

THE UNIVERSITY OF HULL

**The Rules of Procedure of Commercial Arbitration in the Kingdom of
Saudi Arabia (Comparative Study)**

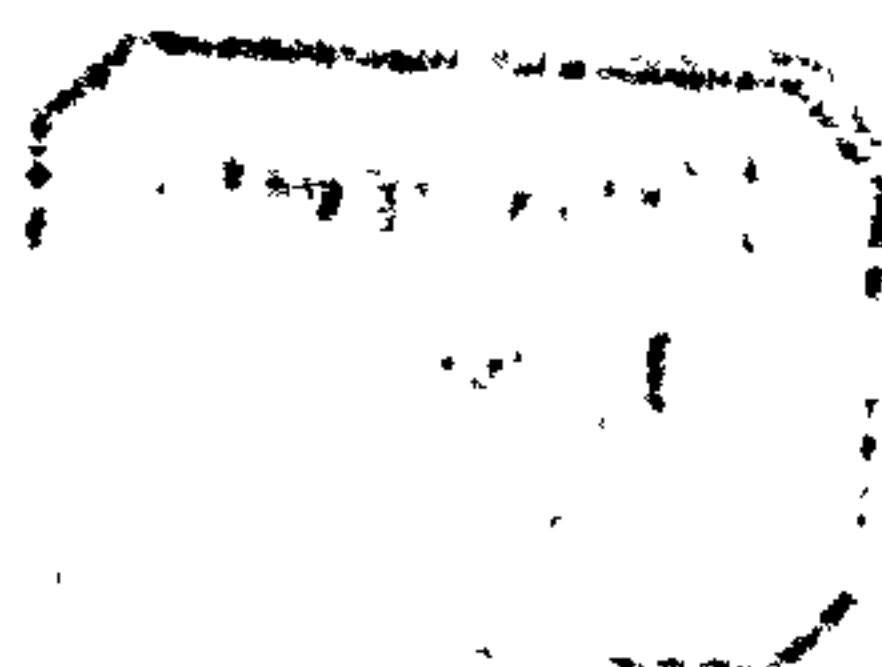
**being a Thesis submitted for the Degree of
Doctor of Philosophy in Law
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by

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Abstract

This thesis is about solely the Saudi arbitration regulation (1983) and its implementation rules of 1985. It examines several fundamental questions: are the rules of procedure provided by the 1983 Regulations appropriate to the developments that have occurred in the area of international commercial arbitration in the period following their adoption? Or are they considered outdated? Do those rules of procedure provide the flexibility necessary to meet the complexity usually involved in commercial disputes? What do foreign companies think of the 1983 Regulations? Do the 1983 Regulations require any adjustment? The thesis is intended to provide guidance to legislatures in their regulatory efforts and assist local courts and judges in developing an arbitration culture.

This first chapter consists of the general introduction. Chapter two provides general background on the nature of international commercial arbitration from one side and concept in *Sharia* from the other side. Chapter three demonstrates the status of arbitration in Saudi Arabia from the establishment of the Kingdom up to the issue of the Arbitration Regulation.

Chapters four, five and six analyse and compare the UNCITRAL Model Law and some other national arbitration laws with the position in KSA in the light of the Arbitration Regulation of 1983 and its Implementation of 1985. Chapter four focuses on arbitration agreements, addressing the validity of the arbitration agreement. Chapter five deals exclusively with all issues related to the arbitrator: numbers, method of appointments and qualifications. This chapter moves on to discuss dismissing and challenging the arbitrator. Fees and expenses are also considered. Chapter six is devoted to arbitral awards: deliberation, use of vote, time limits, awards in writing, language, place, date, reasons and signature of the award, registration of the arbitral award and its notification to the parties to the dispute. Correction and interpretation of the award are also

discussed. Essential aspects of challenge are examined: reason, method, time limit and the procedure of challenge. Finally, recognition and enforcement of the arbitral award are discussed, concentrating on the role of the international conventions and the rules of arbitration concerning the recognition and enforcement.

Chapter Seven contains the conclusions to the whole thesis and Recommendations.

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APPENDIX TWO: UNCITRAL MODEL LAW OF 1985

Abbreviations

ADR	Alternative Dispute Resolution
A D	After Christ
A H	After Hegira (Muslim Calendar)
CAAMB	Committee of Administrative Affairs of the Members of the Board
CFA	Court of Final Appeal
FOSFA	Federation of Oil, Seed, and Fats Association
GCC	Gulf Cooperation Council
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
LCIA	London Court of International Arbitration
NY	New York
NYCCI	New York Chamber of Commerce & Industry
OPIC	Overseas Private Investment Corporation
SAR	Saudi Arbitration Regulations
UNCITRAL	UN Commission on International Trade Law

UN **United Nations**

USA **United States of America**

WTO **World Trade Organisation**

Glossary

<i>a posteriori</i>	Describing or relating to reasoning based on deductions from observation or known facts.
<i>a priori</i>	Anticipates the effects of particular causes
<i>ad hoc</i>	For a particular purpose only
<i>ad valorem</i>	Charged as a percentage of the total amount
<i>audi alteram partem</i>	Hear the other side
<i>Compromis</i>	An agreement to submit an existing dispute to Arbitration
<i>Compromissoire</i>	Arbitration clause
<i>de facto</i>	Existing as a matter of fact rather than of right
<i>de jure</i>	As a matter of legal right
<i>Diwan Al-Mzalim</i>	Board of Grievances
<i>ex officio</i>	By virtue of holding an office
<i>ex parte</i>	On the part of one side only
<i>functus officio</i>	This term is applied to something which once had life and power, but which now has no virtue whatsoever
<i>Gharar</i>	Jeopardy

<i>Hadith</i>	The second primary source of the <i>Sharia</i>, the words and deeds of the Prophet Mohammed
<i>Hakam</i>	Arbitrator
<i>Hudud</i>	The crimes of murder, injury, adultery, drunkenness, theft and robbery
<i>Ifta</i>	Deliverance of legal opinion
<i>Ijma</i>	Unanimous agreement of the religious scholars of the Muslim community of any period following the demise of the Prophet
<i>Imam</i>	Head of Muslim State
<i>In camera</i>	Held privately
<i>inter alia</i>	Among other things
<i>ipso jure</i>	By the law itself
<i>Kompetenz-kompetenz</i>	The power of an arbitral tribunal to determine its own jurisdiction
<i>lex loci arbitri</i>	The law of the place where arbitration takes place
<i>Lian</i>	mutual imprecation
<i>per diem</i>	Charged as a regular rate (such as daily rate)

<i>Qadhf</i>	Libel
<i>Qisas</i>	Retribution
<i>Qiyas</i>	Connection of one matter with another due to a shared cause between them.
<i>Quran</i>	Words of God (the Muslim Holy Book)
<i>res judicata</i>	A matter that has been decided
<i>Riba</i>	Usury
<i>sensu</i>	
<i>Sharia</i>	The Islamic law
<i>Sunna</i>	The saying and deeds of the Prophet Mohammed
<i>stricto sensu stricto</i>	
<i>Taazir</i>	Reprehension
<i>Tawliya'</i>	Be in charge of
<i>travaux preparatoires</i>	Preparatory works that form a background to the enactment of legislation
<i>Zakat</i>	The tax under the Islamic law

CHAPTER ONE

INTRODUCTION

1.1 General

The requirement imposed by the rapid growth, nationally and internationally, of commercial transactions of trade, have coincided with a trend away from reliance on courts of law and towards an alternative dispute resolution (ADR) process. Even though there are various types of ADR, they share with each other some of the same characteristics. Arbitration is regarded as one the ADR types as it shares with the other ADR the characteristic of settling the dispute outside the court. However, arbitration is distinguished from the other ADR in that it ends with a binding award.¹

Reference to arbitration as a method of dispute settlement has become a noticeable feature in national and international trade contracts. The growing importance of arbitration as a prominent feature of contemporary law reflects disputants' preference to avoid referral to the judicial institutions, as the burden of these institutions has increased.² The reason behind the enhanced importance of arbitration, and why it has proved to be the most attractive method for resolving commercial disputes, may be due to the fact that arbitration offers advantages that are not found in any other methods of disputes settlement. These include the satisfaction of the parties to be freed from the difficulties and complexities imposed by the adjudication system, the fact that arbitration is a much speedier means of dispute resolution than judicial settlement, the parties' freedom in appointing the members of the tribunal, language(s) ...etc.

¹ More detail of comparison between arbitration and some of the important ADR methods will be presented in the following chapter.

² M. Al-Jyyuish, 'Foreign arbitrator and foreign awards', *The Lawyer*, June, 1993, p. 46.

During the past 10 years, economic growth in Saudi Arabia has led to the influx of a huge number of foreign investors. The occurrence of commercial related disputes is inevitable in such an atmosphere, due to the high level of activity involving a considerable number of foreign international companies and corporations and, as elsewhere, arbitration is the usual preferred forum for the settlement of such categories of disputes. The basic legislation which governs arbitral dealings in the Kingdom of Saudi Arabia is the Arbitration Regulations of April 25, 1983 issued by Royal Decree No. M/46. However, with the 1983 Regulations and its Implementation now entered their third decade of existence, several fundamental questions may be raised, namely, are the rules of procedure provided by the 1983 Regulations appropriate to the developments that have occurred in the area of international commercial arbitration in the period following their adoption? Or are they considered outdated? Do those rules of procedure provide the level of flexibility necessary in order to meet the level of complexity usually involved in some commercial disputes? What do foreign companies think of the 1983 Regulations? And do the 1983 Regulations require any adjustment or updating?

1.2 Aim of the Study

The aim of this study is to provide an overall review, analysis and evaluation of the effectiveness of the rules of procedure provided in the 1983 Saudi Arbitral Regulations and its implementation of 1985, in the light of current international commercial arbitration standards, the criteria of which in this regard will be the UNCITRAL Model Law of 1985 and some other arbitral rules, notably though not exhaustively the ICC Arbitration Rules of 1998, and the rules of the London Court of International Arbitration (LCIA), and the International Centre for Settlement of Investment Disputes

(ICSID). These are chosen due to the wide success they have achieved in the field of commercial dispute settlement. Studies covering the issue of international commercial arbitration in Saudi Arabia are rare. Moreover, none of them has considered the issue whether those rules of procedure comply with current arbitral procedural standards on the international level and whether they may need to be updated accordingly. By addressing these issues, this study may enhance the role of arbitration as a means for settlement of commercial disputes within the context of dealings between the Saudi Government and businesses with foreign companies, as well as increase the confidence of those companies in the means of settlement provided by Saudi laws.

Since the main topic of this thesis is concerned with the Saudi Arabian Arbitration system which is based on the Islamic *Sharia*, the study will take into account the following factors: the scope of arbitration in *Sharia* as well as the legitimacy of arbitration under the four schools of *Sharia*; the drafting history of the 1983 Regulations; the arbitration regulations that is found in the application of the 1983 Regulations and its Implementation of 1985 in practice and their reputation; and a comparison between the rules of procedure of the 1983 Regulations and those of the UNCITRAL Model Law of 1985 in order to pinpoint the differences (if any) between the two and what adjustments (if required) should be made in that respect.

1.3 Limitations of the Study

Since the study concerns the present position of the arbitral procedure of Saudi Arabia and is intended to give recommendations for the Saudi legislature to be able to develop the current system, each recommendation should reflect on the Saudi Regulation, either by improving a given rule to enhance its functioning or by making adjustment to the weak point of a certain rule. Overall the recommendations should be sound

internationally, to overcome the disadvantage of some of the present rules concerning dispute settlement, which do not serve the interest of the foreign investor. However, it must be borne in mind that all the recommendations that will be concluded from the discussions and arguments of this study should be within the context of *Sharia*, as it is the basis of the Saudi constitutional law. Therefore, any movement towards the development of the regulations in the Kingdom must be within the territory of *Sharia*.

The rules of procedure of commercial arbitration are many. Covering the discussion of the each procedure in the arbitration in a comparative manner might result in a huge thesis that would exceed the limitations imposed on academic research. Therefore, this study will focus on certain aspects of arbitral procedure rules. Exclusion of the rest does not mean they are regarded as unimportant, but is for the above reason and also to give the researcher scope for further research. As to the number of issues covered, some of the international and national regulations have classified these rules into sections. This thesis will adopt the same method in order to delimit the research and also to preserve the consistency of the rules. The first section will discuss all the rules related to the arbitration agreement, including the form, validity the content of the agreement, the legal capacity of the parties to the agreement, etc.

The second section will examine all the rules that concern the arbitral tribunal, including the various types of arbitral tribunal, the number of arbitrators, the ethics and qualifications of the arbitrator, the dismissal and challenge of the arbitrator etc

The third section will focus on all the rules that concern the arbitral award, including the form and content of the award, correction and interpretation of the arbitral award the procedure of issuing the award, challenging the award and the recognition and enforcement of the arbitral award.

In order to evaluate the limited rules of procedure in this study, comparison with other rules is necessary in line with academic practice. The main body of comparable rules is

the rule of the UNCITRAL Model Law of 1985. However, some other international and national rules have gone further than these rules in some areas of the arbitral procedure, and a significant impact on the development of the Saudi Arbitration Regulation could be achieved by integrating them into this study.³

Comparing the Saudi Arbitration Regulation with the arbitral rules of the neighbouring states has not been attempted. This is a deliberate omission, for the simple reason that most of these states, such as UAE, Oman, Bahrain and Egypt, have adopted the Model Law as it stands. Therefore, these laws are not any different from the laws of the developing countries nor better to be chosen as a segment for comparison in this study. *Sharia* Law did not constitute a barrier to the legislatures of these states in adopting the Model Law. However, the situation in Saudi Arabia is different, as *Sharia* principles are always the key point in the process of either producing a new law or reforming any existing one.

1.4 Methods Employed for Gathering Data

In order to obtain in-depth knowledge of the subject of this study, certain data were required. Due to the amount of valuable literature relevant to the study written in Arabic, translation was an essential part of the study. Further, since all the literature written on this subject concentrates on analysing the rules of procedure, with less attention to the practice in this study, interviews were conducted with specialists on arbitration to be able to enrich the research with contemporary practice. Therefore, the research is based on two sources, as follows:

A. Literature:

³ Such as the ICC Rules, Netherlands Procedure Code etc, as these rules are regarded as the rules of civilized nations.

1. Saudi Arbitration Regulation of 1983 issued by Royal Decree No. M/46, and its Implementation Rules of 1985.
2. Legal documents, books and articles, in the relevant field, such as Islamic law, international arbitration law, commercial law and various studies focusing on the legal nature of Saudi Arabia and its surroundings.
3. All relevant publications on the subject of arbitration found on the World Wide Web.
4. A wide range of unpublished cases, pertinent to each branch of the arbitral procedure, which will enable the researcher to analyse and criticise the rules of procedure and identify omissions and shortcomings.

B. Surveys based on interviews conducted by the researcher with senior judges of the Board of Grievances, the competent authority having the original jurisdiction over commercial disputes, to assess the practice of arbitration in Saudi Arabia, in order to enrich the research by highlighting areas of the rules which have shortcomings. These provide for the researcher's analysis of the rules of procedure and recommendations to the Saudi legislator for any adjustment or update if needed. One of these interviews was held with Dr. Fahad Alhugbani, senior judge, chairman of the commercial committee at the Board of Grievances and a member of the Saudi arbitration team. This interview took place on the 15th-17th February 2004 in Jeddah. The second interviewee was *Shaik* Abdullwahab Almansori, senior judge and chairman of the commercial committee at the Board of Grievances, interviewed on 20th January 2004 in Jeddah. The third interview was with Dr. Abdullaziz Altwelay, a judge at the commercial committee of the Board of Grievances in Almadina Almonwara. This interview was conducted by phone, due to the distance between the interviewer and the interviewee. The interview took place on the 12th, 15th and 17th of December 2003. The fourth interview was conducted with Abdullah Al-Hussain, member of the Commercial Circuits of the Board of Grievances

in the western branch. The interview took place on the 20th, 23rd, 24th of February 2004. Further, some critical questions were presented by the researcher to senior judges and lecturers during a workshop, on the subject *Islamic Legal and Procedural Principles in Arbitration*, held between 11th-14th of December 2003 organised by Imam Mohammed Bin Saud Islamic University.

1. 5 Organisation of the Thesis

In order to achieve the aim of this research, as described above, the thesis is composed of seven chapters, each dealing with a particular concern:

Chapter One, The General Introduction, includes the aim and significance of the study, limitations of the study, the methods adopted in gathering material for the study and the organisation of the thesis.

Chapter Two, proposes a comprehensive definition of arbitration, and brings a number of points to light, among which are the usefulness of arbitration and its preferability to litigation and other means of dispute resolution. Further, it discusses the nature of arbitration, and the differences between arbitration and alternative dispute resolution (ADR) methods. This is followed by an examination of arbitration in Islamic jurisprudence, including the concept of arbitration in the era before Islam. Evidence is provided from the four sources of *Sharia* that arbitration is a legitimate method for settling disagreements among mankind. The opinions of the four *Sunni* Schools in this regard are addressed to prove that even though these schools differ slightly and represent different periods of time, they share the same opinion regarding the legitimacy of arbitration.

Chapter Three discusses the phases of development of Saudi arbitration law since the establishment of the Kingdom of Saudi Arabia up to the date of issuing the current regulation, and sets forth the attitudes of the Saudi government towards arbitration as a

means of resolving disputes, and the reasons for such attitudes during these periods. For the sake of giving more contextualised understanding about arbitration in general within Saudi Arabia we will shed the light in this chapter on arbitration rules in different areas, such as the Commercial Court Regulation of 1931, the Labour and Workman Regulation of 1969 and the Chambers of Commerce and Industry Regulation of 1980.

Chapter Four is concerned with the Arbitration Agreement. First, the form of the Arbitration Agreement is analysed, examining the significant differences between the submission agreement and the arbitration agreement. The second section will address the validity of the arbitration agreement, to observe which methods of writing the agreement are acceptable nowadays in international law. This will enable any differences from these norms in the Saudi Arbitration Regulation to be identified, and suggestions made for any adjustment deemed necessary. The last point to be discussed in this chapter is the consequences and effects of the Arbitration Agreement

Chapter Five: The Arbitrators, covers the main aspects concerning the arbitrators themselves, such as their number and the methods of their appointment. The parties to the dispute have the right to choose and appoint the members of the arbitral tribunal by themselves or can concede this right to a third party, such as a specialist arbitral institution. In addition, this chapter discusses the major qualifications required in a person who wishes to act as an arbitrator. For instance, he must have full legal capacity, he should have experience in dealing with the subject-matter of the dispute, and he must be and remain impartial and independent throughout the process. Also, this chapter analyses the circumstances where the arbitrator can be subject to dismissal or challenge, particularly the reason for challenge, its time limit, procedure and effects resulting from the challenge. The fees and expenses of arbitrators, and the methods of assessing them, are also considered.

Chapter Six is concerned with the main issues related to the arbitral award. The first section sets forth the important aspects concerning the way in which the arbitral award is made, such as the deliberations, majority vote and time limits. Types of arbitral award, such as partial award, final award and additional award are discussed. The third section discussed the most important formalities required in the arbitral award, such as award in writing, language, place, date, reasons and signature of the award. Registration of the arbitral award and its notification to the parties to the dispute, its correction and interpretation are discussed.

The essential aspects of challenge of the arbitral award are examined in the following part of this chapter, such as the reason, method, time limit and the procedure of challenge. Further, a distinction will be drawn between challenge of a national arbitral award and that of a foreign arbitral award. Recognition and enforcement of the arbitral award, whether a national or foreign award, are discussed in the last section of the chapter, which concentrates on the role of the international conventions and the rules of arbitration concerning the recognition and enforcement of the arbitral awards. Furthermore, this part sets forth the position in Saudi Arabia regarding the recognition and enforcement of arbitral awards, whether Saudi or foreign.

Chapter Seven contains the conclusions to the whole thesis. The main themes and problems discussed in the thesis are reviewed and conclusions drawn. On the basis of the discussion, recommendations are proposed to the Saudi legislature with respect to the Saudi Arbitration Regulations and its Implementation.

CHAPTER TWO

ARTRATION AND ITS SCOPE IN ISLAM

2.1 Introduction

Before addressing the main issue of this thesis, it is essential to prepare the reader with some general background on arbitration which will assist the reader to get the full picture of the research.

In this regard, the first part of this chapter will deal with the definition of arbitration linguistically and technically (legally), followed by the nature of arbitration and its usefulness in the field of financial transaction. The last point of this part will shed light on characteristics of the ADR methods with comparison with arbitration.

The second part of this chapter will deal with the definition of arbitration within the context of Islamic jurisprudence and its legality. Arab arbitration before Islam and after Islam will be discussed. Evidence of the legitimacy of arbitration from the perspectives of the *Quran*, *Sunna*, consensus *Ijma* and analogy *Qiyas* will be presented. This part of the chapter will also shed light on the opinions of each of the four *Sunni* schools on the legitimacy of arbitration.

2.2 Definition of Arbitration and its Elements

One of the problems involved in doing comparative studies is that of defining a concept in such a way as to encompass the practice in various countries covered by the study.

Attempting to provide a universally valid definition of arbitration presents such a problem because the practice of arbitration varies from one country to another. Despite attempts at the unification of laws governing arbitrations, national laws on arbitration

still differ in some respects. However, the dissimilarities do not preclude the extraction of certain elements which mark international commercial arbitrations. To define arbitration it is worth considering some of the widely known definitions at the outset, in order to determine whether they succeed in adequately defining the practice. However, it is worth mentioning that most of the attempts have failed to formulate a comprehensive definition of arbitration taking into account every aspect of arbitration.⁴ It has been said that arbitration is an institution more easily identified than defined.⁵

The Shorter Oxford English Dictionary defines arbitration as:

The settlement of a question at issue by one to whom the parties agree to refer their claim in order to obtain an equitable decision.⁶

The Oxford Dictionary of Law has defined it as "The determination of a dispute by one or more independent third parties."⁷

These definitions seem to have left out some crucial aspects of arbitration, such as the enforceability of its decision, but they give a simple idea of what it is. However, some arbitral institutions present a different picture, such as in the introduction of the ICC International Court of Arbitration, where the drafters referred to arbitration as leading to an enforceable decision.

The American Arbitration Association defines Arbitration as "the reference of a dispute to one or more impartial persons for final and binding determination". As Lew argues, the 'private character of arbitration' and the 'judicial responsibility of the arbitrators' seem to be missing in the definition mentioned.⁸

According to another definition, arbitration is "a process of dispute resolution in which a neutral party renders a decision after a hearing at which both parties have an

⁴ J. Lew, *Applicable Law in International Commercial Arbitration*, Oceana Publications Inc., New York, 1978, p. 11

⁵ *Ibid.*

⁶ *New International Dictionary*, 3rd ed, 1944

⁷ *Oxford Dictionary of Law*, 4th ed, Edited by Elizabeth A. Martin

⁸ J. Lew, *op. cit.*, p. 11

opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision."⁹ This definition indicates that the parties are free to choose the arbitrators, but not other matters, such as the applicable law and the place of arbitration, which is not the reality of arbitration.

Similarly, W. Gill defined it as "the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction"¹⁰

M. Reynolds defines arbitration as " a consensual process in a judicial manner whereby a dispute between two or more persons is finally resolved by the arbitrator's decision which is binding upon the parties and enforceable at law"¹¹ Although Reynolds made a good effort in defining arbitration, he neglects the fundamental element which distinguishes arbitration from other dispute settlement methods, namely, that arbitration is a private method of settling disputes.

