a.a (Italy)</i>	60
<i>Bowen v. Amoco Pipeline Co.</i>	91
Case 100/1985, <i>Majmou'a</i> , vol. II	238
Case 129/1984, BSCD Judgment, <i>Majmou'a</i> , vol. I	238
Case 181/1998, Commercial Court	237
Case 239/87, BSCD Judgment, <i>Majmou'a</i> , vol. V	238
Case 260/85 (23/2/1986), BSCD Judgment	207

¹ Under the law, Omani cases are reported by their numbers, while the names of the parties are deleted. The same applies to the case law of some other Arab countries such as Egypt, Bahrain and Dubai. In the following table of cases, the name of the forum country or its relevant court is added to the number of the case, in order to distinguish the country of origin of cases reported only by their numbers. Omani cases are mentioned, however, without adding the name of Oman. Nevertheless, if any information about the names of the parties is acquired through different methods, they are mentioned between []. The name of the source, in which the case is reported, is also added to the number of the case. Full addresses can be found within the main text of the thesis.

Case 312/1997, Commercial Court	237
Case 330/87, BSCD Judgment, <i>Majmou'a</i> , vol. IV	207, 273
Case 365/86, judgment issued on 18 March 1990, <i>Majmou'a</i> , vol. VI	116
Case 37/1990, Court of Appeal, <i>Majmou'a</i> , vol. VI	116
Case 393/1984, BSCD Judgment, <i>Majmou'a</i> , vol. I	12
Case 42/1998, Court of Appeal	236
Case 43/1984, BSCD Judgment, <i>Majmou'a</i> , vol. I	235
Case 483/1984, BSCD Judgment, <i>Majmou'a</i> , vol. II	12
Case 51/86, <i>Majmou'a</i> , vol. III	236
Case 52/86 (25/5/1986), BSCD Judgment	207
Case 642/1989, BSCD Judgment, <i>Majmou'a</i> , vol. VI	187
Case 832/1996, Court of Appeal	236
Case No. 10/99 (5/3/2000), [<i>Amin ben Baqer ben Habib v. Omani National Bank</i>], Commercial Court	157
Case No. 1259, Judicial Year 49, 13/5/1983, Egyptian Court of Cassation	159
Case No. 127 on the Appeal No. 10/2000, Supreme Court Decision	220
Case No. 147/99, the Muscat Court of First Instance (25/9/1999) [<i>Sultan Centre L.L.C. v. Zaher ben Hamad al-Harethi</i>]	163
Case No. 168/97 (24/11/1997), Court of Appeal	207
Case No. 17 of 2002 (10/8/2001), Dubai Court of Cassation Judgment	252, 279
Case No. 18/2001 (22/10/2001), Appellate Division, Commercial Court	213, 342
Case No. 180/92 (16/12/1992), BSCD Judgment	208
Case No. 216/1999, Court of First Instance	235
Case No. 240/2001 (8/12/2001), Dubai Court of Cassation	208
Case No. 245, Judicial Year 50, 21/1/1985, Egyptian Court of Cassation	159

Case No. 326, Judicial Year 51, 13/1/1986, Egyptian Court of Cassation	159
Case No. 33/96 (27/5/1996), Court of Appeal	208
Case No. 34/96 (27/5/1996), Court of Appeal	208
Case No. 41 of the 114 th Judicial Year (2 October 1997), Cairo Court of Appeal..	188
Case No. 465/1984, BSCD Judgment (30/10/1985), <i>Majmou'a</i> , vol. II .	155, 207, 265
Case No. 62 of the 113 th Judicial Year (31 December 1997), Cairo Court of Appeal.	156
Case No. 714, Judicial Year 47, 26/4/1982, Egyptian Court of Cassation	159
Case No. 84 of the 19 th Judicial Year, Egyptian Supreme Constitutional Court	165
Case No. 89/39 (February 1990), BSCD Judgment.....	193
Case No. 90/451 (12/5/1991), BSCD Judgment	147
<i>Chromalloy Aeroservices Inc. v. Arab Republic of Egypt</i>	65, 66
Commercial Case No. 61 of the 113 th Judicial Year (11 August 1996), Cairo Court of Appeal.....	198
Commercial Case No. 64 of the 113 th Judicial Year (19 March 1997), Cairo Court of Appeal	153
<i>CSOB v. Slovakia</i> , ICSID Case No. ARB/97/4	281, 282
<i>Dardana Ltd v. Yukos OIL Co.</i>	262
<i>Eco Swiss China Time Ltd v. Benetton International NV</i>	86
Egyptian Appeal Case No. 1029 dd. 6/11/1994.....	148
Egyptian Case No. 345 dd. 11/12/1997	148
Egyptian Case No. 3755 of the 97 th Judicial Year (21 January 1982)	240
Egyptian Case No. 42 of the 115 th Judicial Year (25 December 1998).....	162
Egyptian Case No. 8547 dd. 22/5/1997	148
<i>Eurodif Corp v. Islamic Republic of Iran</i>	72

<i>Fedax N.V. v. Venezuela</i> , ICSID Case No. ARB/96/3	281
<i>Fougerolle SA (France) v. Ministry of Defence of the Syrian Arab Republic</i>	60
<i>Fritz Scherk v. Alberto-Culver Co.</i>	329
<i>Gateway Technologies, Inc. v. MCI Telecommunications Corp</i>	90
<i>Halligan v. Piper Jaffray, Inc.</i>	89
<i>Hilmarton Ltd. v. Omnium de traitement et de valorisation</i>	65
<i>Hiscox v. Outhwaite</i>	79
<i>Holiday Inns v. Morocco</i> , ICSID Case No. ARB/72/1	311
ICC Case No. 3916	93
<i>Iran Aircraft Ind. v. Avco Corp.</i>	61
Judgment 157 of the Year 19 (25/4/1999), UAE Supreme Court of Cassation	233
Judgment 165 of the Year 18 (30/11/1996), UAE Supreme Court of Cassation	233
Judgment 17/2001 (10/3/2001), Dubai Court of Cassation	266, 268
Judgment 267/99 (November 1999), Dubai Court of Cassation	266, 268
Judgment 371 of the Year 18 (30/6/1998), UAE Supreme Court of Cassation	233
Judgment No. 1136 of the 54 th Judicial Year (28/11/1990), Bahraini Court of Cassation	258
Judgment No. 34/1990 (12/5/1991), Bahraini Court of Cassation	258
<i>K/S A/S Bill Biakh and K/S A/S Bill Biali v. Hyundai Corporation</i>	88
<i>Klöckner Industrie – Anlagen GmbH v. Republic of Cameroon</i> , ISCID Case No. ARB/81/2	291
<i>Lapine Technology Corp v. Kyocera Corp</i>	90
<i>Liberian Eastern Timber Co (LETCO) v. Gouvernement de la République du Libéria</i>	293
<i>Liberian Eastern Timber Company v. Government of Liberia</i>	72

<i>Mangistaumunaigaz Oil Production (MOP) v. United World Trade, Inc.</i>	85
<i>Merrill Lynch v. Abdul Jalil Behbehani</i> , Bahraini Case No. 859/m/1985, Civil High Court of Appeal.....	252
<i>MINE v. Guinea</i> , ICSID Case No. ARB/84/4.....	288
<i>MITOB v. SNTP</i>	159
<i>Mitsubishi Motors Corporation v. Solor Chrysler-Plymouth Inc. (1985)</i>	329
<i>Montes v. Shearson Lehman Brothers, Inc.</i>	89
<i>Norsolor S.A. v. Pallbalk Ticaret Ltd.</i>	78
<i>Northrop Corp. v. Triad International Marketing S.A.</i>	92
<i>Oil & Natural Gas Commission v. Western Company of North America</i>	79
<i>Parsons & Whittemore Overseas Co. Inc. v. Societe General de l'Industrie du Papier (RAKTA)</i>	55
<i>Petroleum Development (Trucial Coast) Ltd. V. The Sheikh of Abu Dhabi</i>	6
<i>Publicis Communications & Publicis SA v. True North Communications Inc</i>	64
<i>Regazzoni v. Sethia</i>	70
<i>Renusagar Power Co. Ltd. v. General Electric Co.</i>	79
<i>Rhone Mediterranee Comagnia di Assicurazioni e Riassicuazioni v. Lauro</i>	63
<i>Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited</i> , an ICC award.	172, 175, 186, 213
<i>Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited</i> , Appeal No. 18/2001 (21/4/2004), Commercial Department, Appeal Court	343
<i>Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited</i> , Case No. 29/2004 (5/6/2004), Commercial Department, Supreme Court	344

<i>Rotana Hotel Management Corporation Limited v. Gulf Hotels (Oman) Company Limited</i> , Case No. 5/2001 (22/10/2003), Commercial Department, Supreme Court	213, 343
<i>Saudi Arabia v. Arabian American Oil Company (ARAMCO)</i>	6
<i>Soleimany v. Soleimany</i>	70
<i>Sonatrach v. Distrigas</i>	329
<i>Southern Pacific Prop., Ltd. v. Egypt</i> , ICSID Case No. ARB/84/3	284
<i>Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt</i>	68
<i>Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania & AB Geonafta</i>	72
<i>The Mohafazat of the Port Said and the Suez Canal Company v. Rolaco Holdings</i>	159
<i>The NINIVO v. the REDEC</i>	250
<i>Tradex v. Albania Hellas S.A.</i> , ICSID Case no. ARB/94/2	282
<i>Warburg LLC v. Auerbach, Pollak & Richardson</i>	92

Table of Stautes

Abu Dhabi Civil Procedure Code No. 3 of 1970	212
Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures	9
Bahraini Legislative Decree No. 9 of 1983 with respect to amending Schedules of Judicial Fees	255
Bahraini Legislative Decree No. 9 of 1994 Promulgating the International Commercial Arbitration Law	9
Conciliation and Arbitration Regulations of the Omani Chamber of Commerce ...	105
Egyptian Civil Code No. 131 of 1948	148
Egyptian Constitution of 1980	165
Egyptian Law No. 13 of 1968 on the Code of Civil and Commercial Procedures ..	155
Egyptian Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters	passim
Egyptian Law No. 77 of 1949 on Civil and Commercial Procedures	13
Egyptian Law No. 8 of 2000	166
Egyptian Law No. 9 of 1997 amending the Arbitration Law No. 27 of 1994.	153
English law Arbitration Act of 1979	81
English law Arbitration Act of 1996	69
English law Foreign Judgments (Reciprocal Enforcement) Act of 1933	55
English State Immunity Act of 1978	71, 72
French Code of Civil Procedure	25, 253
French Decree No. 81-500 of 12 May 1981, Official Journal of 14 May 1981, amendment JORF of 21 May 1981	144
German Arbitration Law of 1986	29

Jordanian Civil Code No. 43 of 1976	148
Kuwaiti Commercial Code of 1981	101
Kuwaiti Conflict of Laws Code No. 5 of 1961	187
Kuwaiti Law No. 11 of 1995 on Arbitration in Civil and Commercial Matters.....	9
Kuwaiti Law No. 38 of 1980 on Civil and Commercial Procedure	9, 186
Law of the Constitution of the Omani Chamber of Commerce and Industry of 15 May 1973	105
Law of the Oman Chamber of Commerce and Industry of 1979	105
Muscat Securities Market Law	100
Netherlands Arbitration Act of 1996	30
Omani Ministerial Decree No. 88 of 2000 Regarding the GCC Commercial Arbitration Centre Based in the State of Bahrain	297
Qatari Law No. 13 of 1990 on Civil and Commercial Procedures	10, 250, 264
Qatari Law No. 4 of 1963 Establishing the Chamber of Commerce and Industry	10
Regulation No. 32 of 1350 H on the Statues of the Saudi Commercial Board	147
Saudi Implementation Rules for the Arbitration Law	161
Saudi Royal Decree No. 32 of 1931 on the Commercial Court Law	9
Saudi Royal Decree No. M/46 of 1403 H [1983] on Arbitration Law	10, 147
Sultani Decree 1/1979 on the Law for the Organisation and Encouragement of Industry	114
Sultani Decree 101/1996 on the Omani Basic Law of the Sultanate of Oman	99
Sultani Decree 102/1994 on the Foreign Capital Investment Law	115
Sultani Decree 102/94 relating to the Regulation of Foreign Capital Investment ..	109, 110, 235, 265
Sultani Decree 12/1979 promulgating the Insurance Companies Law	100

Sultani Decree 12/1980 amending Sultani Decree 48/1976	153
Sultani Decree 13/1976 amending Sultani Decree 26/1975 on the Law Regulating the Administrative Apparatus of the State	99
Sultani Decree 13/1997 on the Establishment of the Commercial Court	passim
Sultani Decree 26/1975 on the Law Regulating the Administrative Apparatus of the State.....	99
Sultani Decree 26/1977 on the Commercial Agencies Law	111
Sultani Decree 26/1977 promulgating the Commercial Agencies Law.....	100
Sultani Decree 29/2002 on the Law of Procedures in Civil and Commercial Disputes	passim
Sultani Decree 3/1973 on the Interpretation of Certain Terms and General Provisions	99
Sultani Decree 3/1974 on the Commercial Register Law.....	100
Sultani Decree 3/2007 Amending Some Provisions of the Law of Arbitration in Civil and Commercial Disputes	11, 108, 133
Sultani Decree 32/1984 on the Rules for the Hearing of Law Suits and Arbitration	passim
Sultani Decree 35/1978 on the Customs Management Law	100
Sultani Decree 4/1974 on the Commercial Companies Law	100, 103
Sultani Decree 47/1981 on the Corporate Income Tax Law.....	114
Sultani Decree 47/1981 on the Law of Income Tax on Companies	114
Sultani Decree 47/1997 on Law of Arbitration in Civil and Commercial Disputes	133, 323
Sultani Decree 48/1976	153, 154
Sultani Decree 55/1990 on the Commercial Law	101, 138, 139, 150