In another attempt, arbitration is defined as " a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons- the arbitrator or arbitrators- who derive their powers from a private agreement, not from the authorities of a state, and who proceed and decide the case on the basis of such an agreement".¹² Reně argued that this definition does not correspond to the meaning of arbitration in some other laws and the practice of lawyers in some other places. David also argued that the definition is too broad in some ways and too narrow in others.¹³

According to A. Redfern and M. Hunter, arbitration has three substantial peculiarities. First, it is an agreement to arbitrate. Second, the arbitral tribunal must determine the

⁹ *Black's Law Dictionary*, 6th ed, 1990

¹⁰ W.Gill, *The Law of Arbitration*, Sweet & Maxwell, London, 1975, p. 1

¹¹ M. Reynolds, *Arbitration*, Lloyd's of London Press Ltd, London, 1993, p. 3

¹² Reně David, *Arbitration in International Trade*, Kluwer Law & Taxation Publisher, Deventer, The Netherlands, 1985, p. 5

¹³ *Ibid*

dispute by decision on the matter, rather than by compromise. Third and finally, the decision must be significant in terms of recognition and enforcement.¹⁴

Regarding what has already been mentioned, it is fair to say that these definitions seem to have defined arbitration differently. Some of them made efforts to define arbitration comprehensively, and focused on some angles and left some of the main elements unclear. Whereas, arbitration in the researcher's view can simply be defined as an agreement between two or more persons to submit a present or future dispute to be settled by the determination of one or more persons.

2.3 The Nature of Arbitration and its Usefulness

How useful can arbitration be? What is in arbitration that is not found elsewhere? These and many other questions may arise regarding the trend towards arbitration nowadays. Is it because arbitration has been the unique method of settling the disputes from old days, or is it because of the failure of the system of the competent courts? In fact, the reason why arbitration is a preferred method of settling disputes, compared with litigation and ADR, is because of several significant factors which can be identified from the practice of commercial arbitration in different countries. However, the most important feature of arbitration as Merrills indicated, is that "Arbitration is employed when what is wanted is a binding decision". This makes arbitration in the same line as the judicial system to be categorized as the legal means of dispute settlement.¹⁵

Among the advantages of arbitration is the speed of the process. Undoubtedly, disputing parties prefer not to be subject to any restrictions that may inhere in the national law procedure. The reasons why arbitration is a quicker method for resolving disputes

¹⁴ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, London, 1999, p. 3

¹⁵ J. G. Merrills, *International Dispute Settlement*, 4th Edition, Cambridge University Press, Cambridge, 2005, p. 80.

appear to be: first, parties can choose the procedure, as will be discussed later in this chapter, which they could not do amid the complex and confusing field of litigation. Second, the arbitrators selected are experienced and highly respected in the area of the dispute. This means that the time of the hearing is likely to be shortened because of the ability of the arbitrator to understand the issue to be decided in more technical sense, and thus to be able to make the decision quicker than a judge.¹⁶ Furthermore, most judges in different levels of the national courts do not take into consideration the appropriate flexibility that might be required, and speed, in order to determine the disputes. Therefore, arbitration promotes a speedy resolution.¹⁷

When disputes are referred to Court, a dispute may, by its nature, require a long time for resolution. Furthermore, matters may occur during the hearing of the dispute at more than one stage, causing the dispute to be subject to appeal and further appeal to the highest court, before a final decision is reached.¹⁸

Arbitration gives freedom to the parties in appointing the arbitrator, or arbitrators, as we will see in chapter five, with suitable experience and qualifications relevant to the content of the dispute, in order for the arbitrator to realize the dimensions of the dispute. Some disputes may involve technical terms, foreign languages and customs.¹⁹ These qualifications, which rarely exist in judges, make arbitration more desirable. Sometimes disputes may arise between two persons from different nationalities, where each party (or their arbitrator) has been brought up in a different legal background. In this case, arbitration has the key to making this situation smoother by choosing the right arbitrator, to avoid any misunderstanding that may arise as a result of differences in legal background or language.²⁰ A competent lawyer comments on this, "The choice of

¹⁶ M. Wagn, "Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?", *Arbitration International*, Vol. 16, No. 2, 2000, pp. 192-193.

¹⁷ For more read John Collier & Vaughan Lowe, *The Settlement of Disputes in International Law Institutions and Procedures*, Oxford University press, Oxford, 1999, pp. 45-46.

¹⁸ F. Elkouri and E. Elkouri, *How Arbitration Works*, BNA Incorporated, Washington D. C., 1960, pp. 7-8

¹⁹ More details in M. Wagn, *op. cit*, p. 192

²⁰ A. Redfern and M. Hunter, *op. cit* pp. 8-9

the persons who compose the arbitral tribunal is a vital and almost decisive step in arbitration. It has rightly been said that arbitration is only as good as the arbitrators".²¹

The arbitration agreement is considered as one of the crucial elements because it fulfills several functions. The agreement indicates the consent of the parties to resolve their disputes by arbitration, and without this agreement, arbitration can be invalid.²² Also, this agreement generally details all the aspects concerning the dispute, such as the constitution of the arbitral tribunal, the law to be followed, the dispute to be decided, the time and the place.²³ Generally speaking, this agreement may be considered as the scenario of the whole procedure, which makes it very consistent and easier than litigation and other ADR means as a method of dispute resolution.

In Arbitration, parties are free in choosing the law applicable in the arbitration agreement. The freedom of choosing the applicable law may prevent certain kinds of complexities from occurring. For instance, parties from different countries, which may be either developed or developing countries, with different legal systems, may enter into commercial relations. If any dispute arises between them, it is likely that neither will trust the other party's jurisdiction. Furthermore, the ability to choose the applicable law maintains some sort of safeguard, especially for the foreign investor, in the case of Mixed Arbitration.²⁴

Arbitration has the advantage of giving the parties the right of choosing the place and the time of the hearing, unlike litigation, where the time and the place of the hearing are rarely suitable for the parties of the dispute.

Confidentiality and privacy are most crucial issues in the business field. However, business is always subject to differences or conflicts, submitting such disputes to litigation could lead to revelation of business secrets, and on the other hand, it might

²¹ *Ibid*, p. 9

²² *Ibid*, pp. 6-7

²³ *Ibid*, p. 6

²⁴ Arbitration between State and Foreign investor (party). After entering into a contract the law of the State is subject to change.

affect the disputing parties' reputations.²⁵ Thus, the effect of hearing in open court on the disputing parties is one of the reasons for disputants to prefer arbitration.

Thus, arbitration has many advantages to offer, which in practice make arbitration preferred to litigation and ADR means. Nevertheless, arbitration involves some disadvantages, for instance, high cost. Nevertheless, one may argue that the considerably increased cost of arbitration is an indication of the value of arbitration, in terms of its effectiveness and the demand for it. Therefore, the high cost of arbitration is a positive indication, in the sense that the more the demand increases, the higher the cost gets. Nevertheless, M. Wagn stated, "Since the arbitration process is not as lengthy as that of court proceedings, the necessary costs may be reduced substantially because parties would not need to hire the lawyer for as long a period of time as may be required in case of litigation"²⁶.

The second disadvantage is, that in some countries, the effectiveness of arbitration depends on the state courts' attitude, as they may refuse to enforce the arbitral award.

Furthermore, lack of predictability is considered as one of the disadvantages of arbitration. In practice, disputing parties may consult any lawyer about the usefulness of arbitration in their dispute. Therefore, they can decide whether to resolve their dispute by arbitration or by litigation or other ADR means.

2.4 Differences between Arbitration and other ADR Means

There are many methods of ADR for settling commercial disputes, in addition to arbitration. These methods have become widespread in the business community. However, people tend to be confused about the essential nature of these methods with respect to the nature of arbitration.

²⁵ P. Rothman, "Please Keep it Confidential: Arbitration Makes it Possible", *Dispute Resolution Journal*, September, 1994, pp. 69-72

²⁶ M. Wagn, *op. cit.*, p. 196

Since arbitration is the concern of this study, it will be useful to address the nature of these alternative methods of dispute resolution respectively.

2.4.1 Mediation

Mediation functions, when two parties have failed to settle their dispute by themselves and turn to a third party, or mediator, who listens to each party separately, and attempts to solve these differences between them by focusing on each party's interest, rather than the legal entitlement of the parties.²⁷ Therefore, the disputants conclude their differences by making a new agreement in which their rights and duties, after abandonment of part of their rights, are stated. Furthermore, during the mediation, the mediator does not make his own recommendations, but assists the disputants to reach a new agreement.²⁸ In addition, he draws up terms which he considers to be fair, having listened to each side's views: the mediator may also point out to the parties what he sees as being a probable outcome should mediation fail and the dispute proceed to litigation or arbitration.

2.4.2 Conciliation

Conciliation is an agreement between the disputants or their representatives, where they settle their disputes by relinquishing parts of their rights. The conciliator is a neutral party whose role is to help the parties reach an agreement. He may see each party separately, listening to their views, and making sure that each side understands the other's viewpoint. He moves backwards and forwards between the parties. A

²⁷A. Redfern and M. Hunter, *Op. cit.*, p. 33

²⁸ M. Hunter, *The Frishfield Guide to Arbitration and ADR: Clauses in International Contracts*, Kluwer Law & Taxation Publishers, Deventer, 1993, p. 65

conciliation agreement is not effected unless it is completed in a formal contract. The conciliation agreement is binding on disputants to a dispute, and is not appealable.

2.4.3 Med-arb

Med-arb functions when, if mediation carried out unsuccessfully, an authorization may be issued for another designated third party to act as arbitrator and give a binding decision. The advantage of this method is that, if the mediation proves a failure, the mediator possesses details that will make the process of arbitration quicker and less costly than if a separate process had to be proceeded. However, the parties may neglect to resort to mediation, because of the awareness that in the event of the failure to agree, arbitration will then take over²⁹.

2.4.4 Mini-Trial

This is not a normal trial and is not a binding ADR method; however, it helps the parties of the dispute to get full picture of all the aspects of the dispute matter, to enable them to enter the dispute settlement process on a knowledgeable basis." The mini-trial can be seen as an abbreviated non-binding arbitration followed by negotiation and/or mediation".³⁰

The procedure of the mini-trial starts with a hearing of parties based on a limited form of disclosure documents. Then, attorneys may step in to outline the evidence they will present at the trial. The hearing is carried out at the presence of the "neutral advisor"

²⁹ A. Alghamdi, *Alternative Dispute Resolution (ADR) in Commercial Disputes*, LLM thesis, University of Aberdeen, 1999, pp. 23-24.

³⁰ *Ibid*, p. 25

who follows the negotiation of the parties. If the parties failed to reach a settlement, they may ask the neutral advisor to give a non-binding opinion.³¹

2.5 Arbitration in Islamic Jurisprudence

In order to learn about arbitration in the Islamic jurisprudence it is necessary to define arbitration within the framework of Islamic jurisprudence and its legality, as well as arbitration in the era before Islam, which is called Arab arbitration, as the mission of the prophet Mohammed (peace be upon him) was in Arabic and the Arabs witnessed it. Therefore, acknowledging the concept of arbitration before Islam would help us to comprehend the conversion that has occurred to arbitration in the Arab community after Islam.

Therefore, this section will shed light on the nature of arbitration in Islamic jurisprudence with the clarification of proofs from basic sources of Islamic jurisprudence. These original sources are the *Quran*, *Sunna*, *Ijma* and *Qiyas*.

Finally, the distinctions between arbitration and other similar methods in Islamic jurisprudence, such as adjudication and *ifta*, will be clarified.

2.5.1 Arbitration before Islam

Before the coming of Islam, arbitration issues covered all aspects of life, due to the fact that people at that period lacked institutional judicial systems. Various incidents occurred during that period.³²

³¹ A. Redfern and M. Hunter, *Op. Cit*, p. 36. The "Neutral Advisor" is a person who has experience of how a court functions, for instance, a retired judge or senior lawyer.

³² The institutional judicial system was absent at that period. If a difference occurred among the tribe members they took it to arbitration by the head of the tribe or any person whom they considered wise enough to settle the dispute. If the dispute took place between two tribes, they arbitrated before a third party from another tribe, normally the head of that tribe, which is the same as international arbitration

The case of *Alqama v. Amer bin Tofail* (620 A.D), like the majority of Arab disputes, arose from the issue of pride. The parties to the dispute belonged to the Amer tribe and quarreled about the chieftdom. This conflict between the two parties went on for a period of years but eventually they went to see the head of another tribe, who acted as arbitrator in their dispute. Both of the disputant parties were great poets and able to recite their poetry in the presence of the arbitrator. The arbitrator was not able to give sound and final judgment in the case and declared that both parties deserved to be head of the tribe. Ultimately, they accepted his arbitration and shared the chieftdom.³³

In another case of *Al Quraish v. Khozzah tribe*, the Quraish and Khozzah tribes were in constant conflict over the custodianship of Makkah and Alkaaba. The situation escalated to the stage that many people died in the conflict. An agreement was made to choose a competent Arabic arbitrator. The selected arbitrator made his decision to give the Quraish tribe Al Kaaba, and to give Makkah to the Khozzah tribe. By this judgment, the dispute was solved.³⁴

The most outstanding case of arbitration before the coming of Islam was the case of the removal of the Black Stone. It occurred in the seventh century when the Quraish tribes met to discuss the problem of building a new Black Stone in the Kaaba in Makkah. This was a site of great religious significance and pilgrims traveled from Arab states for the purpose of visiting the Kaaba and the Black Stone in the corner of it. The conflict arose among the tribes when each one of them wanted the honor of removing the Black Stone. They were locked in disagreement for four nights about who should remove it. Finally they gathered and decided to appoint the first person entering the Kaaba from the Alsalam Gate as an arbitrator.³⁵ The arbitrator was the Prophet Mohammed (peace be

between two states nowadays. See Mosaad Al-Juhani, *Arbitration in Islamic Sharia and Positive Rules*, Dar Alemaan, Al-Madinah Al-Monawarah, 1994, pp. 21-22. (in Arabic)

³³ *Ibid*; also see Mohammed Shoukri Aloussi, *Bulugh Al irb fi Maarifat ahwal al arab*, 2nd Ed, Vol. 1, Al Rahmaniyyah Press, Egypt, 1924, p. 287

³⁴ Abdel Malek bin Hasham, *Alsirah Alnabawiah (the Prophet Bibliography)*, Vol. 1, Makkah Printing press, Makkah, 1971, pp. 123-124.

³⁵ Alsalam Gate is one of Makkah Holy Mosque's Gates.

upon him) before he received his message from God. The decision was to put the stone in a piece of cloth and each tribe carry that piece of cloth, so that the stone could be removed by all the tribes. Thus, the dispute was settled.³⁶

2.5.2 Definition of Arbitration within the Islamic jurisprudence:

Hakam is the term used in Arabic to refer to an arbitrator. This is the person who is chosen to arbitrate between the disputing parties to give sound advice and final judgments in disputes.³⁷ Also, the term *Hakam* is one of the God's names, as it is said in the *Quran* "shall I seek a judge (arbitrator) other than Allah"³⁸

As to the legal meaning of arbitration within the Islamic jurisprudence, Muslim scholars have defined the arbitrator as '*Tawliya*' which means that 'two adversaries accept the arbitration of an arbitrator'.³⁹ Ibn Kodama said:

"If two men agree to make between them an arbitrator and this deed is in the interest of justice, then arbitration is acceptable."⁴⁰

The code of Judicial Rules (*Majallat Al Ahkam Aladliyah*) claims that arbitration is the act of agreeing about an arbitrator to issue a settlement between disputants.⁴¹ Arbitration

³⁶ *Ibid*, pp. 1-197; Also see Al Imam Ahmed Bin Hanbal, (died in 241 A.H, 821 A. D), *Almusnad*, May Mania Printing, Egypt, Vol. 3, p. 245

³⁷ Al Mujam Wassit, *The Arabic Language Complex*, Vol. 1, Qatari Printing Press, Administration of Islamic Heritage Revival, Qatar, p. 190.

³⁸ *The Holy Quran*, Surat El Anaam, Verse. 114. The meaning of 'arbitrator' is given in the verse as "the righteous man seek no other standard of judgment but Allah" in *The Holy Quran*, Translation of the Meaning and commentary, Complex for printing the *Holy Quran*, Madinah, KSA, 1413 A. H (1992 A. D), p. 376

³⁹ Zain Adin Ibn Najem (died 970 H, 1549 A.D.) *Albahar Al Reaq (The Clear Sea) Sharh Kanz Al Daqaiq*, 2nd Ed, Vol. 7, Dar Al Maarifa, Beirut, (1333H, 1912 A.D.) P. 24; Also the opinion of Sheik Al Azhar, Jad Al Had Ali in his answer to the arbitration question, *Al Azhar Magazine*, Issue September 1994, Vol. 4, P. 441. Also see Dr Saleh Al Hassan, *The Legal in Arbitration*, Al Narjis Press, 1417H, (1996 A.D.), P. 32; Also see Ahmed Al Ghazali *Arbitration in Islamic Jurisprudence*, Imam Mohamed bin Saud, Islamic University, Ryadh, 1417H, (1996 A.D.), P. 25; also see Dr Qahatan Al Dawri, *Arbitration Contract in Jurisprudence and Law*, 1st Ed, Al Khoulood Press, Baghdad, 1985, p. 20.

⁴⁰ Ibn Kodama, *Al Muagni*, Vol. 9, (General Directorate of Printing of Scientific & Economic Research, Saudi Arabia, p. 107.

⁴¹ Article 1790 from the Magazine of Judicial Judgements. This magazine is considered to be the First Civil Codification of Islamic Code following the Al Hanafi School, 1876.

was defined as the appointment of an arbitrator by the adversaries to settle their disputes.⁴² Article 2091 of the Code of Legal Rules (*Majallat AL Ahkam Al Shariah*) stipulates that it is acceptable for adversaries to agree upon an arbitrator to decide between them as a judge.⁴³

Some Islamic researchers consider arbitration to be a contract between two conflicting parties where they freely choose an arbitrator to end their dispute.⁴⁴ It has also been defined as a contract among contracts,⁴⁵ and finally it has been defined as “an agreement made by disputants to appoint a qualified person to settle their dispute by reference to Islamic law”.⁴⁶

There have been various definitions of ‘arbitration’ given by different scholars but they have all had only an approximate meaning.

In Islamic Jurisprudence, ‘arbitration’ is the fact of an agreement between two adversaries brought about by an arbitrator who has settled their dispute by virtue of Islamic Jurisprudence rules. The following will explain more clearly the components of the definition of arbitration:

The expression ‘two adversaries agreeing to the use of an arbitrator’ is proof that the two parties are in conflict, which makes the presence of an arbitrator necessary. It is unlikely that arbitration would take place in the absence of only one of the parties. ‘To their satisfaction’ is the term used to signify that the opponents have agreed of their own free will to appoint an arbitrator to finalise their dispute. Arbitration can therefore be considered as a contract between two disputing parties.

⁴² Ali Haidar, *Darar Al Hokkam Sharh Majalat Al Ahkam (Explanation of Code of Rules)*, Vol. 4, Al Nahda Library, Beirut, P. 523. See also the same meaning Salim Rostom, *Explanation of Rules Magazine*, 2nd Ed, House of Islamic Heritage Revival, 1986, p. 1163.

⁴³ Ahmd Al Kari, *Majalat Alahkam Alashariah (Code of Legal Rules)* – Study and Enquiry of Dr Abdewahab bin Sulaiman and Mohammed Ibrahim, Tohama Press, 1st Ed, 1981, p. 60.

⁴⁴ Mustapha Zarka, *The General Introduction to Jurisprudence*, 7th Ed. Vol. 1, Dar Al fikh, P. 601. Also see Hmoud Mahjoub *Reconciliation and its Impact on Settling Disputes*, Dar el Jil Press: Beirut, p. 138.

⁴⁵ Ibn Kodama, *op, cit*, Vol. 9, p. 108.

⁴⁶ S. H. Amin, *Commercial Arbitration in Islam and Iranian Law*, Billing & Sons, Worcester, 1948, p.31. In this way arbitration is defined in the *Shii* School in a similar way to the *Sunni* School.

The expression 'to settle their disputes' indicates that there is a conflict. Establishing that a state of conflict exists is of paramount importance, because without it arbitration becomes meaningless. Additionally, it may not be necessary for a third party to be present, as one of the opponents may agree that the other act as arbitrator to put an end to the existing problem.

The expression 'by virtue of the Jurisprudence rules' is required for the arbitration process to be able to proceed, whether used for Islamic Jurisprudence or for conventional rules. This means that Islamic arbitration must comply with Islamic Jurisprudence rules, although there are of course issues that do not require arbitration, and, in fact, there are issues where arbitration is not permitted.⁴⁷ Laws that must be applied as defined for scholars of Islamic Jurisprudence are known as 'Jurisprudence rules'. Failure to mention these rules of Jurisprudence defines arbitration in general terms. However, this could lead to the understanding that arbitration can include all types of quarrels and conflicts.

2.5.3 Legitimacy of arbitration in the Islamic jurisprudence

Sharia is considered an independent legal system with its own particular approach, so it is natural that arbitration should have a distinctive character within the *Sharia*. In order to consider the legitimacy of any phenomenon in Islam, the matter in question must be referred to the sources of Islamic law. Thus, a particular matter should first be referred to the *Quran*, but if the answer is not found in the *Quran*, reference is then made to the *Sunna*. If no answer is found in the *Sunna*, reference should then be made to the *Ijma*, and hence to the fourth source, *Qiyas*, if no answer is found in *Ijma*. In the following

⁴⁷ Such as the issues that are related to God rights, for instance agreement to arbitration is not permitted in the activities that are only for worshipping God or *Hudud*. These issues are not the same in the view of the Scholars of the four *Sunni* Schools as will be clarified later in this chapter.

paragraphs, these sources are used for evidence as the legitimacy of arbitration in Islamic law.

2.5.3.1 Legitimacy from the *Quran*.⁴⁸

There are several verses of the *Quran* that indicate that arbitration is permitted in the *Sharia* as a method of dispute settlement.

If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; If they wish for peace, God will cause

⁴⁸ The *Quran* was sent through the Last of the Prophets, Mohammed. It is the first primary source of the *Sharia* and the most important original source. It is regarded as the actual word of God. As a result, all other sources are interpretations and explanations of it, for more see *Al-Mizan, The Balance*, 1994, vol. 1, Issue 1, p.47. One of the sufficient proofs that the *Quran* was revealed to the Prophet by God, and it was not made by the Prophet himself, is that it revealed many scientific matters hundred of years before they were discovered by scientists. Indeed, the *Quran* corrected mistaken theories then existing about the universe and revealed new ones. For example, it revealed the spherical shape of the earth, its rotation upon its own axis, the movement of the sun round the earth once a day, the revolution of the moon around the earth, the day and night, and many others, for more see Soliman, "*Scientific Trends in the Quran*", London, Ta-Ha Publisher Ltd., 1985; Hussain, *The Astonishing Truths of the Holy Quran*, London, Ta-Ha Publisher Ltd., 1996; Al-Sharawi, *The Miracles of the Quran*, London, Dar Al Taqwa Ltd., 1989. The text of the *Quran*, which exists now in all Muslim worlds, is exactly the same text, which was revealed to the Prophet more than fourteen centuries ago. Indeed, it is accepted, by all Muslims, to be accurate and beyond dispute, for more see John Burton, *The Collection of the Quran*, Cambridge, University Press, 1977, chap. 8. This is evidence of Allah's care and guard of his Book through all ages. All corruptions, inventions, and accretions pass away, but Allah's pure and holy truth will never suffer eclipse, even though the whole world mocked at it and were bent on destroying it. In the Holy *Quran* Almighty Allah says " *We have, without doubt, sent down the Message (the Quran); and We will assuredly guard it (from corruption).* (Q, 5:9). With regard to its legislation, the *Quran* is not a code of law; rather, the vast majority of its verses are concerned with the religious duties and ritual practice of prayers, fasting and pilgrimage, for more see Coulson, *A History of Islamic Law*, Edinburgh, the University Press, 1994, p. 12. Generally speaking, rulings in the *Quran*, as a principal source of Islamic law, are either general or specific. The *Quran* is specific on matters which are deemed to be unchangeable by the passage of time. Its provisions pertain to belief and deal with family law such as marriage, divorce, heritage and fostering as well as with the five offences: murder, theft, robbery, adultery, and slander or false accusation and their prescribed penalties. Indicating the specific rulings in the *Quran* and the *Sunna*, Allah says in the Holy *Quran* " *it is not fitting for a Believer, man or woman, when a matter has been decided by Allah and his Messenger, to have any option about their decision: if anyone disobeys Allah and his Messenger, he is indeed on a clearly wrong path.*" (Q, 33:36). The great majority of the rulings in the *Quran* are general. Indeed, general guidelines are laid down on almost every major topic of Islamic law, for example, on civil, economic and political law, and the objectives these will pursue. It must be stressed in this context that the fact that the *Quran* mainly gives general guidelines must not be taken to mean that the Islamic ruling on any given matter is weak or vague, and that that is all it has to offer. By contrast, as a comprehensive system of life, Islamic law does not cover every single human action in detail. Otherwise, there would come a time when the Islamic rules would be out of date, which would conflict with the view of *Shari'a* as a system believed by Muslims to apply to all time and all places. As a result, flexibility on certain matters is essential, and the provision of general guidelines on some issues ensures that Islamic law can be modled and organised in accordance to the ever-changing socio-political situations that arise in each society, see *Al-Mizan, op., cit.*, p. 48.