Sultani Decree 6/1974 on the Law for the Protection of Developing Industries	100
Sultani Decree 65/1977 affecting reduction in Income Tax on Mixed Ownership Companies.....	114
Sultani Decree 68/1987 on the Law of Trade Marks and Commercial Indications.	100
Sultani Decree 7/1974 on the Banking Law	100, 236
Sultani Decree 79/1981 on the Establishment of the Board for the Settlement of Commercial Disputes	105
Sultani Decree 84/1975 of 3 December 1975	103
Sultani Decree 90/99 on the Judicial System Law.....	208, 333
Sultani Decree 98/1982	106
Sultani Decrees 5/1980 and 88/1982 on the Land Law	100
Swiss Federal Act of Private International Law of 1987	29
UAE Federal Civil Transactions Law No. 5 of 1985	148
UAE Federal Law No. 26 of 1999 on Conciliation and Settlement Committees at the Federal Court.....	11
UAE Law No. 11 of 1992 on Civil Procedures	passim
US Federal Arbitration Act, 9 USC	52, 85
US Uniform Arbitration Act of 2000	86, 92, 162

Table of Rules

Arbitral Rules of Procedure for the GCC Commercial Arbitration Centre of 1994	passim
GCAC Rules Regulating the Costs of Arbitration of 1995, Annex No. 1 (1995) to Arbitral Rules of Procedure for the GCC Commercial Arbitration Centre	300
ICC Rules of Arbitration of 1998	303, 307
ICC Rules of Conciliation and Arbitration of 1988	172, 339, 342
ICSID Additional Facility Rules of 2006	284
ICSID Rules of Procedure for Arbitration Proceedings	288, 289
Internal Rules of the International Court of Arbitration of the ICC of 1998	87
London Court of International Arbitration Arbitration Rules of 1998	35
Rules of the Cairo Arbitration Centre of 1998 as amended in 2000, 2002 and 2006	168
UNCITRAL Arbitration Rules of 1967	34, 84

Table of Treaties

Amman Convention on Commercial Arbitration of 1987	passim
Arab League Convention on the Enforcement of Foreign Judgments and Awards of 1952.....	294
Charter of the GCC Commercial Arbitration Centre of 1993	passim
Charter of the Gulf Co-operation Council of 1981	321
Convention on the Enforcement of Judgments, Disputes and Judicial Summons in the Arab Gulf Co-operative Council States of 1995	76
Energy Charter Treaty of 1994	283
European Convention on International Commercial Arbitration of 1961	passim
Free Trade Agreement of 1994 between Colombia, Mexico and Venezuela	283
Geneva Convention on the Execution of Foreign Arbitral Awards of 1927	passim
Geneva Protocol on Arbitration Clauses of 1923	42
Inter-American Montevideo Convention on the Recognition and Enforcement of Court Decisions and Arbitration Awards of 1979	49
Las Lenas Protocol of Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR of 1992	49
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958	passim
North American Free Trade Agreement of 1992 (NAFTA)	283
Panama Inter-American Convention on International Commercial Arbitration of 1975.....	48
Riyadh Arab Convention on Judicial Co-operation of 1983	76, 263, 294, 295

UAE Federal Decree No. 31 of 1992 Promulgating the Judicial Co-operation Treaty between the UAE and France	11
UAE Federal Decree No. 33 of 2000 Promulgating the Agreement between the UAE and the Republic of India on Juridical and Judicial Co-operation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Judicial Commissions, Execution of Judgments and Arbitral awards	11
UNCITRAL Legal Guide on International Countertrade Transactions of 1992	29
UNCITRAL Model Law on International Commercial Arbitration of 1985	passim
Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965	passim

Bibliography

“16th ICCA Congress: International Commercial Arbitration: Important Contemporary Questions – 12-15 May 2002, London”, *GCC Commercial Arbitration Centre Bulletin*, issues 22/23 (June 2002), at 20-21.

“18th Meeting of the Centre’s Board of Directors”, *GCC Commercial Arbitration Centre Bulletin*, issue 13 (Dec. 1999), at 4.

“25th Meeting of the [GCC Arbitration] Centre’s Board of Directors – 7th & 8th January 2002, Muscat, Sultanate of Oman”, *GCC Commercial Arbitration Centre Bulletin*, issue 20/21 (Dec. 2001 and March 2002), at 6.

“26th Meeting of the [GCAC] Board of Directors – 24th & 25th April 2002, State of Kuwait”, *GCC Commercial Arbitration Centre Bulletin*, issue 22/23 (June 2002), at 10.

Abdullah, Morsy M., “Changes in the Economy and Political Attitudes and the Development of Culture on the Coast of Oman Between 1900 and 1940”, *Arabian Studies*, vol. 11 (1975), at 167-178.

Aboul-Enein, M. I. M., “Egypt”, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, Supplement 36, The Hague: Kluwer, November 2002.

Aboul-Enein, M. I. M., “Reflections on the New Egyptian Law on Arbitration”, *Arbitration International*, vol.11, no. 1 (1995), at 75-84.

Aboul-Enein, M. I. M., “The Important Differences between the Egyptian Law concerning Arbitration in Civil and commercial Matters and the Model Law”, International Conference of the Cairo Regional Centre for International Commercial Arbitration, Cairo, 12-13 September 1994.

Aboul-Enein, M. I. M., “Islamic (Shari’a) Law and the Commitments to the World Trade Organization Agreements (A Brief Study)”, in the International Bureau of the Permanent Court of Arbitration, *Strengthening Relations with Arab and Islamic countries through International Law: E-Commerce, the WTO Dispute Settlement Mechanism and Foreign Investment*, The Hague: Kluwer Law International, 2002.

Abul-Faraj, Isfahani, *Kitab al-Aghani*, vol. 15, Cairo: Dar al-Kotob al-Messriyaa, 1963 AD (1383 H.).

Abul-Wafa, Ahmad, *Al-Tahkim al-Ikhtiyari wa al-Ijabari*, 5th ed., Cairo: Mansha'at al-Ma'arif, 1988.

- Adaralegbe, Adebayo G., "Challenges in Enforcement of Arbitral Awards in Capital-Importing States: The Nigerian Experience", *Journal of International Arbitration*, vol. 23, no. 5(2006), at 401-426.
- Al Mulla, Habib Mohd. Sharif, "Conventions of Enforcement of Foreign Judgments in the Arab World", *Arab Law Quarterly*, vol. 14, issue 1 (Feb 1999), at 33-56.
- Al Mulla, Habib, "International Commercial Arbitration", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 29-35.
- Al Obeikan, Sheikh Abdul Mohsen, "The Codification of Islamic Shari'a", in *Al-Sharq Al-Awsat* (28/04/2006).
- Al Tamimi and Company, *Law Update News*, February 1996.
- Al Tamimi, Essam, "The Status of Arbitration in the UAE", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 36-48.
- Al-Ashban, Abdul Aziz, "The Formation of the Oman Trading Empire under the Ya'aribah Dynasty(1624-1917)", *Arab Studies Quarterly*, vol. 1, no. 4 (1971), at 354-370.
- Al-Baharna, Husain M., "Arbitration in the Arab World", in Fathi Kemicha, *Euro-Arab Arbitration III: proceedings of the Third Euro-Arab Arbitration Congress, Amman, October 1989*, London: Graham & Trotman, 1991, at 45-47.
- Al-Baharna, Husain M., "the Enforcement of Foreign Judgments and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain", *Arab Law Quarterly*, vol. 4 (1989), at 332-344.
- Al-Bahuti, Mansur ibn Yunus, *Kashshaf al-Qina' 'an Matn al-Iqna'*, 6 vols, vol 6, Riyadh: 1368 H.
- Al-Baji, Abu al-Walid, *Ihkam al-Fosul fi Ahkam al-Usul*, Dar al-Gharb al-Islami, 1981.
- Al-Dasuqi, Shams al-Din Mohmmad 'Arafa, *Hashiya Al-Sharh al-Kabir*, 4 vols., Cairo: 1295 H.
- Al-Eshiwiy, Mouteb Saleh Hamad, *Arbitration Regulations in the Gulf Co-Operation Council (GCC) States: A Comparative Study*, unpublished PhD Thesis, University of Exeter, 1997.
- Al-Hārithi, 'Abdullah ibn Humayd, *Al-'Uqud al-Fiddiyya fil Usul al-Ibadiyya*, Beirut.
- Ali & Partners, "Doing Business in Oman", http://www.mideastlaw.com/middle_eastern_laws_oman.html, (available on 10/01/2008).
- Ali, Arif Hyder, "Resolving Information and Communication Technology Disputes under the GCC Centre's Arbitration Rules", *GCC Commercial Arbitration Centre Bulletin*, issue 20/21 (Dec. 2001 and March 2002), at 12-15.

- Al-Khiraqi, Abu al-Qasim ibn Hossein, *Al-Mukhtasar*, Damascus: 1964.
- Al-Kindi, Mohammad ibn Ibrahim, *Bayan Al-Shar'*, Muscat: Ministry of National Heritage and Culture, 1988.
- Al-Mahdi, Hussain M., "Intra-GCC and International Trade: the Need for Arbitration", *GCC Commercial Arbitration Centre Bulletin*, issue 3 (August 1996), at 8.
- Al-Mas'oodi, Zahran ibn Khamis, *Al-Imam ibn Baraka al-Bahlawi wa Dawroho fi al-Madrasa al-Ibadiyya men Khilal Kitabeh (al-Jamie)*, Sultante of Oman: Ministry of Awqaf, 2000.
- Al-Mus'abi, 'Abd al-'Aziz ibn Ibrahim, *Kitab al-Nil*, Cario: 1305 H.
- Al-Nawawi, Mohiuddin Yahya Ibn Sharaf *Minhaj al-Talibin*, Beirut: Dar al-Ma'rafa.
- Al-Sabe'i, Nasser Suliman, *Al-Khawarij wa Al-Haqiqa Al-Gha'eba*, Muscat: Maktabat Al-Jeel Al-Va'd, 1999.
- Al-Sālimī, 'Abdullāh ibn Humayd, *Jawhar al-Nizām fī 'Ilm al-Adyān wal-Ahkām*, 2 vols., Cairo: 1344 H.
- Al-Sālimī, Noro-Din 'Abdullāh ibn Humyad, *Tal'at Ash-shams*, Ministry of National Heritage and Culture: Muscat, 1981.
- Al-Sanhouri, Abdul Razzaq, *Al-Waseet fi Sharh Al-Qanoon Al-Madani*, vol. 1: *Nazariyyat Al-Iltizam bi Wajhin 'Am: Masader ul-Iltizam*, Beirut: Dar Al-Ehya' Al-Torath Al-'Arabi, 1973
- Al-Sarakhsi, Abi Bakr Muhammad bin Ahmed, *Kitab al-Mabsut*, Cairo: al-Sa'ada, 1331 H.
- [Al-Sayad, Mohammad Soud], "Arbitration Aspects in the Region", *GCC Commercial Arbitration Centre Bulletin*, issue 3 (August 1996), at 2 and 5.
- Al-Shamakhi, Amir ibn 'Ali, *Kitāb al-Idāh*, 4 vols., Beirut: 1971.
- Al-Sheybani, Mohammad ibn Hassan, *Al-Sair Al-Kabir*, vol. 1, Cairo.
- Al-Siyabi, Khalfan ibn Jomail, *Fosūl Al-Osūl*, Muscat: Ministry of National Heritage and Culture, 1982.
- Al-Suwaidi, Ahmed, *Finance of International Trade in the Gulf*, London: Graham and Tortman, 1994.
- Altaras, David, "Enforcement of Foreign Award: *Dardana Ltd v. Yukos OIL Co.*", *Arbitration*, vol. 68, no. 3 (2002), at 315-317.
- Al-Tabari, Abu Ja'far Muhammad ibn Jarir, *Tarikh al-Rusul wa al-Muluk (Tarikh al-Tabari)*, Beirut: Mo'asesa al-'Elmi li al-Matbu'at, 1409 H6.