*their reconciliation: For God hath full knowledge,
and is acquainted with all things.*⁴⁹

This verse permits arbitration in family disputes by appointing one arbitrator from among the husband's relatives and another one from among the wife's relatives in order to resolve the couple's dispute. It also gives proof of the legality of arbitration, which can give the indication that arbitration is permitted to be used to solve other disagreements with no recourse to the judicial authority.

*If two parties among the believers fall into a quarrel, make ye peace between them: but if one of them transgress beyond bounds against the other, then fight ye (all) against the one that transgress until it complies with the command of God; but if it complies, then make peace between them with justice, and be fair: for God loves those who are fair (and just). The Believers are but a single brotherhood: so make peace and conciliation between your two (contending) brothers; and fear God, that ye may receive mercy.*⁵⁰

In this verse, arbitration is also permissible with regard to disputes between peoples and nations, known as international relations; also with regard to the situation of war.

*O ye who believe! Kill not game while in the Sacred Precincts or in pilgrim garb. If any of you doth so intentionally, the compensation is an offering, brought to the Ka'ba, of a domestic animal equivalent to the one he killed, adjudged (arbitrated) by two just men among you...*⁵¹

This verse includes the interdiction of killing game if the Muslim is on pilgrimage, and the compensation is decided by just arbitrators chosen by the one who has done the killing. It is therefore evident that arbitration is allowable. Nevertheless, God's rights are not arbitrable; arbitration is allowed only for people's rights. People's rights are disputable, whether they are commercial or of any other type. Most of the verses that

⁴⁹ *Holy Quran*, Surat El nessa, Verse 35, *op. cit.*, p. 220

⁵⁰ *Holy Quran*, Surat Al Hujurat Verse 9

⁵¹ *Holy Quran*, Surat Al- Maidah Verse 95



are found in the *Quran* indicate preaching good deeds and the interdiction of bad deeds.

For instance, The Almighty said:

*“In most of their secret tails there is no good, but if one exhorts to a deed of charity or goodness or conciliation between people...”*⁵²

2.5.3.2 Legitimacy from Sunna⁵³

Arbitration was recognized by the prophet Mohammed as a useful procedure for settling disputes. Therefore, there were many incidents indicating the permissibility of arbitration.⁵⁴

⁵² Surat Al Nass, Verse 114, *op. cit*, p. 25

⁵³ *Sunna* is the second primary source of the *Sharia*. The Arabic verb *Sunna*, in its wide sense, means to fashion a thing and produce it as a model. It is also applied to model behaviour. When referring to its use in Islam, *Sunna* means the model behaviour of the Prophet. Thus, *Sunna* is the second primary source of the *Sharia*. "*Sunna*" or "*Hadith*" means the saying and deeds of the Prophet Mohammed. It means, in other words, what the Prophet said, did, or allowed. As a result, *Sunna* consists of all the narrations going back to the Prophet, to give reports of his sayings, acts or things of which he tacitly approved. The *Sunna* of the Prophet is a proof for the *Quran*, testifies to its authority and enjoins Muslims to comply with it. It is very important to point out that the Prophet never spoke out of his own imagination or promulgated his own ideas, but only what Allah had revealed to him. Proof of this can be found in the *Quran*: Almighty Allah says "*nor does he say (ought) of (his own) desire. It is no less than inspiration sent down to him.*" (Q, 53:3-4). It is for this reason that the Prophet's acts and teachings that meant to establish certain rules of the *Sharia*, are also binding. With regard to its legal nature, the *Sunna* may be divided into two types, namely, legal and non-legal *Sunna*. The latter mainly consists of the natural activities of the Prophet, such as the manner in which he ate, slept, dressed and such other activities as do not seek to constitute a part of the *Sharia*. The legal *Sunna* consists of the exemplary conduct of the Prophet, be it an act, saying, or a tacit approval, which incorporates the rules and principles of the *Sharia*. This variety of *Sunna* was laid down by the Prophet in his capacities as Messenger of God, as the Head of State or the Leader (*Imam*), or as a judge. The *Quran* enjoins obedience to the Prophet and makes it a duty of believers to submit to his judgement and his authority without question. Allah says in the Holy *Quran* "*O believers, obey Allah and obey the Messenger and those in authority among you. If you should quarrel on anything, refer it to Allah and the Messenger.*" (Q, 4:59) To refer the judgement of a dispute to God means recourse to the *Quran*, and referring it to the Messenger means recourse to the *Sunna*. However, there is no dispute over the occurrence of extensive forgery and distortion in the *Hadith* literature. As a result, it must be emphasised that the binding nature of the *Sunna* or *Hadith* depends on its reliability in terms of its narration. As a result, the *Sunna* is classified according to its reliability. The transmitter of a *Hadith* (narration of the sayings or conduct of the Prophet) must possess certain qualifications in order for his *Hadith* to be considered authentic. A *Hadith* or a Tradition formally consists of two essential parts, namely, the text (*Matn*) and the chain of transmitters (*Isnad*) over whose lips it had passed. For example, X said, "therefore narrated Z saying ... so far it is the (*Isnad*) until it came to the last link and then followed the (*Matn*), The Messenger of Allah said, "*Acquisition of knowledge is compulsory for Muslim men and women*". For a Muslim, the *Isnad* is quite as important an element in the *Hadith* as the *Matn* itself. The scholars of the *Hadith* literature, in their attempt to set up tests of authenticity which would exclude unauthentic material, picked on the *Isnad* as the testing point and worked out an elaborate system for testing the trustworthiness of these "chains" and of the individuals who formed the links therein, so that *Isnad* could be labelled "excellent", "good", "fair", "weak", etc and the *Hadith* or Tradition itself rated accordingly. For more detail see Kamali, *Principles of Islamic Jurisprudence*, Cambridge, Islamic Texts Society, 2003, pp.44-85

One of the most significant incidents is the agreement concluded from differences between the Prophet Mohammed (peace be upon him) and the Jewish tribe of Banu Quraizah in Madina, which stated that Prophet Mohammed (peace be upon him) would be the arbitrator if a dispute arose between the two parties. This agreement indicated that all disputes that arose between the Prophet and Banu Quraizah should be submitted to arbitration and the prophet would be the arbitrator.

The legitimacy of arbitration is also supported by the following narration:

Shuraih b. Hani quoted his father as saying when he went with his people on a deputation to the Apostle of Allah (may peace be upon him) he heard them calling him by the Kunyah (surname) Abu al-hakam. So the Apostle of Allah (may peace be upon him) called him and said: Allah is the judge (al-Hakam), and to him judgment belongs, why are you given the Kunyah abu al-hakam? He replied: when my people disagree about a matter, they come to me, and I decide between them, and both parties are satisfied with my decision. He said: how good is this! What children have you? He replied: I have "Shuraih, Muslim and 'abd Allah. He asked: who is the oldest of them? I replied: "Shuraih. He said: then you are Abu Shuraih.⁵⁵

The legitimacy of arbitration in this *Hadith* can be inferred from the acknowledgment of the Prophet when the Prophet (peace be upon him) said 'How good is this!' This might be taken as a proof of the legitimacy of arbitration in the *Sunna*. It seems from the above that arbitration is not only permitted in the *Quran* but also the Prophet Mohammed recognized and practiced it on different occasions.

⁵⁴ M. Shamam, 'Arbitration in Islamic Jurisprudence', paper presented to the ninth session of the Islamic Jurisprudence Assembly, UAE, Abu Dhabi, 1-6 April 1995, p. 9

⁵⁵ S. Al-Uzdy, *Sunan Abu Dawud*, Prepared and commented by A. Al-Da'as & A. Al-Sayed, Vol. 5, 1974, p. 240

2.5.3.3 Legitimacy from Consensus (*Ijma*)⁵⁶

After the death of Prophet Mohammed, a number of arbitration cases occurred among the companions of the Prophet. It can be said that there was *Ijma* among the Prophet's Companions, indicated from these cases, that arbitration was considered as a proper method of resolving disputes⁵⁷. Some of these cases will be stated:

In the case of *Omar Bin Al- Khatab v. Ubyy ibn Kab*, a dispute arose between Omar Bin Al- Khatab, the second Rightly Guided Caliph, and Ubyy ibn Kab. Zaid ibn Thabit was chosen to act as arbitrator in this case.⁵⁸ Zaid was not a recognized judge, but he was famous for jurisprudence and Islamic knowledge. Zaid arbitrated that the oath was on Omer, the leader of believers.⁵⁹

⁵⁶ This secondary source is resorted to when there is no specific text in the two primary sources to deal with a specific question. *Ijema* is defined as the unanimous agreement of the *mujtahideen* or the religious scholars of the Muslim community of any period following the demise of the Prophet on any matter. It would seem that the reference, in this definition, to the *mujtahideen* (singular *mujtahid*) precludes the agreement of laymen from the purview of *Ijema*. Similarly, by reference to the *mujtahideen* of any period, is meant the body of religious scholars in existence at the time when an incident occurs. The reference in the definition to any matter implies that *Ijema* applies to all juridical, intellectual, customary and linguistic matters. The authority of consensus or *Ijema* is based on a number of Quranic verses and authentic *Sunna*. Almighty Allah says, "O believers, obey Allah and obey the Messenger and those in authority among you. If you should quarrel on anything, refer it to Allah and the Messenger." (Q4: 59). Obedience to Allah and the Messenger mentioned in the above Quranic verse means following the injunctions of *Quran* and authentic *Sunna*. The reference in the verse to "those in authority among you" means religious scholars of the Muslim Community and those charged with authority or responsibility or decision, or the settlement of affairs. Since all ultimate authority rests in God, men of God derive their authority from him. As Islam makes no sharp division between sacred and secular affairs, (see Kamali, *op. cit*, pp. 169-170), it expects ordinary government to be imbued with righteousness, and stand in the place of the righteous ruler. Such authority must be respected and obeyed by Muslims; otherwise there will be no order or discipline. To refer the disputed matters to *Allah* and the Messenger (after his death) means to refer them to the injunctions of the *Quran* and the authentic *Sunna*. For more detail see Ibn Katheer, *Commentaries on the Holy Quran*, (in Arabic), Damascus, Dar Al Faiha, 1994, pp. 687-690; Hourani, "The Basis of Authority of Consensus in Sunnite Islam", (1964), 21, *Studia Islamica*, p. 13 at p. 40. In addition to the Quranic support of the *Ijema* quoted above, it was also supported by the Prophet in the famous Tradition (*Hadith*) which may be translated as following: "My people would never agree on whoever leads them astray", or "My Community shall never agree on an error".

From the viewpoint of the manner of its occurrence, *Ijema* is divided into two types:

- (One) Explicit *Ijema*, in which every *mujtahid* expresses his opinion either verbally or by an action;
- (Two) Tacit *Ijema*, whereby some of the *mujtahideen* of a particular age give an expressed opinion concerning an incident while the rest remain silent. see Kamali, *op. cit*, p185

According to the majority of Muslim scholars, explicit *Ijema* is definitive and binding, whereas tacit *Ijema* is a presumptive *Ijema* which only creates a probability but does not preclude the possibility of fresh *Ijtihad* on the same issue. As a result, the majority of Muslim scholars state that tacit *Ijema* is not proof and does not amount to more than the view of some individual *mujtahideen*. see Kamali, *op. cit*, p.185

⁵⁷ M. Al-Alfi, "Arbitration in Islamic Jurisprudence", paper presented to the ninth session of the Islamic Jurisprudence Assembly, 1-6 April 1995, Abu Dhabi, UAE, p. 12

⁵⁸ Case of *Omar Bin Al- Khatab v. Ubyy ibn Kab* see Ahmed Al Ghazali, *op. cit*, p. 70

⁵⁹ Ibn Al-Hammam, *Sharh Fath al-qadir*, Vol. 5, Dar Sadir, Beirut, 1937, p. 498

Another incident arose in the period of the Prophet's companions and was solved by arbitration in the case when a disagreement arose as to whether Uthman, the third Rightly Guided Caliph, or Ali, the fourth Rightly Guided Caliph, should accede to the caliphate after the death of Omar Bin Al-Khatab. Abd Al-Rahman Bin Aof was appointed as an arbitrator. His decision was that the caliphate should go to Uthman, the third Rightly Guided Caliph.⁶⁰

The case of *Muawyah Bin Abi Sufian v. Ali Bin Abi Talib* was a famous arbitration case between Ali, the fourth Rightly Caliph, and Muwiyah, which arose in the year 37. Ali selected Abi Mossa as arbitrator and Muwiyah selected Amr Ibn Al-As. These two were among the Prophet's companions. It is worth mentioning that the parties agreed to cease fighting while the arbitration procedure was in process.⁶¹

⁶⁰ E. Foda, *The Projected Arab Court of Justice*, Martinus Nijhoff, The Hague, 1957, p. 50

⁶¹ *Ibid.*

2.5.3.4 Legitimacy from Analogy (*Qiyas*).⁶²

The legitimacy of arbitration through analogy can be proved by the following:

Islamic jurisprudence permits people to retain the liberty to stand up for their rights. The analogy used in this case is that people may choose other people to stand for these rights whether these rights concern buying or selling. If that is allowable, people can stand up for their rights by having recourse to arbitration.

Islamic jurisprudence always aims to facilitate people's right. Therefore, prohibiting arbitration would be contradictory to what Islamic jurisprudence aims to achieve. Moreover, arbitration has been a legitimate method from the era before Islam up to the present. The Islamic context does not contradict this belief, therefore arbitration is still legitimate.

Regarding the above mentioned and after considering how the *Quran*, *Sunna*, *Ijma* and *Qiyas* acknowledged the permissibility of arbitration in Islamic law, it is sufficient to observe that arbitration in Islamic law is absolutely lawful, and arbitration does not

⁶²*Qiyas* means the application of specific rules that had been applied in similar previous cases, to the matter in question, in the absence of limited and specific rules in the *Quran*, the authentic *Sunna* and the *Ijema*. Indeed, only points of law and facts that were not covered by the previous sources were to be the object of reasoning through *Qiyas*. *Qiyas*, in other words, suggests an equality or close similarity between two things, one of which is taken as the criterion for evaluating the other. The majority of Islamic scholars have defined *Qiyas* as the application to a new case on which the law is silent, of the ruling of an original case because of the effective cause which is in common to both. The foregoing definition sets out the essential requirements of the *Qiyas* which are as follows:

1. The original case, *Asl*, on which a ruling is given in the text and which analogy seeks to extend to a new case;
2. The new case, *Fara*, on which a ruling is wanted;
3. The effective cause, *Illah*, which is an attribute of the original case and is found to be in common between the original and new case;
4. The rule, *Hukm*, governing the original case which is to be extended to the new case. To illustrate these, we may adduce the example of the Quranic verse (Q5:90) which forbids wine drinking. If this prohibition is to be extended by analogy to narcotic drugs, the four pillars of analogy in this example would be: wine drinking is the original case, the new case is taking drugs, the effective cause is the intoxicating effect and the rule governing the original case which is to be extended to the new case is the prohibition. See Kamali, *op. cit.*, pp. 199-220

There are, however, some jurists who oppose the use of *Qiyas*. Ghazali responds to them by stating that if they reject the *Qiyas* and abide by the strict letter of revelation the rule will be restricted to the mere prohibition or permissibility of what is stated in the revelation. See Hallaq, "Non-Analogical Argument in Sunni Jurisprudential Qiyas", (1989), 36, *Arabica*, p. 294. For example, it is prohibited, according to the *Quran* (17:23), to say "fie" (a word of contempt) to one's parents or to chide them. If one were to abide by the strict letter of the Quranic verse, and the *Qiyas* had not been applied here, all words denoting the same meaning, and actions exceeding in strength the mild expression of "fie", such as insulting or beating one's parents, which are prohibited, would not have been prohibited.

contradict with the judiciary.⁶³ This view is based on the evidence of the *Quran*, *Sunna*, *Ijma* and *Qiyas*, interpreted in the light of common sense and logic.

2.5.4 Arbitrability in Islamic Jurisprudence

After having accepted that arbitration is permissible in *Sharia*, it is necessary to decide what matters are arbitrable according to *Sharia*, and whether arbitration is the usual preferred forum for the settlement of all matters or whether there are certain restrictions on the matters to be decided in this way. Some of the *Shafi* and *Hanbali* scholars hold the view that arbitration can be applied without any restriction in any matters⁶⁴, while some *Hanafi* scholars argue that arbitration is allowable in any matters apart from those matters involving the rights of God and *Hudud*.⁶⁵

Therefore, all matters concerning people's right such as family cases etc... are arbitrable, while matters concerning the crimes for which specific rules exist in Islamic *Sharia* are not. Since these matters are not negotiable, therefore arbitration is not permissible.

Regarding the legitimacy of arbitration in the view of the four Islamic Schools of thought, as has been stated above, these four Schools recognize arbitration as a legitimate method of settling disputes. The *Hanafi* School holds the view that arbitration is legitimate since it has been proved by the *Quran*, the *Sunna*, the *Ijma* and *Qiyas*. Some scholars of the *Hanafi* School have pointed out that arbitration is a legitimate method as it is necessary for resolving the disputes in flexible way.⁶⁶ Moreover, some of these scholars have commented that the arbitrator has the same role as a Judge.⁶⁷ Scholars of the *Shafi* School have expressed the legality of the appointment of the arbitrator in order to resolve the differences between the parties, no matter if there is

⁶³ Arbitration can be applied whether there is a judge in the city or not.

⁶⁴ A. al-Murdawi, *al-Insaf fi ma'rifat al-rajiḥ min al-khilaf*, vol. 11, Muhammadun Sunnah Press, Cairo, 1958, pp. 197-198

⁶⁵ A. Al-Babarti, *Sharh Al-Inayah 'ala al-hidayah*, Vol. 5, Dar Sadir, Beirut, 1937, p. 500

⁶⁶ A. El-Ahdab, *Arbitration with the Arab Countries*, Kluwer Law International, The Hague, 1999, p. 18

⁶⁷ *Ibid*

a judge at the place where the dispute has arisen.⁶⁸ This School derives the legitimacy of Arbitration by referring to the incidents that occurred in the period of Prophet Mohammed (peace be upon him) and his companions, for instance, when the people went to the caliph Omar Ben Elkhatab and chose him as arbitrator to resolve their dispute. Notwithstanding, arbitrators in this School are seen as different from judges, since the appointment of an arbitrator can be revoked, whereas judges may not be dismissed. Therefore, according to this school, arbitrators play a lesser role than judges.⁶⁹ On the other hand, the scholars of the *Hanbali* School hold that an arbitrator's decision has the same power and effect as a decision made by the judge. Thus, parties are bound by the arbitrator's award.⁷⁰ The *Maliki* School trusts arbitration as a method of dispute settlement to such an extent that it is allowed, according to this school, to appoint one of the disputing party as an arbitrator if the other disputant consents to this appointment. Moreover, 'the decision of the arbitrator is binding unless it contains "flagrant injustice"'.⁷¹

Even though these four schools recognize arbitration as a legitimate method of settling disputes, it must be stated that since these schools are distinct schools of thought, they are not identical in their manner of dealing with the concept of arbitration. Thus, while these schools consider arbitration to be a legitimate method of dispute settlement in Islamic law, they each value the significance of arbitration differently.

2.5.5 Opinion of the four Sunni Schools:

It may be generally stated that the four *Sunni* schools have the same view of arbitration as a means of dispute settlement.⁷¹ However, there are minor differences among the

⁶⁸ *Ibid*

⁶⁹ *Ibid*

⁷⁰ *Ibid*, p. 19

⁷¹ It is worth mentioning in this respect that the *Ibadi* school of jurisprudence, in contrast with all the other *Sunni* schools, stands alone in that it does not recognize arbitration if the subject-matter relates to

above schools regarding the legitimacy of arbitration. The opinions of the four schools will be illustrated respectively:

2.5.5.1 Hanafi School.⁷²

According to this school, arbitration is possible in matters relating to money. However in matters of *Hudud* punishment, it is not legal to arbitrate on the basis of consensus according to *Hanafi* School. As for libel (*Qadhf*) punishment and retribution (*Qisas*), there are some who allowed it, among them *As Srakhsi*.⁷³

Hanafi scholars differ on arbitration in matters relating to libel, as *Srakhsi* and some other *Hanafis* allowed it, but the majority rejected it.⁷⁴ *Ibn Nujym* stated: therefore, what *As-Srakhsi* opted for in allowing arbitration in cases of libel, is weak because divine right is probably more dominant in it.⁷⁵

Further, *As-Srakhsi* also said: the arbitrator should not adjudicate in matters of *Hudud* punishment, or mutual imprecation (*Lian*) between husband and wife, because conciliation between the adversaries, or anything like it is irrelevant in this case. The reason is that matters of *Hudud* punishments and mutual imprecation (*Lian*) between husband and wife are divine rights. Therefore, none has authority to adjudicate except the representatives appointed to enforce that right and those are judges and *Imams*. One cannot adjudicate and pass *Hudud* punishment against himself; neither can the arbitrator because he was not appointed as a representative to extract divine rights.⁷⁶

the Caliph's appointment. The main reason for this seems to be that the *Ibadi* school believes that the matter of the Caliph's appointment is not arbitrable, since this matter is directly linked to God and as the Caliph carries out God's rules and orders.

⁷² The *Hanafi* school was the first school of law to be founded in *Kufa* in Iraq by Numan bin Thabat, a non-Arab scholar who is well known by his surname, Abu Hanifah (697-767). He belonged to that pious period of the *Tabi'in*, successors of the *Sahabah* (the companions of the Prophet). He rejected the post of judge (*Kadi*), when it was offered to him by the second Abasid Caliph, because he feared to displease Allah by erring in his judgments.

⁷³ Alaa Addin Al-Kasani, *Bada'i as-Sana'i Fi Tartib ash-Shara'i*, Vol. 7, p.3. (in Arabic)

⁷⁴ Mulana Sheikh Nizam, *al-Fatawa al-Hindiyyah*, Vol. 1, Dar Kutubul Ilmiyyah, Beirut, 2000, p. 317. (in Arabic)

⁷⁵ Zayn ad-Din Ibrahim Ibn Najaim, *al-Bahr ar-Raiq Sharh Kanz ad-Daqaiq*, Vol. 7, p. 28. (in Arabic)

⁷⁶ Abu Bakr Muhammad *As Srakhsi*, *al-Mabsut*, Vol. 16, p. 111. (in Arabic)

As for retribution (*Qisas*) and the legality of arbitration, there are two opinions:

The first is that it is legal to arbitrate on the ground that the dominant right is that of the human.⁷⁷ The second opinion is that it is not legal to arbitrate. *Ibn al-Humam* in '*Fath al-Qadyr*' stated this view, when he cited *Abu Hanifah* saying that arbitration is not lawful in cases of retribution.⁷⁸ According to *al-Fatawa al-Hindiah*, *al-Khassaf* also stated that the judgment of the arbitrator in retribution cases is not lawful'.⁷⁹

This group bases its opinion on the following:

- i. That arbitration is the same as conciliation, and everything that is allowed to be obtained through conciliation must be allowed by arbitration, but what is not allowed in one is not allowed in the other. Conciliation is not allowed in cases other than those where the right is allowed to be solitary. Libel (*Qadhf*) and retribution (*Qisas*) cannot be settled through conciliation because it is not legal to drop the right embodied in them, since Allah and the person share the right in them, and where the person's right cannot be produced, arbitration cannot be right;⁸⁰
- ii. The *Imam* is the person in charge of executing *Hudud* and *Qisas* punishment by the virtue that these are divine rights (the rights of Allah);⁸¹

The argument of *As-Sarakhsi* and those who approve arbitration in cases of libel (*Qadhf*) and *Qisas* is arbitrable, that libel (*Qadhf*) and (*Qisas*) are human rights and since people have the right to obtain those rights, then arbitration is lawful, just as it is in cases relating to money.⁸²

⁷⁷ Mulana Sheikh Nizam, *op. cit*, p.316.

⁷⁸ Ibn Al-Hammam, *Sharh Fath al-qadir*, Vol. 5, Dar Sadir, Beirut, 1937, p. 500; also see Ibn Abidin, Mohammed Amin, *Hashiat ad-Dur al-Mukhtar*(known as *Hashiat Ibn Abidin*), Vol. 5, Cairo, Dar Al-Fiker, 1979, p.429. (in arabic)

⁷⁹Mulana Sheikh Nizam, *op. cit*, Vol. 3, p.316.

⁸⁰ Zayn ad-Din Ibrahim Ibn Najaim, *Op., Cit*, p.26.

⁸¹ Muhammed Ibn al-Humam, *Sharh Fath al-Qadir*, Vol. 7, edl_ Amiriah Press, Egept, 1315 AH (1896 AD), p.318. (in Arabic)

⁸² Muhammed Ibn al-Humam, *op. cit*, p. 318.

The outweighing view is that of the second opinion. The evidence put forward by proponents of this view to support their argument is the strongest because it is consistent with the general basis of arbitration, and besides being the opinion of the *Imam Abu Hanifah*, it was concluded by *Ibn al-Humam* and *Ibn Nujaym* to be of greater weight.

Ibn Nujaym stated in his explanation of '*Kanz ad-Daqai'q*': 'and what in *al-Muhit* the argument for allowing it particularly that it falls within human right is weak in all terms'. This right in retribution is not exclusively human, but one where human and divine rights are combined, although the dominant right is the divine one.⁸³

2.5.5.2 Maliki School.⁸⁴

This group say it is lawful to arbitrate on matters of money and matters contained in the meaning, but it is not lawful to arbitrate in the following matters: *Hudud* punishment, Qisas, mutual imprecation between husband and wife (*Lian*), libel (*Qadhf*), divorce, liberty of slaves, and descent (*Nasab*).⁸⁵

These matters were excepted because evidence of proof or refutation is needed from persons other than the adversaries and no one other than the adversaries would have agreed on the arbitration of this arbitrator.⁸⁶

If an arbitrator passed judgement on these matters justly, his judgment would be enforced but he would be told not to do it again. If the arbitrator took it upon himself to order execution, or impose *Qisas* punishment, he would be disciplined and reprimanded and what was right in his judgement would be accepted.

⁸³ Zayn ad-Din Ibrahim Ibn Najaim, *op. cit*, p. 26.

⁸⁴ Medina, in Hijaz, was the birthplace of Malik bin Anas, the founder of the second school, the *Maliki* school in Madina (693-778). Like Abu Hanifah, Malik was a *Tabi'i*. He belonged to a royal family of *Humair* from Yemen which had settled in Madina after the advent of Islam. He studied under many scholars of Quranic studies and great scholars of *Hadith*.

⁸⁵ Ahmad, bin Muhammad As-Sawi, *Bulghat as-Salik li Aqrab al- Masalik Ila Madhhab al- Imam Malik*, Vol. 2, p. 309. (in Arabic)

⁸⁶ Ibn Farhun, Ibrahim Abu al-Wafa, *Tabssirat al-Hukkam fi Usul al-Aqdiyah Wa Manahij al-Hukkam*, Vol. 2, p. 62. (in Arabic)

Arbitration is lawful in any case where parties have the legal authority to relinquish their right. This carries the same meaning given by the famous general statement of scholars; where forgiveness and absolution is permissible, arbitration is lawful.

The reason for saying that it is unlawful to arbitrate in cases of divorce, freeing of slaves and descent, is that only the *Imam* can adjudicate these matters.

This group based their opinion on the following:

- i. They supported the interdiction of arbitration in *Hudud* punishments in the same way as the *Hanafis*, that is since *Hudud* punishments are to deter people from breaking sacred laws, adjudication in these cases cannot be for anyone other than the *Imam*,⁸⁷
- ii. These matters are serious, they are not like money,⁸⁸
- iii. Arbitration on divorce and the freeing of slaves is not lawful because arbitration contradicts a fundamental principle of *Sharia*, since a divorced woman cannot be brought back to her husband's authority, even if she agrees, nor is it lawful to send a man back to slavery even if he agrees to return;
- iv. These exceptions entail rights that do not belong to the adversaries, but to God or another person. Mutual imprecation between husband and wife (*Lian*), for instance, entails the right of a child to the name of his father. It is possible that the arbitrator may rule to refute the child's relationship to the father and he has no authority to rule on matters relating to the boy. Also descent (*Nasab*) is a matter that applies to persons other than the adversaries, and those to whom it applies have not agreed on the arbitration. In the case of divorce, liberty of slaves, *Hudud* punishment and death, all these are divine rights (Allah rights). It is not lawful for a wife to remain under the husband's authority after being

⁸⁷ Sulaiman bin Khalaf Al-Baji, *al-Muntaqa sharh al-Muwata*, 2nd Ed, Vol. 5, Dar al-Kitab a-Arabi, undated, Beirut p. 228. (in Arabic)

⁸⁸ Salih Al-Azhari, *jawahir al-Iklil Sharh Mukhtasar khalil*, Vol. 2, Dar Ihya al-Kitab al-Arabi, Egypt, undated, p. 223. (in Arabic)

irrevocably divorced, nor is it lawful to send back to slavery a liberated slave even if he agrees, because Allah did not give authority to the arbitrator to adjudicate in these rights.⁸⁹

2.5.5.3 *Shafii* School.⁹⁰

Opinions differ among *Shafii* scholars on the subject of arbitration. Some of them are of the view that arbitration is lawful in everything except the following:

- i. *Hudud* with the exception of libel (*Qadhf*) where they see it is lawful because it deals with human right;
- ii. *Taazir*, because like *Hudud* punishments they are all *Allah*'s rights;
- iii. Divine financial rights which do not have a specific petitioner, such as alms tax (*Zakat*) if those who were entitled to it are not limited in number, and this is the majority view among the *Shafii*s.⁹¹

They support their view by the fact that these matters have no specific petitioner.⁹² *Al Mawardi* went further on questions of divine right – where arbitration is unlawful – and added to these guardianship of orphans, on the ground that these fall within the jurisdiction of judges.⁹³

However, scholars of this school have mutually agreed that arbitration is lawful in cases concerning money only. They support their view on the following guidelines:

- i. Because money is less serious than other matters;

⁸⁹ Ibn Farhun, Ibrahim Abu al-Wafa, *Tabsirat al-Hukkam fi Usul al-Aqdiyah Wa Manahij al-Hukkam*, Vol. 1, p. 62 (in Arabic); also see as-Sawi, Ahmad, bin Muhammad, *Bulghat as Salik li Aqrab al-Masalik Ila Madhhab al- Imam Malik*, Vol. 2, p. 309. (in Arabic)

⁹⁰ The third school is the *Shafi'i* school which was founded by Muhammad Idris Al-Shafi'i (767-821) in Mecca and Medina in *Hijaz*. He belonged to the *Quraish* tribe and, thus, was a descendent of the Prophet. From his early childhood, he displayed a sharp intelligence and was excellent at memorising things.

⁹¹ Mohammad Arramli, *Nihayat al-Muhtaj ala Sharh al-Minhaj*, Vol. 8, p. 242. (in Arabic)

⁹² *Ibid*

⁹³ Muhyi ad-Din An-Nawawi, , *Arrawdah*, Vol. 2, al-Maktab al-Islami, Beirut,1405H (1985), p. 105. (in Arabic)

- ii. Because of the seriousness of matters others than money, like marriage, mutual imprecation between husband and wife (*Lian*), and retribution (*Qisas*), these are entrusted to the judge and his office.⁹⁴

2.5.5.4 Hanbali School.⁹⁵

Hanbali Scholars differ regarding the legitimacy of arbitration and split into two groups:

The first group holds that arbitration is lawful in all cases, such as *Hudud* punishments, retribution (*Qisas*), mutual imprecation (*Lian*), marriage and other matters, because the arbitrator in those cases is just like the judge who enforces his judgement in all things.⁹⁶

The second group holds that Arbitration is lawful in all cases except for four: marriage, mutual imprecation (*Lian*), libel (*Qadhif*) and retribution (*Qisas*), because these have a distinct characteristic, in that all fall within the jurisdiction of the *Imam* who can delegate authority to his representative to hear them.⁹⁷

2.5.6 Conflict of Schools of Jurisprudence:

Even though all schools of jurisprudence adhere to the same sources of *Sharia*, they differ in their opinions. This does not mean there are a fundamental differences of the principles of *Sharia*, it simply means that within the fixed base of fundamentals there is a margin for individual interpretation and practices.⁹⁸ As a result of such disparity between the schools of jurisprudence, the question of conflict of laws, ie conflict of

⁹⁴ Mohammad Ash-Sharbini, *Mughni al-Muhtaj*, Vol. 4, p. 379. (in Arabic)

⁹⁵ In Baghdad in Iraq, the fourth school, the *Hanbali* School, was founded by Ahmed bin Hanbal (777-855). He began his early study of *Hadith* Literature when he was only sixteen. It is said that he became such a great scholar of *Hadith* that he remembered almost a million *Hadiths*. Therefore, he based his juristic opinions solely on *Hadith* and became an eminent jurist in his time, and for the time to come. He had studied under *Shafi*, whose influence is evident in his narrations in his famous book, *Musnad Ahmed*, which was derived from *Shafi*.

⁹⁶ Abdallah bin Ahmad Ibn Qudamah, *al-Mughni*, (edited by at-Turki and al-Hilw), Vol. 14, p. 93. (in Arabic)

⁹⁷ *Ibid.*

⁹⁸ Nudrat Majeed, Arbitration and Sharia Law, Lecture at ILA, London, 24th November 2004.

schools, may arise in arbitrating the dispute. The role of conflict of laws rules is to assist the tribunal deciding the case, when it contains foreign elements, as to which law, ie which school of jurisprudence, should prevail, as is the case in common and civil law systems.⁹⁹ To determine the issue of conflict of laws among the schools of jurisprudence, it is worth going through all the circumstances that might occur in relation to the arbitration agreement between the disputant parties.

1. If the parties to the arbitration agreement adhere to different schools of jurisprudence and the venue of arbitration is a Muslim state:

(a) If the parties have specified in the arbitration agreement which school of jurisprudence is to be applied, the rule of conflict of laws is irrelevant, as the tribunal is obliged to apply the rule of the school the parties had chosen in the arbitration agreement.

(b) If the parties did not decide the school of jurisprudence in the arbitration agreement and parties cannot decide between themselves upon this issue, the tribunal should apply the rules of the school of jurisprudence that is applied in the seat of arbitration.

2. If the parties to the arbitration agreement adhere to different schools of jurisprudence and the venue is a non-Muslim state:

(a) If the parties have decided in the arbitration agreement the school of jurisprudence as the applicable law, the issue of conflict of law is irrelevant. The tribunal is obliged to apply the rule of the school the parties have agreed to, even if that is different from what they adhere to. The same is true if the parties agree on the school of jurisprudence to be applied, at the time of arbitration.

⁹⁹ For more about conflict of laws see L. G. Collier, *Conflict of Laws*, 3rd Edition, Cambridge, Cambridge University Press, 2001, pp. 12-35

(b) However, if the parties did not specify in the arbitration agreement and could not agree between themselves on which school they should apply, the arbitral tribunal is in a different position, as there are no rules on the conflict of laws in *Sharia* law, to determine which school of jurisprudence should prevail in such circumstances. However, according to the opinion of one Islamic scholar, in such a case the arbitrator should not be restricted to one school of jurisprudence in deciding the case. The arbitrator should determine the property of the identity of the matter (*Hukom*) upon whatever evidence is available from the sources of *Sharia*, applied in the correct successive order.¹⁰⁰ He can on that basis support his award, irrespective what doctrine his decision reflects, as long as he maintains justice between the disputing parties and does not contradict the Islamic jurisprudence. Further, he emphasised that arbitrator may sometimes go out side the borders of the schools of jurisprudence if it is required to achieve justice.¹⁰¹ On the other hand, a judge from the Board of Grievances, emphasised that, when a conflict of doctrines occurs while deciding the case the arbitral tribunal should apply the consensus opinion of the four schools scholars on the matter in question. Alternatively, parties should grant the arbitral tribunal the power to decide the doctrine to be applied in the case when there is no consensus opinion between the scholars of the schools of jurisprudence.¹⁰²

It seems from the above that the only Islamic jurisprudence required from the arbitral award is that it be in accordance with the *Sharia*, regardless of what doctrine is followed; in other words it is only necessary refer to Allah's words dictated in the Quran and the

¹⁰⁰ The first is the *Quran*, then *Sunna*, then *Ijma* (consensus), then *Qiyas* (analogy).

¹⁰¹ Shaikh Saleh Al Husaian, Chief of the Two Holy Mosques Affairs, Interview on the 26th of October, 2006.

¹⁰² Shaikh Fahad Al Hugbani, Senior Judge at the Board of Grievances, western province, Interview on the 28th of October 2006.

Prophet's sayings emphasised in the correct Sunna, Consensus and Analogy. From these, the origins and details of an award are decided.

Further, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not stipulate that the award must be derived from one specific doctrine. As it stated in the Arbitration Regulation of 1983:

The award of the arbitrators shall be executed when it has become final pursuant to an order by the Authority having original jurisdiction to consider the dispute. This order shall be passed upon request by an interested party after ensuring that it is not contrary to *Shariatic* principles.¹⁰³

Implementation Rules of 1985:

The arbitrators shall issue their awards without being bound by legal procedures except as provided for in the arbitration regulations and its rules of implementation. Awards shall follow the provisions of Islamic *Shariah* and the applicable regulations.¹⁰⁴

From these articles it is possible to say that the attitude of the Saudi Arbitration Law focuses on the final results of arbitral awards, with the sole proviso that they must not be contrary to Islamic Jurisprudence. However, the rules and regulations followed in Saudi Arabia are derived from the *Hanbali* School. The legislature could have restricted the rules to be followed in this regulation to the *Hanbali* School. However, the Saudi legislature seems to have taken the approach of liberating the parties, in the course of agreeing the terms of reference, and the arbitrators, in the case when there is no agreement between the parties, to choose the rules or doctrine to be applied during the process of arbitration, whether national or international, which suit the dispute, as long as they do not contradict *Sharia* law.

Furthermore, despite the controversy over whether the arbitrator is a judge or not, in the Islamic judicial system, judges have no obligations to follow the school that is adhered

¹⁰³ Arbitration Regulation of 1983, Art. 20.

¹⁰⁴ Implementation Rules of 1985, Art. 39

to in the state in deciding cases at the court. A judge is obliged to use his legal reasoning in cases where the door of legal reasoning, ie *Ijtehad*, is open; otherwise he must refer to the primary sources respectively. This discretionary power remains even if his legal reasoning contradicts the doctrine applied in the state. The general consensus of Islamic scholars is that there is no rule in the Islamic jurisprudence that the judge and the ruler of the state, who represents the law of the state, must be essentially the same in the doctrine, so that the *Shafii* ruler may assign a *Maliki* judge or vice versa. Besides, the ruler cannot compel the judge to decide from outside his legal reasoning and beliefs, since the judge is empowered to use his legal reasoning.¹⁰⁵ *Almawardi* said it is not impermissible in Islamic jurisprudence if a *Shafii* judge uses his best endeavour to decide the case and his legal reasoning leads him to the opinion of *Imam Abu Hanifah*.¹⁰⁶

From what has been said on the position of the arbitrator and the position of the Saudi Regulation Rules and finally the Islamic Judicial Rules, it can be concluded that if the parties do not agree in the arbitration agreement upon a doctrine and can not agree during the course of arbitration, then the arbitrator is entitled to choose the doctrine suitable for the case to enable him to render the award justly based on the sources of Islamic Jurisprudence, regardless of what school his decision is based on.

2.6 The distinctions between arbitration, adjudication and deliverance of legal opinion (*Ifta*)

According to Islamic Law, it is generally accepted that one of the most important tasks of the arbitrator is bring into view the rule of Islam, or rather God's rule, on any particular matter. Accordingly, in Islamic practice, it is not only the arbitrator who can

¹⁰⁵ Shihabdeen Abi Is haq Ibrahim Bin Abdullah, *Judicial Ethics*, Dar Al Feker, 1982, pp. 95-96. (in Arabic)

¹⁰⁶ *Ibid.*

identify the Islamic ruling, but also certain others who may perform the same function and be allowed to identify the Islamic ruling. Such persons are the judge and the *mufti* (the religious consultant).¹⁰⁷ It is difficult sometimes for the common people to distinguish between the arbitrator, judge and mufti, since each of them is authorized to identify the Islamic ruling in different matters. In this situation it is appropriate to identify the differences between the adjudication, giving advisory legal opinions (*ifta*) and arbitration.

In general terms, adjudication in Islam is defined as the enunciation of a binding rule.¹⁰⁸ However, while adjudication shares with arbitration the task of declaring the Islamic rules, the two differ in certain aspects. For instance, the judge derives his competence from the head of the Muslim state (*imam*), implying that the adjudication is the original forum for settling disputes, whereas the arbitrator derives his competence from the arbitration agreement, implying that arbitration is merely a branch of adjudication.¹⁰⁹ In adjudication the judge has general jurisdiction over every single matter, where the power of the arbitrator is restricted only to the dispute before him and he cannot go off the point into another matter.¹¹⁰ Finally, adjudication does not require the consent of the disputing parties to hear the case, and either of the disputing parties can submit the dispute to adjudication unilaterally. On the other hand, arbitration depends on the consent of both parties, since the arbitrator derives his competence from the will of the parties.

¹⁰⁷ In addition to the arbitrator, the Judge and *mufti* practice the authoritative identification of the Islamic ruling. The Judge and *mufti* derived their legitimacy from *Quran* and *Sunna*. As to the many *Quranic* verses and the *Sunna* practice which indicate the legitimate authority of the Judge and *mufti*. We will refer to two *Quranic* verses, of which the first will indicate the legitimacy of the Judge's practice in Islam while the second one will show the position of the *mufti* in Islam:

1. "We have sent down to thee book in truth, that thou mightest judge between men, as guided by God: so be not as an advocate by those who betray their trust". *Quran*, IV, 105;
2. ...ask of those who possess the message. *Quran*, XVI, 43.

¹⁰⁸ A. Al-Asheikh, *Glances at the Judiciary in the Kingdom of Saudi Arabia*, Dar Al-Shibel for Publications, Riyadh, 1990, p. 15.

¹⁰⁹ M. Al-Alfi, *op. cit*, p. 9.

¹¹⁰ Also by Islamic law arbitrator is not authorised to look into matters that involved with any God's right.

As regards the practice of *ifta*, it is the effort made to identify the Islamic ruling on any particular matter that requires clarification. From time to time, people are faced with uncertainty as to the correct way of proceeding in a particular difficulty, not knowing whether their proposed action may be lawful or unlawful according to the *Sharia*. In such cases, it is necessary to be able to appeal to a competent authority, a specialist in *Sharia*. It will thus be seen how similar *ifta* may appear to arbitration, since both procedures are intended to resolve problems by reference to the Islamic ruling. However, there are many differences between the two concepts.¹¹¹ Thus, arbitration is restricted to the disputed matter which the parties have agreed to refer to arbitration, while *ifta* is open to deal with any subject, to the extent that the mufti has the power to give an Islamic ruling on any matter. Moreover, arbitration is presumed to take place between two parties, while *ifta* may be sought by any individual seeking the rule of Islam on any private matter. Finally, arbitration proceeds according to an agreement binding on both parties, while *ifta* is neither binding nor requires an agreement.

According to above consideration, it is clear that even though the judiciary and *ifta* share with arbitration relatively the same function, i.e. declaring the rule of Islam on any particular matter, arbitration nevertheless not only differs from the other two procedures, but also has its own distinctive features, so that, in fact arbitration requires special attention in Islamic law.

2.7 Summary

Arbitration has been defined in various ways, as the writers differ in their view in defining arbitration. Even though, there has been no universal definition of arbitration, it has not been difficult to distinguish arbitration from other dispute settlement mechanisms. Thus, speed, cost and confidentiality have been the main features that are

¹¹¹ M. Al-Alfi, *op. cit*, p. 8.

ascribed to arbitration. However, these characteristics are observed in the other methods of ADR, but arbitration is distinguished by granting the disputants the enforceability of the arbitrator's judgment.

Arbitration seems to have covered all aspects of life in the period before Islam, since people at that period lacked the institutional judiciary systems. Such awareness has facilitated the understating of arbitration in the eras following that period, as the procedure of arbitration at that time was based on nature, and was almost identical to the procedure of arbitration nowadays in a simpler way. However, there was a considerable improvement in the concept of arbitration after Islam, since after the prophet's (PBUH) mission and the coming of the *Quran*, many ideas of conduct including arbitration were transformed. Islam came to emphasize justice and the equality of people. Arbitration came to rely on stable principles delivered from the *Quran* and *Sunna*, as well as the *Ijma* and *Qiyas* which have been employed after the death of the prophet.

Scholars of the four *Sunni* schools have taken different views regarding the legitimacy of arbitration. On some issues they agree that arbitration is absolutely lawful. These include money rights, compensation contracts and any matter where forgiveness and absolution is permitted. The arbitrator can rule on proof or non-proof, validity or non-validity, on matters relating to the above. This opinion is accepted by all of the four schools. However, on some issues, arbitration is not lawful. These are matters of pure divine rights, such as *Hudud* punishments, and those which embody dual rights shared by the individual and his creator, like guardianship of orphans, all of which fall into the jurisdiction of judges and rulers to enforce. Some issues on which they differ include the following: Retribution (*Qisas*), libel (*Qadhf*), marriage, mutual imprecation (*Lian*), descent (*Nasab*), divorce and freeing of slaves. Thus, on one hand, *Hanafis* permit arbitration in cases of descent, divorce, freeing of slaves and marriage and they do not permit it in mutual imprecation. They are split on retribution (*Qisas*) into two opinions.

The first is that arbitration is legal because it concerns human rights. The second is that not lawful to arbitrate in retribution because it does not concern human right. On the other hand, *Shafiis* and *Hanbalis* are divided. Some allow arbitration absolutely; they say that an arbitration judgement is lawful in everything where it is right for adversaries to seek a ruling from a judge, just like the judgement of a judge appointed by a ruler. They say that arbitration is lawful because it is based on the consent of the adversaries. The other opinion is that arbitration is lawful except in four matters: marriage, mutual imprecation (*Lian*), libel (*Qisas*), because these are different from others in that they are the specific responsibility of the *Imam* or his deputy, since they involve *Hudud* punishments, which are the responsibility of the rulers.

After exploring in this chapter the concept of international arbitration and its characteristics and proving that arbitration is legitimate in the eyes of the four Sunni Schools especially the *Hanbali* school which the one applied in the Kingdom of Saudi Arabia, we will address the issue of the status of arbitration in Saudi Arabia before the enactment of the Arbitration Regulation of 1983 and how the Saudi arbitration laws have developed through different periods of time.