- Al-Thamini, Dhia-a-Din Abdul-Aziz ibn Ibrahim, *Al-Ward Al-Bassam fi Riyadh Al-Ahkam*, Muscat: Ministry of National Heritage and Culture, 1985.
- Al-Tusi, Mohammad ibn Hasan ibn 'Ali, *Al-Mabsut fi Fiqh al-Imamiyya*, Tehran: al-Maktaba al-Mortadawiyya.
- Al-Zubair, Hamza, "Major Characteristics of Securities Industries Dispute Resolution Mechanisms", Seminar on Dispute Resolution in Stock Exchange and Investment, (Muscat, Oman: 30-31 January 2000).
- Al-Zurqani, 'Abd al-Baqi. *Sharh 'ala Mukhtasar Khalil*, 8 vols, vol 7, Cairo: 1303 H.
- Amerasinghe, C. .F., "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", *Indian Journal of International Law*, vol. 19 (1979).
- Amin, Sayed Hassan, *Middle East Legal Systems*, Glasgow: Royston Limited, 1985.
- Antaki, Nabil N., "Enhanced Practices for Solving Foreign Investment Disputes with Arab and Islamic Countries", in the International Bureau of the Permanent Court of Arbitration, *Strengthening Relations with Arab and Islamic countries through International Law: E-Commerce, the WTO Dispute Settlement Mechanism and Foreign Investment*, The Hague: Kluwer Law International, 2002.
- "Arbitration in Petroleum and Other Energy Contracts: A Two-day Seminar Organized Jointly by the GCC Commercial Arbitration Centre and the Abu Dhabi Commercial Conciliation and Arbitration Centre Held in Abu Dhabi on October 13th and 14th 1998", *GCC Commercial Arbitration Centre Bulletin*, issue 10 (Dec. 1998), at 11.
- Atfiyyash, Muhammad ibn Yusuf, *Sharh al-Nīl wa Shifā al-'Alīl*, 10 vols., Cairo: 1343 H.
- Baldwin, Edward, Mark Kantor and Michael Nolan, "Limits of Enforcement of ICSID Awards", *Journal of International Arbitration*, vol. 23, no. 1 (2006), at 1-24.
- Ball, Markham, "Enforceability of arbitral awards outside the country where the arbitration takes Place", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, London and Boston: Graham & Trotman, 1987.
- Ballantyne, W. M., "A Reassertion of the Shari'a: the Jurisprudence of the Gulf States", in W. M. Ballantyne, *Essays and Addresses on Arab Laws*, Richmond: RoutledgeCurzon, 2000, at 210-219.
- Ballantyne, W. M., "Arbitration in the Gulf States: 'Delocalisation': A Short Comparative Study", in W. M. Ballantyne, *Essays and Addresses on Arab Laws*, Richmond: RoutledgeCurzon, 2000, at 44-57.
- Ballantyne, W. M., "The States of the GCC: Sources of Law, the Shari'a and the Extent to which It Applies", *Arab Law Quarterly*, vol. 1, no. 1 (November 1985), at 3-18.

- Ballantyne, W. M., *Commercial Law in the Arab Middle East: the Gulf Studies*, London: Lloyds of London Press, 1986.
- Ballantyne, W. M., *Essays and Addresses on Arab Laws*, Richmond: RoutledgeCurzon, 2000.
- Bandkura, Andrew, "Use of Arbitration in Insurance and Banking", *GCC Commercial Arbitration Centre Bulletin*, issue 9 (August 1998), at 3-7.
- Bello, Aminu Adamu, "Between Allan Christelow, Paul H. Robinson and Adnan Zulfiqar; Abdullahi A. An Na'Im, Sanusi L. Sanusi and Asifa Quraishi: Rationalizing the Concept of Inventing New Forms in Islamic (*Shari'a*) Law in Nigeria", *Islamic Law and Law of the Muslim World Paper*, no. 08-38 (June 29, 2008).
- Berger, K. P., *International economic arbitration*, Deventer: Kluwer law and Taxation Publication, 1993.
- Bernstein, Ronald and Derek Wood, *et al.*, *Handbook of Arbitration Practice*, London: Sweet and Maxwell, 1993.
- Bishop, R. Doak, James Crawford and W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, The Hague: Kluwer Law International, 2005.
- Bjørn Kunoy, "The Notion of *Time* in ICSID's Case Law on Indirect Expropriation", *Journal of International Arbitration*, vol. 23, no. 4 (2006), at 337-349.
- Bockstiegel, Karl-Heinz, *Arbitration and State Enterprises – A Survey on the National and International State of Law and Practice*, Deventer: Kluwer Law and Taxation Publishers, 1984.
- Brewer, Thomas J., "Challenging Awards Is No Simple Task", *National Law Journal*, October 29, 2001, at B13.
- Broches, Aron (Chair of the Panel), "New Developments in International Arbitration", in *Contemporary International Law Issues: Opportunities at a Time of Momentous Change - Proceedings of the Second Joint Conference held in The Hague, The Netherlands, July 22-24, 1993*.
- Brower, Charles N. and Jeremy K. Sharpe, "International Arbitration and the Islamic World: The Third Phase", *The American Journal of International Law*, vol. 97, no. 3 (Jul., 2003), pp. 643-656.
- Brower, Charles N. and Ronald E. M. Goodman, "Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity against Municipal Proceedings", *ICSID Review: Foreign Investment Law Journal*, vol. 6 (1991).
- Brown, Charles L., "Multi-Party Arbitration in Engineering Contracts – the Problems and the Solutions", *GCC Commercial Arbitration Centre Bulletin*, issues 22/23 (June 2002), at 5-9.

- Brown, Henry and Arthur Marriott, *ADR Principles and Practice*, London: Sweet and Maxwell, 1993.
- Bunni, Nael G., "Construction Arbitration in the Middle East", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 6-12.
- Caric, Laurence, *et al*, *International Commercial Arbitration: Cases, Materials and Notes on the Resolutions of International Business Disputes*, New York: The Foundation Press, 1997.
- Carr, Indira, *International Trade Law*, 3rd ed., London: Cavendish Publishing Ltd., 2005.
- "[Commentary:] Ammendment to the Arbitral Rules of Procedure of the Centre", *GCC Commercial Arbitration Centre Bulletin*, issue 13 (Dec. 1999), at 1, 14-15.
- Connerty, Anthony, "Strengthening Relations with the Arab World through Dispute Resolution", in the International Bureau of the Permanent Court of Arbitration, *Strengthening Relations with Arab and Islamic countries through International Law: E-Commerce, the WTO Dispute Settlement Mechanism and Foreign Investment*, The Hague: Kluwer Law International, 2002.
- D'Arcy, Leo, *et al*, *Schmitthoff's Export Trade: the Law and Practice of International Trade*, 3rd ed., London: Sweet & Maxwell, 2000.
- De Boisseson, Matthieu, "Enforcement in Action: Harmonization Versus Unification", in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, The Hague: Kluwer Law International, 1999.
- De Ly, Filip, "Judicial Review of the Substance of Arbitral Awards", in K. Boele-Woelki, *et al*. (ed.), *Comparability and Evaluation: Essays on Comparative Law, Private International Law and International Commercial Arbitration*, Dordrecht: Martinus Nijhoff Publishers, 1994.
- Delaume, G. R., "How to Draft an ICSID Arbitration Clause", *ICSID Review: Foreign Investment Law Journal*, vol. 7 (1992).
- Delaume, J. R., "Sovereign Immunity and Transnational Arbitration", in J. D. M. Lew (ed.), *Contemporary Problems in International Arbitration*, Dordrecht: Martinus Nijhoff Publishers, 1987.
- Dundas, Hew R., "English Court Powers in Support of Foreign Arbitral Proceedings: Exercise of Court's Discretion: *Commerce & Industry Insurance Company of Canada v Certain Underwriters at Lloyd*", *Arbitration*, vol. 69, no. 1 (2003), at 40-47.
- Dundas, Hew R., "Non-Party Disclosure and Witness, Enforcement of Foreign Awards and Costs: Recent Decisions in the English Courts", *Arbitration*, vol. 71, no. 2 (2005), at 172-178.