CHAPTER THREE

THE STATUS OF ARBITRATION IN SAUDI LAW BEFORE 1983

3.1 The Foundations of the Saudi Arbitration Regulation

Generally speaking, arbitration is an acceptable method under the Saudi legal system as the concept of arbitration is recognised by the majority of the early scholars of the Islamic *Sharia*. Saudi Arabia adopted arbitration as a dispute resolution mechanism in the Code of the Commercial Court of 1350 A.H (1929 A.D). The Code entitled disputants to resolve their disputes by means of arbitration.¹¹² However, prior to the 1950s, international arbitration was chosen as a method for the resolution of disputes between the government of Saudi Arabia and foreign oil companies in their concession agreements.¹¹³

Subsequently, however, the attitude of the government of Saudi Arabia towards arbitration underwent a significant change, mainly due to the outcome of 1958 Aramco Arbitral Award as well as other arbitral awards involving other Arabic States and foreign oil companies working within their territories, such as *Petroleum Development Ltd v. Sheik of Abu Dhabi* and *Qatar v. International Marine Oil Company Ltd*.¹¹⁴

The arbitrators of these arbitral tribunals gave no consideration to the Islamic values. Further, they lacked knowledge about the Islamic *Sharia* and its basic principles applicable to commercial transactions. Moreover, the arguments of the arbitrators in some of these cases were untrue to the Islamic *Sharia*. For example, in the Aramco case the tribunal took the view that:

¹¹² Royal Decree No. 32 dated 15/1/1350 A. H, The Code dealt with arbitration namely in Arts, 493-497.

¹¹³ See Article 31 of Aramco Oil Concession Agreement of 1933; Article 45 of Getty Oil Concession Agreement of 1949.

¹¹⁴ *Petroleum Development Ltd v. Sheik of Abu Dhabi* [September 1951], 18 International Law Report, 1951, p. 144; *International Marine Oil Company Ltd v. Ruler of Qatar* [June 1953], 20 International Law Report, 1953, p. 534.

The regime of the mining concession has remained embryonic in Moslem Law and is not the same in the different schools. The principle of one school cannot be introduced into another unless this is done by an act of authority.¹¹⁵

This argument is indeed inconsistent with the basic principle of the Islamic judicial system according to which the judge can directly resort to any school of Islamic jurisprudence to find the principle applicable to the subject matter of the given dispute.

Moreover, in the Qatar award the Arbitral Tribunal argued that the Islamic *Sharia* does not contain any principles sufficient to interpret the concession agreement. It further alleged that the Islamic *Sharia* does not possess a body of legal principles applicable to a modern commercial contract.¹¹⁶

It appears that the argument of the arbitrators comprising these Arbitral Tribunals was intended to prevent the application of the law of the host countries. The fact that foreign investors and their advisors lack knowledge about the Islamic *Sharia*, as well as the Saudi legal system, has made some foreign investors reluctant to accept the Law of *Sharia* as the applicable law of arbitration. This situation resulted in the Saudi government's distrust of International Arbitration.

3.2 Saudi Arabia v. Arabian American Oil Company

In 1954, the Saudi Government entered with Greek shipping magnate Mr. Aristotle Onassis into an agreement which was ratified by the Royal Decree No. 5737 issued on 09/04/1954. This Agreement gave Mr. Onassis the right to form a local company with the name of Saudi Arabian Tanker Company (Satco). It contained a number of provisions which imposed mutual obligations on both parties, such as Satco had to establish a maritime institute in Jeddah in the Kingdom of Saudi Arabia and to employ

¹¹⁵ *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 International Law Reports (I.L.R.). 1963, pp. 163 et esq.

¹¹⁶ *International Marine Oil Company Ltd v. Ruler of Qatar, Op.*, Cit, p. 546

the graduates of this institute in its tankers, also to transport without charge fifty thousand tons of oil or petroleum products from Saudi ports on the Arabian Gulf to any other Saudi port on the Red Sea.¹¹⁷

Article IV of the Agreement gave Satco a right of priority for the transport of oil out of the Kingdom of Saudi Arabia for a period of thirty years from the date of signing of the Agreement, renewable for a further period by mutual consent of the parties.

This Article was the direct cause of the dispute between the Saudi Government and the Arabian American Oil Company (Aramco) because Aramco refused to comply with the text of this Article, asserting that it had an absolute right under its Concession Agreement of 1933 with the Saudi Government to choose the necessary means of transport of oil, including foreign tankers.

The Saudi Government had always tried to settle in a friendly manner the dispute which arose in respect of Article IV of the Onassis Agreement.¹¹⁸ However, Aramco insisted that Article IV be modified or deleted. Therefore, the Saudi Government suggested that the dispute be referred to arbitration in Geneva.

In February 1955, the Saudi Government and Aramco concluded an arbitration agreement which contained questions arising from the parties as follows.¹¹⁹

3.2.1 Submissions by Saudi Government

- 1- Whether Aramco has rights to transport of oil and other products, which the company produces and sells, by sea?
- 2- If Aramco has any such rights,
 - a) Whether, and to what extent, Aramco was or is entitled in the absence of consent by the Government to transfer any such rights in connection with

¹¹⁷ The Agreement between the Saudi Government and satco, Art. 5.

¹¹⁸ *Saudi Arabia v. Arabian American Oil Company (Aramco)*, *op. cit.* p. 130.

¹¹⁹ *Ibid*, pp. 130-31.

transportation by sea of oil obtained under the Concession Agreement to any other person, company or corporation (for example to its buyers)?

- b) Whether Aramco has acquired any such rights to refuse or deny a Government-requested preferential treatment to tankers flying the Saudi flag, and in the event of Aramco not having acquired such right, whether it has violated its obligations under the Concession Agreement?

- 3- Whether the Concession Agreement entitles Aramco to deny preference for priority to national tankers, particularly when the cost of transportation of the oil it produces and sells is not going to be higher than the annual average cost of transportation of Aramco in using non-national tankers?

3.2.2 Submissions by Aramco's

Was Article IV of the Agreement between the Saudi Government and Mr. A. Onassis as amended on 07/04/1954 in conflict with Aramco Concession Agreement of 1933.

In this case, it is appropriate to note that neither of the parties claimed damages for an alleged injury. This dispute was clearly limited to legal questions. It related to the interpretation of the Concession Agreement of 1933 and not to its validity. The question to be decided was whether Aramco could be compelled to use for the transportation of oil and oil products on the high seas tankers which they had not freely chosen, and whether the rights granted to Aramco under its Concession Agreement authorised the Company to resist the implementation of Article IV of the Onassis Agreement.¹²⁰

¹²⁰ *Ibid*, pp. 144-45.

3.2.3 The applicable law

The arbitration agreement contained the following provision in respect of the law to be applied to the relationship existing between the parties:

“The Arbitration Tribunal shall decide this dispute

- a) in accordance with the Saudi Arabian law as hereinafter defined in so far as matters within the jurisdiction of Saudi Arabian are concerned;
- b) in accordance with the law to be applicable by the Arbitration Tribunal, in so far as matters beyond the jurisdiction of Saudi Arabia are concerned; Saudi Arabian law, as used herein, is the Moslem law

1- as taught by the school of Imam Ahmed Ibn Hanbal;

2- as applied in Saudi Arabia.”¹²¹

The method of drawing a distinction between matters within the jurisdiction, and matters beyond the jurisdiction of the Kingdom of Saudi Arabia was the subject of controversy.

Aramco claimed that the general principles of law recognised by civilised nations should be applied to the dispute because the Concession Agreement of 1933 was an international agreement. It also contended that, in view of the international nature of the Concession Agreement, Saudi law should only be applied to matters of a local nature. The Saudi Government replied that the Onassis Agreement complied with the contents of the Concession Agreement granted to Aramco, the *Sharia*, the general principles of law recognised by civilised nations, and International Law.

Although the parties agreed upon the applicability of the Saudi law, the Concession Agreement provisions, the general principles of law recognised by civilised nations and the International Law, they disagreed upon how these rules should be interpreted and applied.

¹²¹ The Arbitration Agreement between the Saudi Government and Aramco, Art. 4.

3.2.3.1 The Tribunal's directions on the applicable law¹²²

In order to determine what law was to be applied, it was held that resort must be had to the principle of private international law known as the autonomy of the will. According to this principle, in any agreement presenting an international character, the law explicitly chosen by the parties should first be applied. As the parties to arbitration gave the Arbitration Tribunal a broad discretion in this aspect, it was free to choose the rules of law applied to the dispute, provided its choice was objective and was justified.¹²³

The Arbitration Tribunal considered that from a legal perspective both clauses (a) and (b) of Article IV of the arbitration agreement were on the same level and both parties were fully aware of the fact that various systems of law must be applied to the different matters connected with the operation of oil concession.¹²⁴

The tribunal concluded, from the parties' agreement to hold arbitration in Geneva, that they had intended from the very beginning to withdraw their disputes from the jurisdiction of Saudi courts¹²⁵

The tribunal applied the Saudi law derived from *Sharia* according to the *Hanbali* School to the concession agreement of 1933 and it found that:

The regime of mining concession, and consequently, also of oil concession, has remained embryonic in Moslem law and is not the same in the different schools. The principles of one school cannot be introduced into another, unless this is done by an act of authority. *Hanbali* law contains no precise rule about mining concessions and *a fortiori* about oil concessions.¹²⁶

According to Islamic law, the King, Imam, has the power to adopt laws necessary for the protection of the general interest. He can resort to a regime of oil concessions based

¹²² The Arbitration Tribunal was composed of three members. Mr. H. Badawi was nominated by the Saudi Government. He died during the arbitration proceeding and was replaced by Mr. M. Hassan. Aramco appointed Mr. S. Habachy. The president of the International Court of Justice appointed Mr. V. Sauser-Hall as the chairman of the Arbitration Tribunal.

¹²³ *Saudi Arabia v. Arabian American Oil Company (Aramco)*, *op. cit.* p. 166.

¹²⁴ *Ibid*, p. 154.

¹²⁵ *Ibid*

¹²⁶ *Ibid*, p. 163.

on an agreement, provided that this solution is not contrary to Islamic law. The tribunal held that:

The concession contract does not conflict with these rules, *Rules of Moslem law*, since it is in conformity with two fundamental principles of the whole system of law, i.e., the principle of liberty to contract within the limits of Divine Law, and the principle of respect for contracts.¹²⁷

Accordingly, the tribunal considered that the Concession Agreement of 1933 was a part of the Saudi legal system where it was not contrary to Moslem law. The Concession Agreement was thus the fundamental law of the parties and the Tribunal was bound to recognise its importance where it filled gaps in the Saudi law with regard to the oil industry.

The Tribunal also found that the law of Switzerland, where the arbitration was held, could not be applied to the arbitration on the basis of the principle of the jurisdictional immunity of foreign States recognised by international law, because one of the parties to the arbitration was a State.¹²⁸

The Tribunal considered that matters pertaining to private law were governed by the Saudi law, but that law must, in case of need, be interpreted or supplemented by the general principles of law recognised by civilised nations, by custom and practice in the oil business, and by nations of pure jurisprudence. As regards the international effects of the Aramco Concession Agreement, such as the effects of the sale and transport of the oil and oil products to foreign countries, the Tribunal held that these effects were regulated by the custom and practice prevailing in maritime trade and in the international oil business.¹²⁹

Finally, the Tribunal considered that the public international law should be applied to the effects of the Concession concerning matters which are not governed by any rules

¹²⁷ *Ibid*

¹²⁸ *Ibid*, p. 155.

¹²⁹ *Ibid*, 171-172.

of the municipal law of any State, as is the case in all the matters regarding transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of State for the violation of its international obligations.

The Tribunal organised the laws to be applied to the case as follows:

- 1) The Saudi law according to the *Hanbali* School.
- 2) The Saudi law would be complemented by the general principles of law recognised by civilised nations, by custom and practice in the oil industry, and nations of pure jurisprudence.
- 3) Finally, public international law, academic writing and case law.

3.2.4 The Arbitral Award¹³⁰

The arbitral awards consists answers to the issues raised to the arbitral tribunal by both parties as follows:

3.2.4.1 Answers to Saudi Government's Submissions

1- The Concession Agreement of 1933 grants to Aramco an exclusive right to transport oil and its products by land and sea within the Kingdom of Saudi Arabia, within the territorial waters of Kingdom of Saudi Arabia and on the high seas to all foreign countries overseas.

2- (a)- Aramco has an exclusive right to transport and export by sea the oil it extracts and its products in a manner which conforms to its Concession Agreement. It has not made an assignment of its exclusive right of transport to its buyers, or to any person, company or corporation. The question as to whether, and to what extent, Aramco is entitled to transfer its right and obligations under its Concession Agreement does not come up for consideration.

¹³⁰ For details about the Award, see *Ibid*, pp 226-28.

(b)- Aramco cannot be forced to recognise a right of priority or preference, contrary to its exclusive right, in favour of any tankers, by whomsoever they may be owned or whatever flag they may fly.

3- The Saudi government may not compel Aramco to recognise a right of priority or preference to tankers flying any flag whatsoever, irrespective of any consideration of the economic consequences of this right or of whether the cost of transportation is going to be less or more than the current freight, or equal to it.

3.2.4.2 Answers to Aramco's Submissions

Article IV of the Onassis Agreement with the Saudi Government of 1954 which grants right of priority or preference to Satco for a period of thirty years is in conflict with the Aramco Concession Agreement of 1933 and is not effective against Aramco.

This award led the Kingdom of Saudi Arabia to become hostile to resolution of its disputes by arbitration outside its territory or under non-Saudi law.

The dissatisfaction of the Saudi Government with the award cannot be adequately explained merely by the fact that it lost, since the Onassis Agreement of 1954 was not really very advantageous for the Kingdom of Saudi Arabia. The dissatisfaction can perhaps be better explained by more general Saudi concerns over the ability and willingness of foreign arbitrators to apply Saudi law to disputes involving the Saudi government or one of its Agencies.¹³¹

The Saudi Government submitted that the *Sharia* contained rules which could be applied to oil concession. The Arbitration Tribunal rejected the Saudi submission and applied instead general principles of law and public international law as the governing law of contract.

¹³¹ George Sayen, Arbitration, Conciliation and the Islamic Tradition in Saudi Arabia, *University of Pennsylvania Journal of International Business Law*, Vol. 19, No. 2, 1987, p. 214.

The applicability of international law to contracts between states and foreign investors has been a subject of great controversy. The prevailing view is that international law may not be applied in the absence of express choice of law.¹³²

At the consequences of the above case several laws had been issued, it might be better to shed the light on how laws are made in Saudi Arabia before dealing with these laws.

3.2.5 How laws are made

State legislation is a source of the law in the Kingdom that comes after the *Sharia*. These regulations are presented to deal with some legal aspect, have occurred as a result of that has accrued from development, to meet need in various areas. The purpose of the state regulation is not to contradict with the *Sharia* or to change it, at this would not be acceptable; but to supplement it.

The relevant bodies to deal with this matter are the Consultative Council and the Council of Ministers.¹³³ The Consultative Council (*Majlis Al Shura*) was established to provide an institutional framework through which the traditional form of Saudi Arabian government may be implemented.¹³⁴ The primary function of the Consultative Council is to provide the King with advice on issues of importance in the Kingdom. As Article 15 of Consultative Council stipulates:

The Consultative Council shall express its opinion on general policies of the State referred by the Prime Minister. Specifically, the Council shall have the right to do the following:

¹³² Esa Paasivirta, *Participation of states in International Contracts*, Helsinki, Finnish Lawyers' Publishing Company, 1990, pp. 77-113; 151-196.

¹³³ The Consultative Council, when set up, was composed of a chairman and 60 members chosen by the King from amongst scholars and men of knowledge and expertise.¹³³ In 2001, the membership of the Consultative Council was increased to 120. It holds an ordinary session at least once every two weeks. Art. 12 of the regulations of the Consultative Council endorsed by the Royal Decree No.A/15 dated 3/3/1414 A. H. published in *Um Al Qura* No.3468 of 10/3/1414 A. H.

¹³⁴ Established by Royal Decree No. A/91, dated 29/8/1412; The Consultative Council marked a significant move towards the formalization of the participative nature of government in Saudi Arabia.

- (a) Discuss the general plan for economic and social development,
- (b) Study laws and by-laws, international treaties and agreements, concessions, and make whatever suggestion it deems appropriate,
- (c) Interpret laws,
- (d) Discuss annual reports forwarded by ministries and other governmental institutions, and make whatever suggestions it deems appropriate.

Members of the Council are able to initiate legislation and review the domestic and foreign policies of the government. Moreover *Majlis Al Shura's* committees may seek the help of others who are not members of the *Majlis* upon the Chairman's approval.¹³⁵

The Saudi legislative and executive authorities are centred in the Council of Ministers headed by the King.¹³⁶ With regard to the legislative authority, Article 19 of 1993

Council of Ministers Regulations provides that:

"...The Council of Ministers will plan the internal, external, financial, economic, educational and defence policies and all the public affairs of the state, and oversee their implementation. It will look into the decrees of the Consultative Council. It will have executive power and it will be the point of reference for financial and administrative affairs in all the ministers and other government bodies".¹³⁷

The executive authority, on the other hand, is embodied in Article 24 of the 1993 Council of Ministers Regulations. It states that "*as the direct executive power, the Council {of Ministers} will have full control over executive and administrative*

¹³⁵ Art 20 of the regulations of the Consultative Council endorsed by the Royal Decree No. A/90 dated 27/8/1412 A. H.(1992 A. D.) published in *Um Al Qura* No. 3397 of 2/9/1412 A. H.

¹³⁶ The Council of Ministers was first established in 1953 and regulated by the Council of Ministers Regulations endorsed by the Royal Decree No. 38 dated May 11, 1958 published in *Umm Al Qura*, No. 1717 of May 16, 1958. This was replaced by the Council of Ministers Statute issued by the Royal Decree No. A/13 of 20 August 1993, see "*The Regulations of the Council of Ministers*", Archives of Council of Ministers. For further details on the very beginning of the Council, see Charles W Harrington, "The Saudi Arabia Council Of Ministers" (1958), 12 *MEJ*, pp.1-19.

¹³⁷ Bulloch, *The Shura Council in Saudi Arabia*, London, Gulf Centre for Strategic Studies (GCSS), 1993 p. 61.

affairs".¹³⁸ The Article specifies in detail the affairs which come under the executive jurisdiction.

As far as the law-making process is concerned, while some unchangeable matters are governed by the provisions of Islamic law, as mentioned earlier, changeable and recent matters are subject to the provisions contained in Royal decrees and delegated orders, codes, and by regulations. The formal procedure of legislation starts with the competent minister. Indeed, Article 22 of the 1993 Council of Ministers Regulations made it clear that each minister has the right to propose for discussion at the Council of Ministers whatever he believes to be of benefit, after the approval of the chairman. He also has the right to propose a draft regulation or a bill to his ministry. After that, the draft is to be submitted to the Consultative Council, which is, according to Article 15 of its Regulations, authorised to study the laws and make suggestions and then submit them to the Chairman of the Council of Ministers, the King. Such a draft is afterwards, according to Article 21, studied by the Council, whose members then vote on each of the proposed articles, one by one, before the draft is sanctioned finally by the King.

However, for those fields of law where there is not a specific ministry or where there is more than one relevant ministry, a committee of experts in cooperation with the Council of Ministers is to be entrusted to prepare the draft text of the regulations concerned. The draft is brought before the Council for discussion, and then submitted to the king for approval. This approval, which takes the form of a Royal Decree, shall be promulgated in the Official Gazette (*Umm Al-Qura*), and the regulation will come into force from the date of publication unless another date is specified.

¹³⁸ *Ibid.*, p. 62.

3.2.6 The Resolution No. 58

At the consequences of the outcome of Aramco case the Council of Ministers issued an important resolution, on 1963, which forbade the Saudi Government or any of its Agencies to have recourse to arbitration.

This resolution was known under the name of Resolution No. 58. It stipulates that:

- a- It is prohibited for any Government Agency to insert in a contract a clause providing for the jurisdiction of any foreign courts or any foreign body having judicial competence, to the effect of excluding the jurisdiction of the Board of Grievances.
- b- It is not permitted for any Government Agency to accept arbitration as a means of resolving disputes which may arise between it and contracting individuals and companies.
- c- It is prohibited for any Government Agency to designate any foreign law to govern its relation with any relevant body as the applicable law shall be the Saudi law”.¹³⁹

However, the drafters of the Resolution made two exceptions as follows:

- (1)- Concession agreements which contain utmost interests for the Saudi Government. These agreements may include clauses submitting any disputes arising out of them to arbitration.

The criterion of the definition of “utmost interests” is ambiguous. However, major government projects, such as national defence projects, usually have utmost interests for the State. Consequently, disputes arising out of these projects may be settled by arbitration.

In 1969, one of the governmental Agencies, Petromin Company, entered with a French company into an agreement which included a clause for ICC Arbitration to be held in

¹³⁹ Albert Jan Van Den Berg, “National Reports, Saudi Arabia”, *The Yearbook of Commercial Arbitration*, 1984, pp. 14-15; also see Mcquaid, Richard F., “Foreign Arbitral Awards: Can They Be Enforced?”, *Middle East Executive Reports*, vol. 2, no. 5, May 1979, pp. 2-3.

Lausanne, Switzerland, if a dispute arose on the basis of the utmost interest exception.¹⁴⁰

(2)- Technical disputes could be submitted to arbitration.

In this case, the Board of Grievances nominates the third arbitrator, if the other arbitrators appointed by the parties are unable to agree upon one. The arbitral award may be appealed before the board of Grievances.¹⁴¹

In view of this provision, the United States Army Corps of Engineers has inserted clauses submitting technical disputes arising out of the contracts executed in the Kingdom of Saudi Arabia to arbitration.¹⁴²

A question may arise in respect of the determination which Governmental Agencies are prohibited from resorting to arbitration. It may be stated that the more the Governmental Agency is subject to the labour and commercial laws in its financial administration and in judicial jurisdiction over its disputes, the more possible it is to resort to arbitration and vice versa.¹⁴³

Resolution No. 58 deals with only the Saudi Government and its Agencies where it prohibits them to submit their disputes to arbitration. The Resolution does not deal with the Saudi private parties, whether natural or legal person. Therefore, Saudi private parties can resolve their disputes by arbitration.

3.2.7 The Ministry of Commerce's Circular

The restriction on arbitration was later confirmed by the Circular of the Ministry of Commerce stating that the articles of association of a company incorporated in the Kingdom must, in order to be approved and registered by the Department of the

¹⁴⁰ A. Lerrick & Q. J. Mian, *Saudi Business and Labour Law*, London. Graham & Trotman, 1982, p. 178.

¹⁴¹ *Ibid.*, p. 178.

¹⁴² *Ibid.*, p. 178.

¹⁴³ Abdul Hamid El-ahdab., *op. cit*, p. 603.

Commercial Registrar in the Ministry, contain a provision providing for the settlement of disputes by a Saudi Court or by means of arbitration held within Saudi Arabia.¹⁴⁴

Consequently, according to this Circular, reference can be made to domestic arbitration in the articles of association of a joint company which is formed by foreign and local businessmen for the purpose of carrying out investment operations in Saudi Arabia. This, of course, includes all forms of joint companies, whether they are formed by foreign investors and private local partners or between foreign investors and governmental agencies.

3.3 Development of arbitration in the Kingdom of Saudi Arabia

Arbitration as a means of settling disputes had been accepted by King Abdal-Aziz before the promulgation of the establishment of the Kingdom of Saudi Arabia in 1932. He entered into some bilateral treaties which contained clauses submitting any dispute arising out of the performance of these treaties to conciliation and arbitration, such as the Treaty for the Determination of the Boundaries between Najd Sultanate and the Government of the East of Jordan concluded on the 2nd of November 1925 and also the Makkah Treaty for the Friendship and Good Vicinity Neighbourhood concluded between al-Hijaz Kingdom and Najd Sultanate and its attachments on the one side, and the Kingdom of Iraq on the other side on the 7th of April 1931.¹⁴⁵

Moreover, after the establishment of the Kingdom of Saudi Arabia in 1932, the Kingdom of Saudi Arabia has not changed its policy in respect of the inclusion of provisions referring any dispute arising from the execution of the bilateral treaties concluded between it and other countries to conciliation and arbitration, such as the Taif

¹⁴⁴ Ministry of Commerce, Company Department Circular No. 31/1/331/01 dated 22/2/1399 A. H (1979 A.D)

¹⁴⁵ Ahmad A. Mohammed, *The Principle for the settlement of International Disputes by the Amicable Means in the International Treaties of the Kingdom of Saudi Arabia*, no. 5, Saudi Studies, 1991, p. 74 (in Arabic); also Ahmad H. Al-rashiydi, *International Arbitration in the Contemporaneous Arabic Experience*, Arabic Affairs, , June 1990, pp. 117-118 (in Arabic).

Treaty between the Kingdom of Saudi Arabia and Yemen concluded on the 20th of May 1934 and the Baghdad Treaty between the Kingdom of Saudi Arabia and Iraq on the 2nd of February 1936.¹⁴⁶

In practice, however the Saudi judicial institutions resented the introduction of any system which might lead to minimising their own jurisdiction. Accordingly, the influence of arbitration as a means of resolving the disputes was absent in practical reality.

In recent years, however, the position of the judicial institutions has changed because of the rapid progress in the business and commercial sphere and also the existence of a special arbitration regulation governing the arbitral process.

The development of arbitration in the Kingdom of Saudi Arabia can be divided into two categories:

- Development of arbitration regarding private parties.
- Development of arbitration regarding the State or one of its agencies.

3.3.1 Development of arbitration regarding private parties

Before the issue of the Arbitration Regulation 1983, there was no specific regulation which governed matters concerning the arbitral process, although there were a few regulations containing some provisions which regulated certain issues of arbitration, for example, the Commercial Court Regulation of 1931, the Labour and Workman Regulation of 1969 and the Chambers of Commerce and Industry Regulation of 1980. Accordingly, arbitration between private parties was sporadic.

In addition, the enforcement of arbitral awards issued in *ad hoc* arbitration before 1983 was left to the parties themselves, and the courts had the power to grant or refuse the enforcement of these awards.

¹⁴⁶ Ahmad A. Mohammed, *op. cit.*, p. 73; also Ahmad H. Al-rashiydi, *op. cit.*, p. 118.

One legal writer considers that the resorting of courts to experts for their views with respect to technical matters is deemed a type of arbitration.¹⁴⁷ However, the judges in the courts are not bound to comply with the experts' opinion, whereas the decisions of arbitrators are binding.

This part may be subdivided on the basis of arbitration rules which are mentioned in some regulations into four points, as follows:

3.3.1.1 The Commercial Court Regulation of 1931

The first modern rules governing commercial arbitration proceedings in the Kingdom of Saudi Arabia were the rules existing in the Commercial Court Regulation issued in 1931. The Commercial Court Regulation of 1931 contained a few rules which governed the arbitral process between private parties. These rules granted the Commercial Court powers to supervise the enforcement of arbitration agreement and awards. However, the State, following the advice of its Islamic scholars, who wished to unify the legal system in the framework of the *Sharia* Courts, suppressed the Commercial Court. This position did not lead to the abrogation of the Commercial Court Regulation of 1931 which remained in force and the rules relating to arbitration continued to apply in theory.¹⁴⁸

The Commercial Companies Regulation issued in 1965 contains provisions regarding the establishment of the Commission for the Settlement of Commercial Dispute which ignored the arbitration rules existing in the Commercial Court Regulation of 1931. Consequently, arbitration became optional and the enforcement of arbitral awards depended on the wish of the parties to the dispute. Courts would not enforce either the arbitration agreement or the arbitral award.

¹⁴⁷ Salah Alhujailan, "National Reports; Saudi Arabia", *The Yearbook of Commercial Arbitration*, vol. IV, 1979, p. 163.

¹⁴⁸ Mohammed Hushan, *The Arab Golf Countries, A paper presented to the Euro-Arab Arbitration Conference held in port EL Kantaoui (Tunisia), 24-27 September 1985*, Published by Lloyd's of London Press Ltd, London, 1987, pp. 22-23.

Articles 493 to 497 in the Commercial Court Regulation of 1931 dealt with some aspects of arbitration. These articles governed the form and contents of the arbitration agreement, the appointment of arbitrators, time limits, some aspects of the arbitration proceedings, such as the testimony of witnesses, the possibility of challenging the arbitral award before the Court and the need for the approval of arbitral awards by the Court before their enforcement. It was provided that an arbitrator, whose nomination had been confirmed by the Court, could not be dismissed by the parties.

Such articles also required that the parties to the dispute respect some formal rules, for example, that arbitration agreements must be certified by a notary public before their execution. It followed therefrom that:

1. Arbitration clauses in contracts signed before the dispute arose are invalid.
2. Any violation of the formal rules may cause the invalidity of an arbitration agreement.¹⁴⁹

3.3.1.2 The Labour and Workmen Regulation of 1969

The Labour and Workmen Regulation issued in 1969 allows employers and employees to submit their disputes to arbitration instead of to the Primary Committee for settlement of Labour Disputes. The parties may nominate a sole arbitrator, or one or several arbitrators for each of them, in order to resolve their dispute. If the parties disagree upon the appointment of the umpire, the President of the Primary Committee of the place of work will appoint him. In fact, it would be better if the arbitration agreement included times and set out certain procedures, such as the date of first session.

The parties can appeal the arbitral award unless the arbitration agreement states that the arbitral award is final and binding. Appeal is brought to the Supreme Committee for the Settlement of Labour Disputes.

¹⁴⁹ A. El-ahdab, *op. cit.*, p. 589

The Labour and Workmen Regulation of 1969 stipulates that an arbitration agreement must be filed with the Primary Committee that has the jurisdiction to decide the dispute. Moreover, the arbitral award must be registered with that same Primary Committee within one week following its issue.¹⁵⁰

3.3.1.3 The Chambers of Commerce and Industry Regulation of 1980

This section will concentrate on the major elements which assist the Chambers of Commerce and Industry in the Kingdom of Saudi Arabia to have jurisdiction to practise and administer arbitration among their members. In 1980, an important regulation governing the Chambers of Commerce and Industry was promulgated by a Royal Decree.¹⁵¹ This Regulation has given the Chambers of Commerce and Industry the right to administer and resolve commercial and industrial disputes by conciliation and arbitration.¹⁵²

In 1981, the Implementation Rules of this Regulation were enacted in the Minister of Commerce Resolution No. 1871. They contain some provisions regulating the procedures applicable to commercial arbitration where one or more of the parties is a member of a Saudi Chamber of Commerce and Industry.

The first Chamber of Commerce and Industry in the Kingdom of Saudi Arabia, which was established in Jeddah in 1946, practised conciliation and arbitration amongst its members as one of its obligations and duties.¹⁵³

¹⁵⁰ The Labour and Workmen Regulation of 1969, Arts. 183, 184 and 187; for further details see Turck Nancy B., "Dispute Resolution in Saudi Arabia", *The International Lawyer*, Vol. 22, No. 2, 1988, pp. 430-31.

¹⁵¹ The Royal Decree No. M/6, dated 22/4/1400 A.H (1980 A.D.).

¹⁵² The Chambers of Commerce and Industry Regulation of 1980, Art. 5 (H).

¹⁵³ M. J. Nader, *op. cit*, p. 1.

3.3.1.4 The Arbitration Regulation of 1983 by the Royal Decree No. M/46

In a very important step to promote the role of arbitration as a means of settling disputes arising from commercial transactions, the Council of Ministers decided to ratify the Arbitration Regulation by the Resolution No. 164 on the 4th of April 1983. The King also gave his approval by the Royal Decree No. M/46 on the 25th of April 1983. This Regulation was published in the Official Gazette, *Um al-Qura*, on the 3rd of June 1983.

In 1985, its Implementation Rules were issued by the Council of Ministers Resolution No. M/7/2021. These Rules have clarified numerous aspects regarding arbitration and specifically answered many of the questions left unanswered by the Arbitration Regulation of 1983.¹⁵⁴

The Arbitration Regulation of 1983 has given clear answers in respect of the arbitrators: their number, appointment, qualifications, replacement and fees, the language of arbitration, the applicable law, the method of making of the arbitral awards and their enforcement.

The main characteristics adopted by the Arbitration Regulation of 1983 may be classified as follows:

(1)- This Regulation derived its rules of procedure from the principles of *Sharia* for two reasons: (i) *Sharia* is the constitutional law of Saudi Arabia; (ii) the capability of the principles of *Sharia* to correspond to all the modern dispute settlement mechanisms.

(2)- This Regulation does not distinguish between the arbitration of commercial disputes and the arbitration of other forms of dispute, such as civil and real estate disputes.

(3)- It recognises the validity of arbitration clauses concerning future disputes.

¹⁵⁴ Niel F. Allam, "Arbitration in the Kingdom: The New Implementation Rules", *Middle East Executive Reports*, vol. 8, no. 8, August 1985, p. 9.

(4)- It grants the Saudi Judicial Authority significant powers in the conduct and supervision of the arbitral process.¹⁵⁵

In recent years, the application of arbitration as a method of resolving disputes has extended to cover new aspects in the commercial domain, such as insurance disputes.¹⁵⁶

Moreover, the committee, in order to mediate disputes between Saudi commercial agents and their principals or former principal, encourages the parties to submit their disputes to arbitration if they do not agree upon a settlement.¹⁵⁷

The Implementation Rules for the Arbitration Regulation were issued on the 27 May 1985 and, as will be seen later, described various aspects of arbitration proceedings under the Arbitration Regulation. The Implementation Rules particularly seek to ensure the flexibility and hastening of arbitration proceedings. They also seek to answer some questions not addressed by the Regulations.

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 will be the main subject –matter of this research and they will be discussed in detail in the following chapters.

3.3.2 Development of arbitration regarding the Government and its agencies

From the first days of oil exploration until 1950s, arbitration was the primary and favoured method of settling the dispute between the Saudi Government or one of its Agencies and foreign private parties.¹⁵⁸ The Saudi Government used to include arbitration clauses in concession contracts concluded with foreign companies for the excavation of oil and other natural resources, such as the concession contract between the Kingdom of Saudi Arabia and the Arabian American Oil Company (ARAMCO)

¹⁵⁵ M. Caudhri & M. A. Clodfelter, "Commercial Arbitration in the Kingdom", *Middle East Executive Reports*, Vol. 8, No. 7, 1985, p. 9.

¹⁵⁶ George N. Sfeir, "The Saudi Approach to Law Reform", *The American Journal of Comparative Law*, Vol. 36, 1988, p. 739.

¹⁵⁷ Alexander S. Kritzalis, "Saudi Arabia", *The International Lawyer*, Vol. 26, No. 3, 1992, p. 828.

¹⁵⁸ George Sayen, *op. cit*, p. 214.

which contains an arbitration clause, providing for the referral of any dispute between them, relating to the contract, to arbitration.

Furthermore, the Kingdom of Saudi Arabia has been a party in the Convention of the Arab League of Nations Concerning the Enforcement of Judgements and awards since 1954. This Convention states that the arbitral awards issued in any of the contracting states to the Convention shall be enforced in the other contracting States.

The Riyadh Convention for Judicial Co-operation concluded on the 6th of April 1983 has replaced the above convention and the Riyadh Convention contains the same provisions in respect of the recognition and enforcement of the arbitral awards issued in any of the contracting states of the League.¹⁵⁹ However, the Kingdom of Saudi Arabia has not ratified the Riyadh Convention of 1983 yet.¹⁶⁰

The Saudi Government's attitude toward international arbitration changed to the contrary after the loss by the kingdom of Saudi Arabia in the famous Aramco arbitration. This new attitude was confirmed by the Council of Ministers Resolution No. 58 dated 17/1/1383 A. H (1963 A.D) which was a reaction to the arbitral award made in the Aramco case.

Resolution No.58 forbade the submission of any dispute arising between the Saudi Government or one of its agencies on the one hand, and private parties on the other to arbitration, whether a domestic or an international arbitration, without prior approval from the Council of Ministers. However, this resolution contains certain exceptions as explained earlier.¹⁶¹

Resolution No.58 has continued to apply so far, despite the fact that the Kingdom of Saudi Arabia had entered into certain international conventions which permit the resort to arbitration as a means of settling disputes.

¹⁵⁹ F. M. Sami, *International Commercial Arbitration*, 2nd Ed, Amman, 1992, pp. 81-95. (in Arabic)

¹⁶⁰ Nancy Turck, "Arbitration in Saudi Arabia", *Arbitration International*, Vol. 6, No. 3, 1990, p. 290.

¹⁶¹ See *infra* 3.2.5

In 1976, the Kingdom of Saudi Arabia concluded an agreement with the American Overseas Private Investment Corporation (OPIC) containing a clause which refers to arbitration any dispute between the Saudi Government or one of its agencies and an American Investor guaranteed by OPIC.¹⁶² This agreement was the first step towards reducing the scope of prohibition mentioned in Resolution No.58 issued in 1963. However, only American investors can profit from this agreement. A similar agreement is in force between the Kingdom of Saudi Arabia and Germany.¹⁶³

In 1980, the Kingdom of Saudi Arabia acceded to the Washington Convention on the Settlement of Investment Dispute between States and Nationals of Other States of 1965, providing for arbitration as a method of resolving investment disputes between member States and nationals of other States who are parties to the Convention. Consequently, a State and a foreign private party may agree in writing upon referring to the International Centre of the Settlement of Investment Disputes (ICSID), as constituted under the Convention, any dispute arising out of an investment contract. The Kingdom of Saudi Arabia reserved the right not to refer all matters relating to petroleum and relating to national sovereignty to the arbitration of ICSID.¹⁶⁴

The ratification of Washington Convention of 1965 re-establishes and promotes the possibility of foreign parties submitting their disputes with the Saudi Government or any one of its agencies to international arbitration. Moreover, this step is deemed as a substantial shift in the Saudi policy concerning international arbitration.¹⁶⁵

Neither the Government nor any governmental agencies is known to have entered into any contract with a foreign private party containing an ICSID arbitration clause.¹⁶⁶

¹⁶² A. El-ahdab, *op. cit.*, p. 604.

¹⁶³ A. Lerrick & Q. J. Mian, *Saudi Business and Labour Law*, Graham & Trotman, London, 1982, p. 181.

¹⁶⁴ *Ibid*

¹⁶⁵ Simon Rous, "Arbitration in Saudi Arabia", *Saudi Business*, August 1980, p. 19; also see Staff Meed, Saudi Arabia Accedes International Arbitration, *Middle East Executive Reports*, Vol. 2, No. 11, 1979, p. 8.

¹⁶⁶ Eduardo Moane, "Saudi Arabia and ICSID", *Middle East Executive Reports*, Vol. 16, No. 1, 1993, p. 8.

In January 1994, the Kingdom of Saudi Arabia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This ratification is considered as a great step forward for international arbitration in the Kingdom of Saudi Arabia.

3.4 Judicial Authorities in Saudi Arabia

Generally speaking, disputes arising from investments are subject to the competent judicial authority in the kingdom, unless otherwise provided in the agreement between the parties.

The courts of general jurisdiction in Saudi Arabia are the *Sharia* courts which are administered by the Ministry of Justice according to the Judicial Code of 1975.¹⁶⁷ The *Sharia* Courts consist of three levels of adjudication which are the Ordinary Courts, the Summary Courts and the Courts of Appeal.

The *Sharia* Courts have general jurisdiction over all disputes except those excluded from their jurisdiction by special codes. Particularly, they have exclusive jurisdiction over civil and criminal cases in matters of personal status. Among disputes which are excluded from the *Sharia* Courts' jurisdiction are labour disputes, commercial disputes and disputes involving the government or any of its agencies. With respect to labour disputes, the Committees for the Settlement of Labour Disputes hear them.¹⁶⁸ It could be argued that, since these committees operate under the administration of the Ministry of Labour, the impartiality and independence of their judicial functions is questionable.

¹⁶⁷ Royal Decree No. M/64 dated 14/7/1395 H(July 23, 1975 A.D), as amended by Royal Decree No. M/76 dated 14/10/1395 H. (October 19, 1975 A.D), and Royal Decree No. M/14 dated 1/3/1401 H. (January 6, 1981 A.D)

¹⁶⁸ The Labour and Workmen Code was issued by Royal Decree No. M/21 dated 9/9/1389 H. (1969 A.D), Articles 127-188. This Committee was set up in 1969 under the administration of the Ministry of Labour and Social Affairs. These Committees are of two types: (1) the primary Committee, (2) the Supreme Committee. The Primary Committee is composed of three members, and the Supreme Committee comprises five members, three of them represent the Ministry of Labour and Social Affairs, while the remaining two represent the Ministry of Commerce and the Ministry of Petroleum and Mineral Resources.

Therefore, it would be sound to hand over these disputes to other judicial bodies such as the Board of Grievances as an alternative to these committees.

Due to the special nature of commercial disputes, special judicial authorities were established in Saudi Arabia to adjudicate these disputes and among them were the Committees for the Settlement of Commercial Disputes. These Committees, which were administered by the Ministry of Commerce, were empowered to hear commercial disputes involving private parties, including investment disputes. The Committees were later superseded by the Board of Grievances, as it was announced that the jurisdiction over commercial disputes was transferred to the Board of Grievances.¹⁶⁹

The Board of Grievances, therefore, has become the competent judicial body with respect to investment disputes within Saudi Arabia. In this respect, one may argue that the expansion of the Board's jurisdiction to cover investment disputes constitutes a significant guarantee of the security of foreign investment in Saudi Arabia. In other words, making the Board of Grievances competent to hear commercial disputes would enhance the confidence of potential foreign investors as to the availability of an effective judicial forum for the settlement of investment dispute in Saudi Arabia.

3.4.1 Authorities in the Current Arbitration Regulation

The term "specialised authority in disputes" can be seen many times in the Regulation as well as the Implementation Rules. In fact, the legislature drafted well the expression "specialised", for the reason that it would make the Saudi Arbitration Regulation and its Implementation Rules suitable for any kind of dispute, commercial or civil, as the special authority would treat each subject differently.

¹⁶⁹ Royal Decree No. M/63 dated 26/11/1407 H. (1987 A.D) abolished article 232 of the Companies Codes according to which the Commission for the Settlement of Commercial Disputes was set up; the Council of Ministers Resolution No. 241 dated 26/10/1407 H. (1987 A.D) provides for the transfer of jurisdiction over commercial disputes to the Board of Grievances.

The significance of the expression “special authority” has become more perceptible as a result of Saudi Arabia’s modern experiences, since the special authority may be the general court¹⁷⁰ or the Board of Grievances, since the latter deals with commercial disputes.¹⁷¹ In addition, the Ministry of Commerce may also be the special dispute authority, as it deals with insurance disputes. Therefore, the specialised authority may be either:

1. The Commercial Department of the Board of Grievances.
2. The General Court, if the subject of the dispute is of a civil nature.
3. The Ministry of Commerce, which is actually the authority that deals with insurance disputes.

It might be questionable for the Ministry of Commerce to take the charge of insurance disputes and not the general Court or the Board of Grievances. To clarify this point, it is important to clarify the religious issue, since there is an opinion within the Islamic Jurisprudence that insurance of lives and possessions is impermissible because this remains abstract, and such insurance may or may not be paid out. On the other hand, another opinion sees insurance as a requirement of modern times, since it brings social solidarity among citizens.¹⁷² As a result of this divergence of jurisprudence, neither the general Court nor the Board of Grievances has been given supervisory authority over the arbitration process related to insurance disputes.

Mention should be made of the practical reality, that Saudi Arbitration has witnessed a noticeable success in relation to insurance disputes, as stated by Dr. Hassan Al Mulla:

The practical application yields excellent success in disputes over insurance. The objectives of insurance have been met through the Ministry of Commerce that has facilitated the procedures of approving the

¹⁷⁰ Such as real estate disputes submitted to Arbitration before a Legal Court, as emphasized by Lawyer Al Shubaiky.

¹⁷¹ By virtue of Resolution of the Ministers Council No. 241 dated 26/10/1407 A. H which copies the specialties of the Board of the Grievances to settle commercial disputes.

¹⁷² For more details see Dr. Othman Al Hugail, *Insurance Transactions in Islamic Jurisprudence*, 1st Ed, Al Farazdag Printing Press, 1987, pp. 97-130.

arbitration document which is in harmony with the objectives of arbitration.¹⁷³

It is very encouraging that Saudi arbitration has played such a very crucial role in resolving disputes related to insurance. Nevertheless, it is important to mention that the Ministry of Commerce which issues the award in insurance disputes or ratifies the arbitral award of insurance disputes is not a judicial authority. It would appear to be appropriate to reconsider the special status of the Ministry of Commerce in dealing with this type of dispute and appoint a specialised judicial authority to perform this task.

3.4.1.1 The Board of Grievances (*Diwan Almazalim*)

As a result of the economic boom of the 1970s, and the country's urgent need for economic development, the role of the government in the economic sector has grown dramatically. This, of course, resulted in extensive involvement of the government agencies in contractual relations with private parties. Hence, the 1970s saw the promulgation of a large number of government statutes intended to regulate various aspects of administration, particularly in the field of commerce and industry. Under such circumstances, the government of Saudi felt that the Board should be restructured and accorded greater judicial power to deal with all types of cases involving the government, or any of its agencies and private foreign and national parties.

The Board of Grievances was therefore restructured by the 1983 Code.¹⁷⁴ Under the new Code, the Board has been transformed from a partly investigative body to a judicial administrative tribunal.¹⁷⁵ It must be noted that, although the Board is defined by Article 1 of the Code as an autonomous judicial body, which possesses an exclusive jurisdiction

¹⁷³ Hassan Al Mulla, Arbitration Centre of Insurance Disputes in Saudi Arabia, *GCC Commercial Arbitration Bulletin*, No. 8, April 1998, pp. 13-14. Also it is emphasized by the former arbitration secretary of the Riyadh Chamber of Commerce and Industry that "the biggest percentage of issues submitted to Saudi Arbitration are related to insurance disputes"

¹⁷⁴ The Board of Grievances Code, Royal Decree No. M/51 dated 17/7/1402 A. H (1983 A. D)

¹⁷⁵ By virtue of the new Code the investigative functions were removed from the Board of Grievances and accorded to the Commission of Supervision and Investigation, *Ibid*, Art. 10

over administrative cases, it is, under this article, linked directly to the King. Many investors would perceive this as contradictory, because how can the Board be described as an autonomous judicial forum while it is linked to the executive power? This feature of the Board may have a negative impact on the independence and impartiality of the Board as a judicial body, because its functions could be influenced by the executive power. Thus, Board could be made more independent in conducting its judicial functions by amending article 1 of the Board's Code.

Furthermore, Article 3 of the Board's Code stipulates that the appointment and dismissal of the president, vice president and the judges of the Board are made by Royal Resolutions and this may be perceived by foreign investors to have a negative effect on the impartiality and independence of the Board's judges. It would be more appropriate if the appointment and dismissal of the Board's members were made by the Supreme Judicial Council rather than by the executive authority.

3.4.1.1.1 The structure of the Board

The Board consists of general and subsidiary panels as well as a Appellate Review Committee. In addition, there are two bodies, one of which deals with members' affairs, such as appointment and removal, that is CAAMB including the disciplinary committee, and the General Body of the Board.

By way of introduction to a discussion of the structure it is useful to mention briefly certain other institutions which are similar to the Board. The French Council of State, the *Conseil d'Etat*, for example, is an administrative court, with consultative and judicial functions reflected in its internal structure.¹⁷⁶ As a result, it is divided into two departments, consultative (including the role of advising on legislation) and judicial. The Egyptian institution, *Majlis Al-Dawlah*, has the same functions as the French

¹⁷⁶ Article 17 of the Rules.