- El-Ahdab, Abdul Hamid, "Enforcement of Arbitral Awards in the Arab Countries", *Arbitration International*, vol. 11, no. 2 (1995), at 169-182.
- El-Ahdab, Abdul Hamid, "Is There an Arbitration Crisis in the Arab World?", in the International Bureau of the Permanent Court of Arbitration, *Strengthening Relations with Arab and Islamic countries through International Law: E-Commerce, the WTO Dispute Settlement Mechanism and Foreign Investment*, The Hague: Kluwer Law International, 2002.
- El-Ahdab, Abdul Hamid, "The Moslem Arbitration Law", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, London and Boston: Graham & Trotman, 1987, at 329 *et seq.*
- El-Ahdab, Abdul Hamid, "The New Egyptian Arbitration Act in Civil and Commercial Matters", *Journal of International Arbitration*, vol. 12, no. 2 (1995), at 65-102.
- El-Ahdab, Abdul Hamid, "The New Omani Act in Civil and Commercial Matters", *Journal of International Arbitration*, vol. 14, no. 4 (1997), at 59-88.
- El-Ahdab, Abdul Hamid, *Arbitration in Arab Countries*, 2nd ed., London and Boston: Kluwer Law International, 1998.
- El-Kosheri, Ahmed S., "Public Policy under Egyptian Law", *ICCA Congress Series no. 3* (New York: 1986), at 321-328.
- El-Kosheri, Ahmed S., "Egypt", in A. J. van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XV, London: Kluwer, 1990, at 305 -306.
- El-Kosheri, Ahmed S., "Egypt": Supplement 11, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration*, The Hague: Kluwer, 1990.
- El-Sharkawy, Mahmoud Samir, "New Trends in Egyptian Arbitration Law", *Journal of International Arbitration*, vol. 16, no. 1 (1999), at 5-24.
- "Enforcement of Foreign Judgments [by the Abu Dhabi Court of Cassation]", *GCC Commercial Arbitration Centre Bulletin*, issue 14 (March/April 2000), at 7-8.
- Fathy, W., "Legal Action for Nullity of Awards According to the Egyptian Arbitration Law No. 27 of 1994", the Conference on the Settlement of Disputes held by the Cairo Regional Centre for International Commercial Arbitration, 28 October 1997.
- Feldman, Mark B., "the Annulment Proceedings and the Finality of ICSID Arbitral Awards", *ICSID Review: Foreign Investment Law Journal*, vol. 2 (1987).
- Gaillard, Emmanuel and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague, Boston: Kluwer Law International, 1999.
- Garfen, "Arbitration in Oman", Conference on Arbitration, Cairo, 1986.

- Genton, Pierre M., "the DRB/DAB, a True Complement to Arbitration", *GCC Commercial Arbitration Centre Bulletin*, issue 7 (December 1997), at 18-20.
- Glanstein, David, "A Hail Mary Pass: Public Policy Review of Arbitration Awards", *Ohio State Journal on Dispute Resolution*, vol. 16, (2001).
- Goldstein, M. J., "Interpreting the New York Convention: When Should an Interlocutory Arbitral 'Order' be treated as an 'Award'?", *Bulletin Swiss Arbitration Association*, vol. 4 (2000), at 830-837.
- Greig, Robert T. and Inna Reznik, "Current Developments in Enforcement of Arbitration Awards in the United States", *Arbitration*, vol. 68, no. 2 (2002), at 120-137.
- "Gulf International Bank Refers to the GCC Arbitration Centre to Settle Disputes", *GCC Commercial Arbitration Centre Bulletin*, issue 11 (April 1999), at 15.
- Gunter, Pierre-Yves, "Enforcing Arbitral Awards, Injunctions and Orders", <http://www.psplaw.ch/Publications/AMBAR-1.html> (available on 10/10/02).
- Haddad, Hamza Ahmad, "Written Form and Interpretation of the Arbitration Agreement in the Arab Law: Egypt, Jordan and United Arab Emirates", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 17-28.
- Haddad, Hamza, "Al-Tahkim al-Tejari al-'Arabi ad-Dovali", Fojeira Conference on Arbitration in GCC Countries: Present and Prospects (31 January to 1 February 1999).
- Hall, Liz, "Arbitration in Insurance and Reinsurance: [A Report on the Two-day Seminar Held in Bahrain on March 3rd and 4th, 1998]", *GCC Commercial Arbitration Centre Bulletin*, issue 8 (April 1998), at 6-8.
- Hassan, Hassan Ibraheem and Ali Ibraheem Hassan, *An-Nodhom al-Islamiya*, 3rd ed. Cairo: Maktaba an-Nehdha al-Messriyya, 1962.
- Hassan, Hussein, "Book Review on *Essays and Addresses on Arab Laws*, by W. M. Ballantyne (Richmond: RoutledgeCurzon Press)", *Journal of Islamic Studies*, vol. 14, no. 1 (2003), at 75.
- Hill, Jonathan, *The Law Relating to International Commercial Disputes*, London: Lloyd's of London Press LTD, 1994.
- Hirst, Alastair, "Contemporary Mercantile Jurisdiction in Oman", *Arab Law Quarterly*, vol. 7, no. 1 (May 1992), at 3-32.
- Hirst, Alastair, "Settlement of Dispute through Arbitration: Sultanate of Oman", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, London and Boston: Graham & Trotman, 1987, at 135-144 .

- Hoellering, Michael F., "Arbitration of Patent Disputes", in *AAA General Counsel's Annual Reports Arbitration & the Law*, 1987-8.
- Horvath, Gunther J., "The Duty of the Tribunal to Render an Enforceable Award", *Journal of International Arbitration*, vol. 18, (2001).
- Hosni, Ahmed, *The Case-Law of the Cour de Cassation in Maritime Problems* (in Arabic), 2nd ed., (Alexandria: 1982).
- Ibn 'Abidin, Mohammad ibn 'Omar, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, 5 vols, vol 4, Cairo: 1299 H.
- Ibn Athir, *Tarikh al-Kamel*, Beirut: Dar al-Kotob al-'Ilmiyyah, 1987.
- Ibn Farhun, *Tabisrat al-Hukkam fi Usul al-'Aqida*, Cairo: 1301 H.
- Ibn Hisham, *Kitab Sirat Rasul Allah*, edited by Ferdinand Wüstenfeld, vols. 1 and 2, Frankfurt-am-Main: Minerva, 1961.
- Ibn Ja'far, Mohammad, *Al-Jame'*, Muscat: Ministry of National Heritage and Culture, 1987.
- Ibn Taymiyyah, *Majmu' al-Fatawa*, 6 Vols., Beirut: Dar Ibn Hazm.
- Ibn Ya'qub, Ahmad, *Tarikh Yaqubi*, vol. 1, Hootsema Publication.
- Ibrahim, Ibrahim Ahmed, *Al-Ikhtesas al-Qadhai ad-Dovali va-l Athar ad-Dovalia Lel Ahkam*, Qairo: Dar al-Nahdha al-Arabia, 1996.
- Igbokwe, Virtus Chitoo, "Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations", *Journal of International Arbitration*, vol. 23, no. 4 (2006), at 267-299.
- Igbokwe, Virtus Chitoo, "Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word been Said?", *Journal of International Arbitration*, vol. 14, no. 1 (1997), at 99-124.
- International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (March 18, 1965).
- International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, London and Boston: Graham & Trotman, 1987.
- International Centre for the Settlement of Investment Disputes, *Bilateral Investment Treaties: 1959-1996*, UNCTAD/ITE/IIA/2, United Nations: New York and Geneva, 2000.
- International Council for Commercial Arbitration. *Yearbook Commercial Arbitration*. vols. I-XXX. Kluwer: London. 1976-2005.