Council of State. Its internal organisation, however, is divided into three departments: consultative, legislative and judicial.¹⁷⁷

In contrast, the Board of Grievances has judicial functions only. The first article of the 1982 act reads "...[t]he Board of Grievances is an independent administrative judicial body...". It should be understood here that the terms administrative judicial do not mean that the Board takes decisions in accordance with administrative policy and not according to the law.¹⁷⁸ It means that the Board's jurisdiction is cases brought by individuals, to which government, and the administration, is a party. Its jurisdiction is exercised in a judicial manner.¹⁷⁹

There are other departments of the Board of an administrative character which together help the judicial section to perform its duties and carry out its objectives, i .e support services. These services include the financial, and communications departments, secretarial and library sections. This chapter is concerned with the judicial activities of the Board only.

A-The Committee of Administrative Affairs of the Members of the Board: (CAAMB)

The CAAMB is composed of the president, who is the Chairman of the Board, or his representative, and six members whose ranks should not below that of counsellor (B).¹⁸⁰

The Act does not specify a method for selection; this is left to the discretionary power of the Chairman of the Board. The only limit to that power is that the member must at least be of the rank of counsellor (b).¹⁸¹

¹⁷⁷ Mahassni, *op. cit.*, p.838. The author was told, in conversation with some members of the Board, that they, the members, will not provide any government document to the other parties if, according to their discretionary power, they regard this document as confidential.

¹⁷⁸ *Ibid.*

¹⁷⁹ An Interview with Abdullwahab Almansori, a member of the Board on January 2004.

¹⁸⁰ Interview with A. Al-Hussain, Member of the Board of Grievances in the eastern region on February 2004.

¹⁸¹ *CF Conway v. Rimmer* [1968] A.C 910.

The CAAMB has authority over the members of the Board similar to the power of the Supreme Judicial Council (SJC) over ordinary Judges.¹⁸²

The Board of Grievances Act grants the CAAMB wide powers. The committee has a general power to make recommendation to the King through the Chairman of the Board regarding appointments and retirements of members.¹⁸³ It has the power to appoint, promote, transfer, assign, lend, and recommend the dismissal of any member in accordance with prescribed rules.¹⁸⁴

The CAAMB also has the power to hear complaints from any member who receives an adverse assessment from the annual assessment conducted by the Board, "...in which his efficiency was entered as below average...". In this instance the decision of the CAAMB is considered to be final.¹⁸⁵

Moreover, in the event of a member of the Board being caught red-handed in a criminal offence and held in custody, the CAAMB has to be informed within twenty-four hours. It will then decide on either "...a continuation of remaining in custody or freedom on bail or without bail."¹⁸⁶ With this exception, it is not permitted to arrest a member even if he is suspected of a crime, nor is it permitted to investigate him or bring a criminal action against him without the permission of CAAMB.¹⁸⁷ This power represents a guarantee of independence for members of the Board. Article 41 of the Board Grievance Act 1982, in which these provisions are set out follows the language of the Judicature Act 1975, Article 84, which vests a similar power in the Supreme Judicial Council. The decisions of CAAMB are taken "...by absolute majority of its members."

Given the considerable power of the Board over the careers of panel members it is submitted that there ought to be clearer criteria for the selection of this body's members.

¹⁸² Article 21 of the Rules.

¹⁸³ See case No. 226/1/Q of 1984 (1405), decision of the Review Committee No. 45/T/1 of 1986 (1406), and see also case No. 554/1/Q of 1985 (1405), decision of the Review Committee No. 28/T/1 of 1986 (1406).

¹⁸⁴ Article 21 of the Rules.

¹⁸⁵ *Ibid.*

¹⁸⁶ Information was given while conducting interviews with Abdullah Al-Hussain, *op. cit.*

¹⁸⁷ Mahassni and Grenley, *op. cit.*, p. 339.

There ought also to be a requirement of a higher minimum qualification than that of the lower rank of counsellor in the hierarchy of members of the Board. However, at present membership and duration of membership are entirely at the discretion of the Chairman of the Board.

B- The General Body

According to Article 7 of the Board of Grievance Act 1982, there will be a general body consisting of the Chairman of the Board and all the Board's members. The jurisdiction or functions of this body are not determined in the 1982 Act. Article 7 vests the authority to determine the jurisdiction and procedure of this body in the Council of Ministers. According to a member of the Board, the General Body has a power to examine and discuss collectively problems that may face the Board's members in practice.¹⁸⁸

C- The Board panels

The Board's judicial functions are carried out through panels reflecting the different types of jurisdiction given to the institution.¹⁸⁹

The basic division is into a general and subsidiary panel. Within the division of the general panel, there are further divisions; thus, the general panels are administrative, commercial and disciplinary. Each is composed of a president, two members and a secretary, as well as a member from another panel who serves as a substitute in the absence of one of the main members.¹⁹⁰ In practice, the selection of a president of a

¹⁸⁸ Article 24 of Rules.

¹⁸⁹ Case No. 437/1/Q of 1982 (1402), decision of the Review Committee No. 89/T/1 of 1986 (1406).

¹⁹⁰ *Ibid.*

panel depends on seniority among panel members. The panel adjudicates and decides cases referred to it by the Chairman of the Board.

There are forty subsidiary panels of the Board located at its headquarters and its branches.¹⁹¹ Each is composed of a single judge. The jurisdiction of the subsidiary panels is briefly discussed below.

The general and subsidiary panels can be considered the equivalent to first instance courts. Their decisions are subject to appeal within a specific period to a Appellate Review Committee The authority to form panels and their work, number, and territorial jurisdiction is conferred by the 1982 Act in the Chairman of the Board.¹⁹² Some relevant decisions issued by the Chairman of the Board on this matter of the panels are discussed below.¹⁹³

C- (i) General panels

According to the Chairman's Decision No. 2 of 1983 (1403) and No. 11 of 1986 (1406) the administrative panels are vested with the power to try and decide cases where the government and its agencies, including public corporations, are a party.¹⁹⁴ Thus, the administrative panels have the power to try cases in which an administrative decision is challenged, or cases in which an indemnity or compensation is sought arising from alleged government responsibility for breaching of contracts or fault, by aggrieved individuals or parties of contracts.¹⁹⁵

With respect to disciplinary panels, clause 1(a) of Article 8 is the source of the jurisdiction of these panels. The decision of the Board of Grievances No. 3, of 1983 (1403), provides that the disciplinary panels have the authority to try decide cases that

¹⁹¹ Article 24 of the Rules.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ See for example case No. 617/1/Q of 1981 (1401), decision of the Review Committee No. 91/T/1 of 1986 (1406).

¹⁹⁵ *Ibid.*

are brought before the Board by the Board of Control and Investigation (BCI) against officials of government departments or general corporate bodies which concern allegations of violations of financial or administrative regulations by officials. Disciplinary panels are also concerned with cases brought by officials challenging disciplinary actions taken by a department against them.

Commercial panels' jurisdiction is governed by clause 1(f) of Article 8 of the Board of Grievance Act 1982 and by decision No. 4 of 1983 (1403) of the Chairman. The Commercial panels have the power to try bribery and forgery cases and in addition accusations against those who have infringed the Public Funds Act of 1975. The Commercial panels have the power to try cases which the President of the Council of Minister, the King, directs the Board to try.¹⁹⁶

Commercial panels have been formed recently in accordance with Council of Ministers' Decision No. 241 of 1987 (26/10/1407) which transfers the jurisdictions of the Commercial Dispute Adjudication Board to the Board of Grievances.¹⁹⁷ As a result, commercial disputes, such as disputes between companies and disputes between traders, are brought before the Board as well as jurisdiction over dispute that is referred to arbitration.

C- (ii) Subsidiary panels

The work of the forty subsidiary panels of the Board concerns the following types of grievances:

a) Disputes relating to the rights of government officials and employees and the staff of independent public corporate agencies, or their heirs, as prescribed by the Civil Service

¹⁹⁶ Interview with Dr Fahad Alhugbani, member of the Board of Grievances, also member of the Saudi Arbitration Team.

¹⁹⁷ Mahassni and Grenley, *op. cit.*, p. 340.

and Retirement Act.¹⁹⁸ This jurisdiction is also shared with administrative and disciplinary and panels.

b) Enforcement of foreign judgments.

c) Cases where the aggrieved person has failed to apply within the prescribed time over financial rights, but claims a reasonable excuse.¹⁹⁹

d) Cases which the view of the Chairman of the Board determines are minor matters.²⁰⁰

In this brief review of the jurisdiction of the subsidiary panels two points may be made. Firstly, the subsidiary panels are in fact often concerned with administrative cases, that is, cases in which the government is a party. These arise, for example, in complaints concerning civil servants and cases where the plaintiffs wishes to make a claim after the expiry of the limitation period. In practice, all minor administrative cases, even if they do not relate to what is prescribed in clause 1(a) of Article 8 of the 1982 Act, are usually referred to these panels.²⁰¹ Since 1987 (1407) when jurisdiction over commercial cases was vested in the Board, the less important commercial cases have also been referred to subsidiary panels.

It should be noted that all the previous panels, regardless of type, act as first instance courts in the *Sharia* courts. In other words their decisions are subject to appeal within a specific period.

C-(iii) Appeals: The Appellate Review Committee

When a case is decided by one of the panels mentioned above, it will be referred to the Chairman of the Board who, acting in accordance with the request of one of the parties

¹⁹⁸ *Ibid.*

¹⁹⁹ Article 23 of the Rules.

²⁰⁰ Interview with Almansori, *op. cit.*

²⁰¹ Article 30 of the Rules.

or according to the Rules concerned,²⁰² will refer the case to the Appellate Review Committee. The decision of this Committee on any appeal is final. The Appellate Review Committee is situated in the Board headquarters in Riyadh.

The Appellate Review Committee is not established under the 1982 Act; it was created by a decision of the Chairman of the Board of Grievances in accordance with Article 6 of the 1982 Act.²⁰³ The Appellate Review Committee consists of four panels,²⁰⁴ each of which has different jurisdiction to review a certain type of case.

According to the chairman's Decision No. 11 of 1406 A.H., each of the Review Committee panels consists of a president, two members and a secretary. The rank of a member should not be less than that of counsellor or *Mustashar*.

The Appellate Review Committee has the power to review decisions of the general and subsidiary panel. It resembles more or less the Appeal Court in the ordinary judicial system.²⁰⁵ However a position in the Appellate Review Committee requires fewer qualifications than a post in the Appeal Courts. Appointments in the latter are open to candidates of not less than forty years of age.²⁰⁶ The person appointed as an appeal judge should either have spent two years in the post of a President of Court (A) or have had eighteen years experience in a similar judicial post or eight years teaching Islamic jurisprudence and its fundamentals in one of the *Sharia* Colleges in Saudi Arabia.²⁰⁷ In contrast, the minimum qualification for the Appellate Review Committee is the lowest level of counsellor, counsellor (D)

²⁰² Interview with Al-Hussain, *op. cit.*

²⁰³ *Ibid.*, and Interview with Abdullaziz Al-Twelay, a member of the Board, Almadinnah Branch on December 2003.

²⁰⁴ *Ibid.*

²⁰⁵ Mahassni, *op. cit.*, p. 842.

²⁰⁶ *Ibid.*

²⁰⁷ Article 30 of the Rules.

3.5 The Attitude towards International Agreements of Arbitration

A number of international agreements signed or subscribed to by the Kingdom contain wording that deals with the enforcement of arbitrator awards. One of these is the Washington Agreement concerning the settlement of investment disputes. The Kingdom subscribed to this agreement which states in Article 45 that any arbitration award issued in accordance with its rules is considered final and enforceable in any country that signed the agreement as if it was an award passed by one of that country's courts.

This constitutes a guarantee, as we mentioned earlier, for the enforcement of arbitration awards that take place within the framework of the International Centre for the settlement of Investment Disputes. The member countries are committed to enforcing arbitration awards issued in accordance with its rules. The ruling is enforced in accordance with law prevalent in the enforcing country. The party which is seeking to get the award accepted and enforced has to produce a documented copy of the award sanctioned by the General Secretary of the centre to the appropriate court or to any authority designated by the enforcing country. Member countries have to advise the General Secretary of the centre of the proper court or departments that they designate for this task.

3.5.1 The Arab League Agreement of 1952

This agreement concerns the enforcement of arbitration awards to which the Kingdom has subscribed, and also dealt with the matter of enforcing arbitration awards. Further to that, the Riyadh Agreement for judicial corporation concluded within the framework of the Arab League on 23/6/1403H (7 April 1983), to which the Kingdom did not

subscribe,²⁰⁸ contained wording relating to the enforcement of arbitration awards. Article 37 commits member countries to enforce arbitration awards issued in any member country in accordance with the law prevalent in the said country.

The agreement also prohibited the judicial authority designated for enforcement from looking into the dispute or refusing to enforce the ruling on the basis of the following:

- i.* If the law of the member country, which is required to accept and enforce the award, does not permit the matter subject to the dispute to be settled through arbitration;
- ii.* If the award was issued to enforce an invalid provision, invalid arbitration agreement or was not final;
- iii.* If the arbitrators did not have the qualifications stipulated in the agreement provision or not in accordance with the law applicable to the award of the arbitrators;
- iv.* If the parties to the dispute were not summoned to attend in the right way;
- v.* If the award of the arbitrators contained something that violates Islamic *Sharia* public order and common decency in the member country required enforcing it.

Despite the fact that the wording in the Riyadh Agreement explicitly stipulates the non-violation of *Sharia*, there are differences of opinion among member states on the question of whether an arbitration ruling that violates *Sharia* constitutes a violation of public order in the enforcing country where *Sharia* is the main source of legislation. This is because some legal scholars in the Arab countries argue that public order should be interpreted in accordance with international concepts and not in accordance with concepts prevalent in the enforcing country.

3.5.2 The 1987 Arab Agreement for Commercial Arbitration

This agreement, to which the Kingdom did not subscribe, also dealt with the enforcement of arbitration rulings in member countries. This is evident in Article 35,

²⁰⁸ Mahmud Shams, *International Judicial Agreements*, al-Asdiqa press, Damascus, 1986, pp. 342-354.

which gives the high court in the member country the authority to issue or enforce the arbitration ruling passed in accordance with the agreement's rules and stipulates that the court cannot refuse to enforce the ruling unless that violates public order in that country. Despite the importance of the above mentioned agreements as means of overcoming the hurdles standing in the way of enforcing foreign arbitrator awards, they are not equal in importance in regard to the foreign awards issued in disputes emanating from investment. In regard to the Arab agreements such as the Riyadh and Amman Agreements, besides being of a regional nature where membership is confined to Arab countries, they did not deal comprehensively with the matter of enforcing arbitration rulings. Moreover, the Kingdom until now has not subscribed to the Riyadh or Amman Agreements. The same can be said of the Washington Agreement, which although it has great importance in the sphere of enforcing arbitrator awards issued in cases of investment disputes, has not reached the level achieved by the New York Agreement.

3.5.3 The New York convention of 1958

The Kingdom entered into the New York Agreement in 1994.²⁰⁹ This agreement constitutes an important step in international cooperation with respect to the enforcement of foreign arbitration rulings. The membership of the Kingdom in that agreement is considered a step towards encouraging foreign investment and assuring foreign investors that investment in the Kingdom is secure by the enforcement of foreign arbitration rulings on its soil.

Having subscribed to it, the Kingdom is committed to its procedures regarding acceptance and enforcement its arbitrator awards and this requires that we look at special rules relating to procedures in the country required to fulfil this rule. In that

²⁰⁹ Royal Decree No. M/11 dated 16/07/1414 A.H (1994 A.D)

respect, the agreement specifies the documents that the applicant must enclose. These documents, as stated in Article 4, are as follows:

i. The original arbitrator award certified, or a copy of it certified from the appropriate authority in the country where it was issued in order to be accepted as an official document;

ii. The original of the written agreement that includes the arbitration provision or the subsequent agreement of the two parties in accordance with which they agreed to resort to arbitration, or a certified copy of each one of them. If the arbitration ruling or the arbitration agreement is not written in the official language of the country which is required to accept and enforce the ruling on its soil, the applicant is required to produce a translation of these documents in the language of that country. The translator must be officially accredited in either the country where the ruling was issued or that which is required to enforce it on its soil. Then they must submit the application of acceptance in order to lend the form of enforcement to the arbitration ruling before the appropriate authority in the country, which is required to enforce that award.

The procedures have to be followed in accordance with the rules of that country and usually the country where the enforcement application is made specifies the law and the documents required. So we can see that the agreement allowed each member country to enforce the foreign arbitration rulings in accordance with the rules and procedures stipulated in its national law and to designate the appropriate authority to receive the application. This authority can be judicial or administrative.²¹⁰ We can see that the agreement did not set a time limit for submitting the application with the stated documents.

Hence, there is disagreement among the judicial institutions in those countries on whether to follow the date set by the rule of procedures in the country that receives the

²¹⁰ Talib Musa, *An Overview of International Commercial Trade*, Dar ath-Thaqafah, Amman, 1997, pp.158-160.

application. In that respect, US federal law demands that the procedure should be followed, and the time set by US federal law is three years after the issue of the ruling. British law, on the other hand, considers that setting a time limit is applicable to national arbitration rulings but not to foreign arbitration rulings. Therefore, the matter is left for the judicial authority. There are also differences with respect to documents and as to whether they should be enclosed with the application or can be produced at a later date with any other missing documents. Italian law states that it is essential to enclose the documents with the application, whereas Dutch law allows parties to produce them or complete any missing documentation after handing in the application.²¹¹

The department which is commissioned for enforcement can also be different in every country. It can be an administrative official or a judicial authority, as is the case in the Kingdom where the jurisdiction was given to *Diwan Al Mazalim*.²¹² But no matter which department it is, it cannot refuse to enforce the ruling except in cases where legal impediment is present.²¹³ So arbitration awards are permissible on the grounds produced in the case, and solely in respect of the issue of the ruling. Consequently, the dispute, which is the subject of the ruling, cannot be reopened before any other body. We can see that if a foreign award violates any Islamic *Sharia* rule, which is a subject of dispute among scholars, this would not prevent its enforcement. The executive list of Saudi Arbitration Law calls on all the designated enforcement departments to take all the necessary actions to force the party against whom the ruling was made, to comply with it.²¹⁴ We can also observe that the New York Agreement permits the department designated to receive the application and enforce the ruling to refuse to accept it or apply it in cases stated by the mentioned article.

²¹¹ *Ibid*, p. 161.

²¹² Fahad Al Hugbani, "The Saudi Efforts Toward Arbitration", *Paper presented in the Conference of "Arbitration from Islamic and International perspective"*, Jeddah, 8-10 April 2003, pp. 6-7.

²¹³ Which is the case if it is against the Islamic *Sharia* law

²¹⁴ Eid M. Al-Ghany, *The Booklet for the Explanation of Saudi Arbitration Rules*, King Faisal Centre for Research and Islamic Studies, Riyadh, 1st Ed, 1984, p. 17.

These cases can be divided into categories: cases where the adversary allows the refusal of acceptance and enforcement on the basis of an application by the party against whom the ruling was issued. This is the case if it proves the existence of any circumstances mentioned in Article 5 of the New York agreement, which are the following:

- i.* If the parties to the arbitration agreement are not fit according to the law applicable to them, or if the mentioned agreement was inconsistent with the law chosen by the parties, and also in cases of non-agreement according to the law of the state issuing the award;
- ii.* If the party against whom the ruling was issued was not correctly informed of the appointment of the arbitrator or arbitration procedures or was unable to produce his defence;
- iii.* If the award was about judgment in a dispute not stated in the arbitration agreement or arbitration provision, or if the ruling included matters exceeding its domain. This would fall within the concept of the arbitrator exceeding his authority. But if the ruling included a paragraph relating to matters governed by arbitration and can be separated from the matters that are not subject to arbitration, then these parts of the ruling can be accepted and enforced;
- iv.* If the formation of the arbitration panel or the arbitration procedures contradicts what the parties had agreed to or contradicts the law of the country where the ruling was issued, and in the case of dealing with the agreement between the parties who formed the arbitration panel;
- v.* If the award did not become obligatory on the parties or it was negated or stopped by the appropriate authority in the country where the ruling was issued in accordance with that country's law. It is noted that this paragraph permits refusal to enforce the arbitration ruling if the party, against whom the ruling was made, can prove that the arbitration ruling does not have binding power in that country.²¹⁵

²¹⁵A. El-Ahdab, "International arbitration court", *The Journal of Arab Arbitration*, May 1999, p. 39.

This is consistent with the 1927 Geneva Agreement, which states that the arbitration ruling must be final in order to be enforceable. This is commonly interpreted to mean that the ruling must be enforceable in the country where it was issued and consequently we reach the conclusion of what is called double enforcement. In other words, the arbitration ruling must be given enforcement status by the appropriate authority in the country where it was issued and then the country where enforcement is sought is required to give it another enforcement status. But the New York Agreement has substituted the previous concept with the word that the arbitration ruling is binding.

In other words, the party seeking the enforcement must prove that the arbitration ruling is enforceable in the country where it was issued. And, on this basis, the enforcement of arbitration awards can be rejected if the party against whom the ruling was made can prove that the appropriate authority in the country where it was issued stopped it.

It is also noted that Article 6 gives the appropriate authority, in the country required to enforce the arbitration ruling, the authority to evaluate if it feels it justifiable. Additionally, it can evaluate whether to postpone its judgement in enforcing the arbitration award and in such cases it can ask the adversary to produce sufficient sureties if he applies to negate the arbitration ruling or stop its effect to the appropriate authority in the country where it was issued. It is important to point out that the text of this article is applied when the adversary has applied to the appropriate authority in the country where the award was issued to negate or stop its effect and he must prove that he has done so. So, if the appropriate authority in that country decides to negate the arbitration award or stop its effect, then the appropriate authority in the country which is required to enforce the arbitrator awards can also reject its enforcement.

As noted earlier, there are two situations stated in Article 5 of the agreement where the appropriate authority is permitted to refuse to enforce an arbitration award without application from the adversary. They are the two following cases:

i. If the matter of dispute cannot legally be settled through arbitration according to the laws of the country which are required to accept it and enforce it, and that matter is contained within the rules of public order in that country, which prevent arbitration in such cases;

ii. If the acceptance and enforcement of the ruling would violate the basis of public order of that country, in which case the appropriate authority in that country would have the right to refuse acceptance and enforcement of the mentioned ruling.

These are the most important rules contained in the New York Agreement for acceptance and enforcement of foreign arbitration rulings. It can be noted that the agreement facilitated the procedures concerning the application of acceptance and enforcement and did not permit the national courts of member countries to refuse acceptance or enforcement of their own accord except in two cases, which have been explained. However, we need to mention here that the agreement allowed countries to express some reservation when they joined and subscribed to the agreement. This is why most of the countries that adopted the agreement and subscribed to it also helped standardize the acceptance and enforcement procedures of arbitration rulings internationally.

3.6 Summary

The understanding of arbitration law in Saudi was very limited until the *Aramco* case occurred. The Saudi legislature realised that lessons should be learned from that case. Arbitration was exclusively for private parties after the Saudi legislature prohibited governmental agencies from entering into any arbitration agreement as a reaction to the outcome of the *Aramco* case.

At that time there was no specific regulation which governed matters concerning the arbitral process, although there were a few regulations containing some provisions which regulate certain issues of arbitration, for example, the Commercial Court

Regulation of 1931, the Labour and Workman Regulation of 1969 and the Chambers of Commerce and Industry Regulation of 1980. Accordingly, arbitration between private parties was sporadic.

In a very important step to promote the role of arbitration as a means of settling disputes arising from commercial transactions, the Council of Ministers decided to ratify the Arbitration Regulation by Resolution No. 164 on the 4th of April 1983. The King also gave his approval by Royal Decree No. M/46 on the 25th of April 1983. This Regulation was published in the Official Gazette, *Um al-Qura*, on the 3rd of June 1983.