- Jarvin, Sigvard, "Enforcement of an Arbitration Award in Oman", *Journal of International Arbitration*, vol. 2, no. 4 (1985), at 81-86.
- Jarvin, Sigvard, "The ICC Court of Arbitration: Recent Development and Experiences Related to Arab Countries", *Arab Law Quarterly*, vol. 1, no. 3 (May 1986), at 278-298.
- Kabbani, Danny, "Enforcement of Foreign Judgements Relative to Project Finance in Islamic Countries", *GCC Commercial Arbitration Centre Bulletin*, issue 19 (June 2001), at 14-19.
- Keesee, Allen P. K., *Commercial Laws of the Middle East: Oman*, Dobbs Ferry: Oceana Publications, 1982.
- Kerrigan, Ellen C., "Comment on Decree 32/84", *Middle East Executive Reports* (August 1984).
- Khadduri, Majid. *War and Peace in the Law of Islam*. Baltimore: Johns Hopkins University Press, 1955.
- Komarov, Alexander S., "Enforcement Experience in the Russian Federation", in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, The Hague: Kluwer Law International, 1999.
- Koppenol-Laforce, Marielle, *et al.* International Contracts: Aspects of Jurisdiction, Arbitration and Private International Law, London: Sweet and Maxwell, 1996.
- Kreindler, Richard H., "Arbitration under the GCC Commercial Arbitration Centre Rules in the Context of Banking and Finance Disputes", *the Lebanese Revue of Arbitration*, No. 8, at 9 *et seq.*
- Lalive, Pierre, "Enforcing Awards", in International Chamber of Commerce, *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future*, Paris: ICC Pub. S.A., 1984.
- Landen, R. G., *Oman Since 1956: Disruptive Modernization in a Traditional Arab Society*, Princeton: Princeton University Press, 1967.
- Lane, Terence M. and William S. Morton, "Enforcement of a Foreign Award in Oman", *Arbitration International*, vol. 2, no. 1 (1986), at 75-76.
- Leboulanger, Philippe, "Arbitrability of Securities Transactions Disputes", *GCC Commercial Arbitration Centre Bulletin*, issue 14 (March/April 2000), at 9-13.
- Leigh, Monroe, "Decision: Arbitration – Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Choice of Law – Procedural defect in arbitration clause insufficient to bar enforcement of clause", *The American Journal International Law*, vol. 78, no. 1 (January 1984).

- Leigh, Monroe, "Decision: Arbitration – Enforcement of Arbitral Awards – New York Convention", *The American Journal of International Law*, vol. 77, no. 2 (April 1983).
- Lew, Julian D. M., "the Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East", *Arbitration International*, vol. 1 (1985), at 161-173.
- "List of Contracting States", <http://www.worldbank.org/icsid/constate/c-states-en.htm>, (available on 11/01/2008).
- Lovett, Graham and Clifford Chance, "Arbitration in the GCC – A Practical Approach", unpublished paper, Clifford Chance Limited Liability Partnership, 25 May 2004.
- Mayer, Pierre, "The Trend towards Delocalisation in the Last 100 Years", in Martin Hunter, Arthur Marriott, V. V. Veeder (eds.), *The Internationalization of International Arbitration*, London, Boston: Graham & Trotman/M. Nijhoff, 1995.
- McHugo, John, "Joint Ventures in Oman", in International Bar Association, *Arab Comparative and Commercial Law: The International Approach (Proceedings of the International Bar Association's first Arab Regional Conference, Cairo 15-19 February 1987)*, vol. 1, London and Boston: Graham & Trotman, 1987.
- "Message from the Chairman of the Centre's Board of Directors", *GCC Commercial Arbitration Centre Bulletin*, issue 19 (June 2001), at 4-5.
- "Message from the Secretary General", *GCC Commercial Arbitration Centre Bulletin*, issue 7 (December 1997), at 1 and 18.
- Mills, Karen, "Judicial Attitude to Enforcement of Arbitral Awards and other Judicial Involvement in Arbitration in Indonesia", *Arbitration*, vol. 68, no. 2 (2002), at 106-119.
- Mistelis, Loukas A., "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations", *The International Lawyer*, vol. 34, no. 3 (2000), at 1055-1069.
- Monico, Anna, "Oman", in Proceedings of the Seminar on Middle East Law IBA, 1981, at 135 *et seq.*
- Mustill, M. J. and SC Boyd, *Law and Practice of Commercial Arbitration in England*, 2nd ed., London: Butterworths, 1989.
- Nolan, Roy, "International Arbitration and Crossborder Trade", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 68-72.
- Palmer, Michael and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, London: Butterworths, 1998.
- Paulsson, Jan, "The Case for Disregarding LSA (Local Standards Annulments), under the New York Convention", *American Review of International Arbitration*, vol. 7 (1996), at 99-114.

- Paulsson, Jan, "the Rules of Evidence in the Arbitral Procedure: Comparative Study", in Fathi Kemicha, *Euro-Arab II*, The Hague: Kluwer, 1989, at 90-99.
- Paulsson, Jan, "Towards Minimum Standards of Enforcement: Feasibility of a Model Law", in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*. The Hague: Kluwer Law International, 1999, at 574-582.
- Prules, M., "Foreign Awards and New York Convention", *Arbitration International*, vol. 9 (1993).
- Quilling, Michael, "The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: North-South Perspective", *Georgia Journal of International and Comparative Law*, vol. 11 (1981).
- Rmli, Shams al-Din Mohammad ib Abu Abbas, *Nihayat al-Mohtaj*, vol 8, Cairo: 1356 H.
- Rashid, Samiya, *Al-Tahkim fi 'Alaqat al-Dowaliyya al-Khasa*, Kitab al-Awwal: *Ittifaq al-Tahkim*, Cairo: Dar al-Nihdha al-'Arabiyya, 1984.
- Rashid, Samiya, *Arbitration under the Afro-Asian Regional Centre in Cairo, and its Submission to the Egyptian Legal System* (in Arabic), (Cairo: 1985).
- Redfern, Alan and Martin Hunter, *Law and Practice of International Commercial Arbitration*, London: Sweet and Maxwell, 1999.
- Reed, Lucy F., "Experience of Practical Problems of Enforcement", in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, The Hague: Kluwer Law International, 1999.
- Reichert, Klaus and Mr Justice Roderick Murphy, "Enforceability of Foreign Arbitration Decisions: *Publicis SA v True North Communications Inc*", *Arbitration*, vol. 64, no. 4 (2001), at 369-373.
- Reisman, W. Michael, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, Durham, USA: Duke University Press, 1992.
- Riad, Tarek F., "Arbitration and the Legal Business Environment in Egypt", *Journal of International Arbitration*, vol. 17, no. 5 (2000), at 169-191.
- Rivkin, D. W., "The Enforcement of Awards Nullified in the Country of Origin: The American Experience", 14th ICCA Congress, Paris, May 1998.
- Robinson, Paul, Adnan Zulfiqar *et al*, "Codifying Shari'a: International Norms, Legality & the Freedom to Invent New Forms", *University of Pennsylvania Law School, NELCO* (2006).
- Rubino-Sammartano, Mauro, *International Arbitration Law*, Deventer, Boston: Kluwer Law and Taxation Publishers, 1990.

- Saleh, Samir, "the Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law", *Arab Law Quarterly*, vol. 1, no. 2 (Feb 1986).
- Saleh, Samir, "the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", *Arab Law Quarterly*, vol. 1, no. 1 (1985), at 19-31.
- Saleh, Samir, *Commercial Arbitration in the Arab Middle East: A Study in Sharī'a and Statute Law*, London: Graham & Trotman, 1984.
- Sanders, Pieter, "Unity and Diversity in the Adoption of the Model Law", *Arbitration International*, vol. 11, no. 1 (1995), at 5-38.
- Sanders, Pieter, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice, A Comparative Study*, London: Kluwer Law International, 1999.
- Sarie-Eldin, Hani Salah, "Financial Disputes in the Arab Middle East, with Special Reference to Egypt", in Norbert Horn and Joseph Jude Norton, *Non-Judicial Dispute Settlement in International Financial Transactions*, London and Boston: Kluwer Law International, 2000.
- Saville, Mark, "the Denning Lecture 1995: Arbitration and the Courts", *Arbitration*, vol. 61 (1995), at 159.
- Sayed Ahmed, Jalila, "Enforcement of Foreign Judgments in Some Arab Countries – Legal Provisions and Court Precedents: Focus on Bahrain", *Arab Law Quarterly*, vol. 14, no. 2 (May 1999), at 169-176.
- Schreuer, Christoph H., *The ICSID Convention: A Commentary*, Cambridge, New York, Port Melbourne: Cambridge University Press, 2001.
- Schreuer, Christoph, "Investment Arbitration: A Voyage of Discovery: A Paper Presented at the SJ Berwin International Arbitration Launch, London, November 4, 2004", *Arbitration*, vol. 71, no. 1 (2005), at 73-77.
- Sorieul, Renaud, "UNCITRAL's Current Work in the Field of International Commercial Arbitration", *Journal of International Arbitration*, vol. 22, no. 6 (2005), at 543-567.
- Sorieul, Renaud, "Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration", *Journal of International Arbitration*, vol. 17, no. 3 (2000).
- Spoliansky, Leon G. R., "Modern Business Law in the Sultanate of Oman", *International Lawyer*, vol. XIII, no. 1 (1979), at 101-17.
- Steiner, Henry H. and Deltev F. Vagts, *Transnational Legal Problems: Materials and Text*, 3rd ed. New York: Foundation Press, 1986.
- Szasz, Paul C., "A Practical Guide to the Convention on Settlement of Investment Disputes", *Cornell International Law Journal*, vol. 1, (1968).

Taniguchi, Yasuhei, "Enforcement in Action: Theoretical and Practical Problems", in Albert Jan Van Den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, The Hague: Kluwer Law International, 1999.

The Holy Quran.

Baz, Salim, *Sharh Ahkam al-Majalla*, 3rd ed. Beirut: 1923.

The Official Portal of Oman Chamber of Commerce and Industry, http://www.chamberoman.com/service_occi_specialized_Committee_arbitration.asp, (available on 23/08/2007).

Totterdill, Brian W., "Construction Claims: Results from Major Tribunal Findings in Kuwait", *Arbitration*, vol. 68, no. 2 (2002).

Totterdill, Brian, "Discussion: Construction Claims: Results from Major Tribunal Findings in Kuwait", *Arbitration*, vol. 68, no. 2 (2002), at 153-154.

Truscott, Nigel, "The Character of Oil and Gas Arbitrations", *DIAC Journal*, vol. 1, no. 1 (March 2004), at 13-16.

Tweeddale, A. G., "Enforcing Arbitration Awards Contrary to Public Policy in England", *The International Construction Law Review*, vol. 17, (2000).

UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*. UN Doc. A/40/17 annex 1.

UNCITRAL Working Group II (Arbitration and Conciliation), 3-7 October 2005, "Settlement of commercial disputes: Preparation of a model legislative provision on written form for the arbitration agreement", UN Doc. A/CN.9/WG.II/WP.136.

UNCITRAL Working Group II (Arbitration), 3-7 October 2005, "Settlement of commercial disputes, Interim measures of protection", UN Doc.A/CN.9/WG.II/WP.138.

United Nations Commission on International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings*, UNCITRAL's twenty-ninth session, New York, 28 May-14 June 1996.

"United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws", http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, (available on 17/8/2006).

United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration*, UNCTAD/EDM/Misc.232/Add.38, New York and Geneva: United Nations, 2005.

van den Berg, A. J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, The Hague: Kluwer, 1981.

- Waqedi, Mohammad ibn 'Omar, *Kitab al-Maqazi Waqedi*, edited by Mercedan Jones, 2 vols. , Oxford: Oxford University Press, 1966.
- Voser, Nathalie, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", *The American Journal of International Arbitration*, vol. 7, (1996).
- Yahiel, E. and R. M. Cranston, "Arbitration and Dispute Resolution in the International Construction Industry", *International Construction Law Review*, vol. 2 (1985), at 231-257.
- Yala, Farouk, "The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?", *Journal of International Arbitration*, vol. 22, no. 2 (2005), at 105-126.
- Zainal, Yousif, "Prevalence of Arbitration in the GCC States", *Journal of International Arbitration*, vol. 18, no. 6 (2001).
- Zainalabedine, Hassan, "Commercial Arbitration Principles and Procedures: An Applied Study on Bahrain's Experience in Arbitration and Settlement of Commercial Disputes", in Fathi Kemicha, *Euro-Arab II*, The Hague: Kluwer, 1989, at 167-181. Zaydan, 'Abd al-Karim, *Ahkam al-Dhimmiyyan wal Musta'minin fi Dar al-Islam* Baghdad: 1963.