In 1985, its Implementation Rules were issued by the Council of Ministers' Resolution No. 7/2021/M. These Rules have clarified numerous aspects regarding arbitration and specifically answered many of the questions left unanswered by the Arbitration Regulation of 1983.²¹⁶

The Arbitration Regulation of 1983 has given clear answers in respect of the arbitrators: their number, appointment, qualifications, replacement and fees, the language of arbitration, the applicable law, the method of making of the arbitral awards and their enforcement.

Confusion could take place among the judicial authority if the Saudi government failed to appoint the special judicial authority who has the original jurisdiction to hear the dispute. Therefore, the Board of Grievances is appointed to carry out this task as the supervisory body on the arbitral process of the commercial disputes.

As part of the developmental movement that occurred in Saudi towards international arbitration, a number of international agreements have been signed or subscribed to by the Kingdom contain wording that deals with the enforcement of arbitration awards. Among these are the Washington Agreement concerning the settlement of investment

²¹⁶ Niel F. Allam, "Arbitration in the Kingdom: The New Implementation Rules", *Middle East Executive Reports*, vol. 8, no. 8, August 1985, p. 9.

disputes, the Arab League Agreement of 1952 and the New York convention of 1958 for the recognition and enforcement of foreign arbitral awards.

After discussing these issues we will move on to start analysing the rules of procedure which concern all the issues related to the arbitration agreement in the arbitration regulation of 1983 and its implementation of 1985, compared with rules of the Model Law and other national and international arbitral procedures.

CHAPTER FOUR

ARBITRATION AGREEMENT

4.1 Introduction

The arbitration agreement is the cornerstone of arbitration because it embodies the consent of the parties to arbitration. It is in the arbitration agreement that the basis for the jurisdiction and powers of an international commercial arbitrator can be found. The necessity of determining the laws relating to arbitration agreements is therefore self-evident.

The laws relating to the arbitration agreement are those which determine whether or not the parties actually consented to arbitration and the legal implications of the arbitration agreement. When reference is made to the law relating to the arbitration agreement, it should be noted that this does not necessarily refer to one body of law. This is because it is possible for different laws to apply to different areas of the arbitration agreement. For example, the law governing the capacity of the parties to enter into an arbitration agreement may differ from the law governing the arbitability of the subject matter.

There are two types of arbitration agreement. The first, the submission agreement, is an agreement to refer an existing dispute to arbitration. This is known in continental parlance as a *compromis*. The second, the arbitration clause, is an agreement to refer any future dispute to arbitration. In continental parlance it is known as the *clause compromissoire*. The arbitration clause, which is usually part of a larger commercial agreement, is the more common source of arbitration.²¹⁷ This understanding is expressed in both domestic law and international treaties.²¹⁸

²¹⁷ W. Carig, W. Park & P. Paulsson, *International Chamber of Commerce Arbitration*, 2nd Ed, Ocean Publications Inc, New York, 1990, p. 49; also see J. Lew, *Arbitration Agreement: Form and Character*, in P. Sarcevic (Ed), *Essay on International Commercial Arbitration*, Martinus Nijhoff, London, 1989, p. 52

²¹⁸ A. Redfern and M. Hunter, *op. cit*, p. 4, also David Renč, *op. cit*, p. 232

4.2 Forms of Arbitration Agreement

Arbitration agreements can be of two types. The first type is where the agreement is made to refer any existing dispute to arbitration. Such an agreement is known as a submission agreement. The second type is where it is agreed in advance to refer to arbitration any dispute which may arise as a result of performance of any particular contract. In this case, the agreement takes the form of an arbitration clause.

Art. 1 of the Saudi Arbitration Regulation validates both the submission agreement, the agreement referring an already existing dispute to arbitration and the arbitration clause, the agreement referring future disputes to arbitration. This constitutes a significant improvement with respect to the previous law under which arbitration clauses were unenforceable.

4.2.1 [A] Submission Agreement

An agreement may be drawn up by the parties to refer to arbitration an existing dispute which has occurred from the performance of the contract, whether the contract contains an arbitration clause or not. The disputants also need to prepare an arbitral agreement, in cases where an arbitration clause is included in the main contract, to determine the other elements necessary, such as the type of arbitration to be used and the constitution of the arbitral tribunal.

The main distinction between the arbitration clause and submission agreement, as reflected in the French Code, is that the former is “an agreement by which the parties to a contract undertake to submit to arbitration a dispute which may arise with respect to

the contract”²¹⁹, whereas the same code defines the latter as “an agreement by which the parties to an existing dispute refer the matter to arbitration by one or more persons”.²²⁰

Submission agreements in international contracts are recognised by many states and international conventions. One such convention is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which uses identical wording to Article 7(1) of the Model Law which provides that “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship”.²²¹ The expression, “dispute which has arisen or which may arise”, which is found in both conventions, refers to a dispute which has already arisen, governed by a “*compromis*” and a dispute which could occur in the future, governed by a “*clause compromissoire*”. This similarity between the two conventions indicates clearly the intention of the conventions to unify the distinction between the two types of arbitration agreement.²²²

Moreover, a submission agreement significantly differs from an arbitration clause in what it contains. While the former outlines the rights, duties and obligations of the parties, the latter contains the procedure for resolving any disputes that have arisen or may arise under the substantive agreement. Thus, the one may be described as substantive and the other as procedural.

The submission agreement contains the most important provisions which normally determine the arbitral process: the type of arbitration, the law applicable, the arbitral tribunal constitution, place of arbitration, method of appointing the arbitrators, the expenses of the arbitration, the hearing and arbitral award enforcement. Moreover, the submission agreement determines the method of appointing experts for natural

²¹⁹ French Code of Civil Procedure, Art. 1442

²²⁰ French Code of Civil Procedure, Art. 1447

²²¹ New York Convention, Art. II(1). Provides: “Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”

²²² Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction*, 1st Ed, Sweet & Maxwell, London, 2000, p. 52

resources contracts. However, these elements must not be exclusive, since each dispute has some relevant elements which must be included, whereas others may be irrelevant and should be excluded from the agreement. Each party is fully aware of the dispute at the time of signing the arbitration agreement and they should therefore include each relevant aspect according to the nature of the dispute.

Nevertheless, according to the researcher view, it is surely important, that the submission agreement should be well drafted to be able to determine the crucial elements, as well as a back up provision. If the regulation lacks a back up provision the submission agreement should obtain such provisions. This is necessary to ensure that the arbitration can be carried out without any obstacles or delays. Omission of such crucial elements may result agreement that express an agreement to arbitrate, but will fail to provide guidance as to where and how to do so.²²³ This should not be seen as a justification for the failure of the arbitral rules in constructing a solid rules regarding arbitration agreement, however, submission agreement will role confidently when the rules regulating arbitration agreement are functioning in allies with the awareness of parties and their advocates in drafting the submission agreement. In ad hoc institutional arbitration supervised by one of the arbitration centres, arrangements are hypothetically well established and the provisions of the centre will be applied, so there is no opportunity for an uncooperative party to misinterpret the submission agreement.

Submission agreement is always drawn up after the dispute has arisen, therefore, the attitude of the parties and their advocates may be slightly changed from their attitude at the time of inserting the arbitration clause, since the relationship between the parties will not be as smooth as before the dispute arose. Nevertheless, if the parties are willing to solve the dispute by arbitration, the interests of the parties might be to resolve the dispute confidentially, with less expense. However, the interests of each party might

²²³ John M. Townsend, "Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins", *Dispute Resolution Journal*, Vol. 58, Issue 1, 2003, pp. 28-36, p. 31.

differ from the other, since the claimant is usually keen to resolve a dispute quickly, whereas the respondent wishes to gain as much time as possible before the arbitral proceedings starts in motion. Delay will result in an interest on top of the arbitrator's decision, but from the defendant's point of view, the time is more valuable than avoiding an interest, because additional time might give him the opportunity to set aside the arbitral claim.²²⁴ It is in this environment that the negotiation of the arbitration agreement takes place, which could result in frustration of the process of drawing the agreement, or a delay.

4.2.1 [B] Submission Agreement under SAR

In Saudi Arabia the arbitration regulation of 1983 and its implementation of 1985 adopt the concept of a submission agreement, which is known by the regulation as an "arbitration document", which allows the parties to submit their dispute to arbitration.²²⁵ The regulation provides: 'an agreement may be made to refer any existing dispute to arbitration...'²²⁶

The parties to the dispute should file the arbitration document with the authority which has the original jurisdiction, which is the Board of Grievances. Article 6 of the Regulation requires that the Authority should approve the submission agreement. However, the provisions requiring approval by the Authority may imply that a submission agreement is to be executed for the purposes of approval. The Arbitration document should fulfil certain requirements as follows:

1. It should bear the signatures of the parties or their official representatives.
2. It should bear the signature of the arbitrator(s).

²²⁴ Abdul Hamid El-Ahdab, "The Arbitration Agreement" (Chapter Two), *Encyclopaedia of Arbitration*, 2nd ed, Dar Al-Maaref, Beirut, 1998, p. 130

²²⁵ Eid M. Al-Ghany, *op. cit*, pp. 11-12

²²⁶ Arbitration Regulation of 1983 Art. 1

3. It should specify the subject matter of the dispute.
4. It should contain the names of the parties to the dispute.
5. It should indicate the name of the arbitrator(s) and his/their acceptance to settle the dispute.
6. It should attach the copies of the documents relevant to the dispute.²²⁷

One might criticize these requirements by observing that they amount to the imposition of a kind of control over arbitration by the state. Nevertheless, the purpose of adopting these requirements may be to ascertain that the subject of the dispute is arbitrable according to Saudi law, and also that the subject of the contract does not violate public order, or perhaps to ensure that the conditions imposed upon the arbitrator(s) are met.²²⁸

Moreover, further criticism may be raised that Article 5 of the Rule limits the content of the submission agreement, whereas in some circumstances other elements should be included in the agreement to ensure that the arbitral process can be carried out without any obstacles or vexatious delay, such as the determination of the place of the arbitration, and provisions for the resignation or the death of the arbitrator, the manner of the replacement, and the case where one of the parties or their representative fails to cooperate in the arbitral process, as applied in some international arbitral institutions.²²⁹

Therefore, the Saudi legislature should bear in mind the importance of such provisions to protect the arbitration process from any misconduct by the unwilling party to frustrate the settlement process. In some circumstances, excluding some elements would result in violation of the rule itself, as in the case between Company A and Company B where the two parties agreed to refer a dispute to arbitration but determined only the subject-matter of the dispute and the arbitrators in the submission agreement. Under Article 5 of the regulation, the parties submitted the agreement to the Board of Grievances for

²²⁷ Saudi Arbitration Regulation of 1983, Art. 5; for more see Dr. Eid M. Al-Ghany, *op. cit.*, pp. 21-22

²²⁸ M. S. Al-Eshiw, *The Saudi Arbitration Regulations: Legal Analysis*, University of Warwick, LLM Dissertation, 1993, p. 15

²²⁹ Abdul Hamid El-Ahdab, 1998, *op. cit.*, p. 132

authorisation of the arbitral proceedings. On the 10/1418 A.H the agreement was ratified by the competent authority. Surprisingly the arbitral tribunal issued the award on the 11/1419 A.H. which means the arbitral process took over a year to issue the award. However, Article 9 of the Rule regulates the timing of the arbitral process, and provides that if the litigants do not specify the time limit in the arbitration agreement then the award must be issued within ninety days from the day of approval. As we can see, the parties did not determine the time limit in the submission agreement approved by the competent authority.²³⁰ On the other hand, the content of a well-drafted submission agreement can facilitate significantly the whole arbitral process within the framework of the regulation, as in the case of *A. H S v. C. Co. for Construction*. The parties were very careful in writing the submission agreement, which contained every relevant aspect that could obstruct, delay or frustrate the process. For instance, the parties stated in the agreement that the arbitral tribunal would continue the arbitral process even if one or both parties was absent from the session. They also agreed that the award should be issued within one hundred days from the first session. It is very wise to start the time limit from the first session rather than from the day of approval, because there might be a long delay between the day of approval and the day of commencement.²³¹

Criticism may also be raised, as Turck emphasised, from the fact that Article 9 of the regulation lays down a time limit for rendering the award “within ninety days from the date on which the arbitration instrument was approved” while Article 22 of the same regulation requires a deposit of the arbitrators' fees “within five days after the approval of the arbitration instrument”. Notwithstanding the apparently imprecise terminology used in Articles 9 and 22 of the regulation referring to the “arbitration instrument” (submission agreement) only, it would be rather strange if the provisions relating to the

²³⁰ Arbitral Award No. 28/D/T J/10 1420A.H. 2000 A.D. of the case No. 1690/2/G 1417 A.H. (1997 A.D.)

²³¹ Arbitral Award No. 253/D/T J/9 1413A.H. 1993 A.D. of the case No. 602/2/G 1413 A.H. (1993 A.D.)

time limit and the deposit were to apply to an arbitral award rendered on the basis of a submission agreement only.²³² In counter to this argument, the rationale for the provision requiring approval of the arbitration instrument by the authority is that the arbitration instrument contains procedures regulated by the Act and the competent authority has original jurisdiction over these procedures. Thus, the approval of the authority is only an exercise of jurisdiction to ensure that the procedures contained in the arbitration instrument are in accordance to the regulation. In contrast, the arbitration clause, as mentioned earlier, does not contain any procedures over which the competent authority has jurisdiction as it only concerns referral of potential future disputes within a larger contract.

However, the Arbitration Regulation of 1983 and its Implementation of 1985 are silent on the question of what happens if the authority having the original jurisdiction fails to approve the submission agreement within the time limit. Also, it seems that neither the Regulation nor the Implementation Rules consider the case where one party, who has contractual agreement to resort to arbitration, refuses to agree to arbitrate once a dispute has arisen. In this regard, in the absence of rules on the subject, an alternative is for the party willing to proceed to arbitration to submit an application to the Competent Authority for appointment of the arbitrator(s) that the other party failed to appoint. However, 'as the Board of Grievance, the likely Authority, has an accumulation of cases and as the recalcitrant party can utilize delay tactics or even fail to appear for two consecutive hearings at the Board of Grievances before being subject to a default judgment, considerable time could elapse before the arbitration gets under way, if at all'.²³³ The Regulation and Implementation Rules also failed to set consequences for a party who refuses to arbitrate after having previously agreed to do so. Further, Turck

²³² Nancy B. Turck, *op.cit.*

²³³ Nancy B. Turck, "Arbitration in Saudi Arabia", *Arbitration International*, Vol. 6, No. 3, 1990, p. 281-291

argues that the Regulation is not consistent in its terminology. The text mentions the arbitration clause at two places only: Articles 1 and 7. In all other instances, it refers to the “arbitration instrument” (submission agreement). It would have been preferable had the general term “arbitration agreement” been used throughout the Regulation, and the specific terms “arbitration clause” and “submission agreement” in those places where a different treatment of these two categories is desired. Such terminology would follow the modern trend which treats both types of arbitration agreements alike under the term “arbitration agreement”, but which treats them separately in exceptional cases only.²³⁴

In addition, it is crucial to indicate in the arbitration document a provision which determines the place of the arbitration inside the Kingdom of Saudi Arabia, and also to determine other matters relating to the arbitral process. The parties usually choose as the place of arbitration one of the Saudi Chambers of Commerce and Industry. Moreover, Article 25 of the Implementation Rules provides that Arabic shall be the official language “to be used before the arbitration panel, whether in discussions or in writing.” The same article further provides that a party who does not speak Arabic must be accompanied by an accredited translator who shall sign with him the minutes of the hearing. Only documents drawn up in Arabic are admissible in Saudi tribunals and generally before an arbitral tribunal. In practice, agreements between Saudi parties and foreigners are usually drafted in English with an Arabic translation. Foreign parties are strongly advised carefully to check the Arabic translation as it is a recurring unpleasant surprise for foreigners to find out at a later, usually critical, stage that the (governing) Arabic translation does not correspond with the original English text. From another point of view, the Saudi legislature should state, whether by adding to the same article or in separate article, that the arbitration agreement may be written in other languages, if the parties agree, since the Saudi Foreign Investment Act gives non-Saudi investors the

²³⁴ *Ibid*

opportunity to enter into a joint-venture with the Saudi businessmen²³⁵ and translation of legal documents from Arabic to other languages might be inappropriate, as the Arabic language is not considered as an ideal language in the international business arena; since the language concerned has a considerable number of legal terms that have different meanings which might lead to some ambiguities in interpreting the agreement in the event of conflict between the parties.²³⁶ Moreover, the Saudi legislature can avoid the complication inherent in article 25 of the Implementation Rules by stating that a copy of the agreement should be written in the language of the other foreign party, in the case of joint-venture, at the same time of writing the Arabic version.

4.2.2 [A] Arbitration clause

An arbitration clause is a clause which refers potential disputes to arbitration, contained in a contract which permits the parties to submit any dispute which may arise during the execution of the respective contract. The principle of the arbitration clause is commonly adopted in a various arbitration institutes. The UNCITRAL Model Law of 1985 recognizes the arbitration clause as a type of arbitration agreement. It provides that:

An arbitration agreement may be in the form of an arbitration clause in a contract or in a form of a separate agreement.²³⁷

Arbitration in the ICC is achievable as long as the disputing parties issue an agreement between them providing for it. Therefore, it is recommended that all parties willing to

²³⁵ Saudi Foreign Investment Act of 2000, Art. 2.

²³⁶ The ideal legal language for writing legal documents is a language where each legal term has only one meaning, such as the French language.

²³⁷ UNCITRAL Model Law of 1985, Art. 7(1); Moreover a distinction between arbitration clause and submission agreement is reflected at the national level. For instance, Art. 1442 of the French Code of Civil Procedure states that the arbitration clause is : “ an agreement by which the parties to a contract undertake to submit to arbitration a dispute which may arise with respect to the contract”

have recourse to ICC arbitration include the following standard clause in their contracts: “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules” .²³⁸

Arbitration under the LCIA is possible if it is based on ‘contractual documents in which the arbitration clause is contained or under which the arbitration arises’.²³⁹ The LCIA Rules recommend the following wording for the arbitration clause: ‘Any disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rule of London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.’²⁴⁰

An arbitration clause grants consent to arbitration as the means to resolve any future differences that may occur. However, in some states, the legislatures claim that parties are not free to submit their disputes to arbitration in advance. In other words, parties can do so only once a dispute arises.²⁴¹ Otherwise, the parties according to their will may specify the arbitration clause in the main contract; for instance, the arbitration clause might be limited to a certain dispute which may arise from the main contract.²⁴² This kind of arbitration clause indicates that a certain kind of dispute is referred to arbitration while other disputes are referred to adjudication. This trend might result in complications, especially in the case of an unclear, vague, arbitration clause inserted in the main contract, which could provide an opportunity for the unwilling party to claim that the court has jurisdiction over the dispute, while it was originally under the

²³⁸ Drafting the Arbitration Agreement,
http://www.iccwbo.org/court/english/arbitration/model_clause.asp. accessed on (01-04-2003)

²³⁹ LCIA Rules Art. 1 para(b)

²⁴⁰ Recommended arbitration clause for further disputes by the LCIA found on official site of Cameron May Ltd, International Law Publishers,
<http://www.jus.uio.no/lm/lcia.arbitration.rules.1985/future.dispute.clause> (09-18-2004)

²⁴¹ Redfern and Hunter, *op. cit*, p. 139

²⁴² *Ibid*, p. 160

jurisdiction of arbitration.²⁴³ This kind of attitude will result in delay in the settlement process, which must be overcome to maintain the advantage of referring disputes to arbitration. Therefore, it is highly recommended that arbitration clauses should be well written, clear and specify all the disputes that might arise from the contract. Drafters can benefit from the suggested arbitration clauses drafted by some arbitration institutions such as LCIA and ICC,²⁴⁴ to avoid misinterpretation resulting from the vagueness of the arbitration clause.

The main characteristic of an arbitration clause is that a general clause, recommended by arbitral institutes, is inserted in a contract. However normally, the arbitration clause does not include the essential elements required for the execution of the arbitral process; the method of appointing the arbitrators, the arbitral tribunal composition, the place of arbitration, the expenses and enforcement of the arbitral award. This is because the circumstances of a dispute which may arise in the future are unknown; the arbitration clause does not specify in depth the details of the nature of the dispute and how it is to be settled.²⁴⁵ Consequently, the parties to the dispute will enter into a submission agreement to resolve their dispute by arbitration, whether or not an arbitration clause is included in the main contract. Some might argue that the arbitration clause is a waste of time, since the parties have to draw up another arbitration agreement to specify the essential elements that the arbitration agreement should possess. However, this argument can be countered, by asserting that the arbitration clause takes a very effective role in the process of the arbitration and shortening the time, because a well-written arbitration clause determines the jurisdiction of the settlement body over any dispute arising from performance of the contract, so that the parties will refer disputes to arbitration according to the arbitration clause. Where a contract does not contain an

²⁴³ Abdul Hamid El-Ahdab, 1998, p. 127.

²⁴⁴ The standard ICC Arbitration Clause which reads "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules"

²⁴⁵ Redfern and Hunter, *op. cit*, p. 136

arbitration clause, parties might still resort to arbitration, but the jurisdiction of the arbitration over the dispute is not determined before the dispute has arisen. The determination of the jurisdiction over the dispute after the occurrence of the dispute will result in some delay, since the parties at the first stage might need to evaluate the methods of dispute settlement, whether arbitration, adjudication or ADR, and decide the appropriate methods to solve the problem according to the nature of the dispute.

Additionally, for an arbitration clause, the disputed matter cannot be specific. For instance, the parties may agree to include an arbitration clause in their contract in order to refer any dispute in relation to the interpretation or implementation of the contract. There are many reasons why the disputed matter should be made clear and specific in the arbitration clause, among them the two following:²⁴⁶ first, the legislature does not want the parties to renounce trust in the tribunal's competence. Second, by specifying the disputed matter, the arbitrator's authority will be determined. Thus, if the arbitrators overstep their specific authority, the award will be voidable. In this respect, general arbitration clause is considered null and void if the parties agree to refer to arbitration all of their future disputes, because some disputes may be unarbitrable. Consequently, arbitration clause should determine in clear format the subject-matter which the disputing parties undoubtedly intended to resort the provision to arbitration.²⁴⁷

4.2.2 [B] Arbitration Clause under SAR

Before the adoption of the Saudi regulation of 1983, arbitration clauses were not endorsed in Saudi statutes. However, arbitration clauses were commonly acknowledged in the practice of contracts in Saudi Arabia.²⁴⁸

²⁴⁶ A. Minshawi, *International and National Arbitration*, Munsh Al-Maarif, Alexandria, 1995, pp. 28-29

²⁴⁷ Gabriel M. Wilner & Martin Domke, *Domke on Commercial Arbitration*, Dorothy O Callaghan, St. Paul, Minn, 1984, p. 48.

²⁴⁸ Saleh Samir, *Commercial Arbitration in the Arab Middle East*, Graham & Tortman, London, 1984, p. 304

Article 1 of the Saudi regulation distinguishes the validity of the arbitration clause concerning future disputes arising from the performance of the contract from the submission agreement arising from existing dispute.

However, some jurists have expressed doubt about the validity of the arbitration stipulation contained in a contract, on the ground that the judicial system is within the sole jurisdiction of the state. In contrast, other jurists argue that arbitration does not imply a violation of the authority of the state; it simply resolves the differences between the contracting parties.²⁴⁹

It is doubtful, in Saudi Arabia, whether it is necessary to draw up a new arbitration agreement which must be filed and approved by the authority having jurisdiction over the dispute, in order to determine the arbitral process, in order to have binding arbitration, if the disputing parties included an arbitration clause in the contract. El-Ahdab holds the opinion that the arbitration clause is binding by itself, and there is no need to enter into a new arbitration agreement. He argues that where the arbitration clause (future disputes) is concerned, the regulation might seem to have abolished the requirement under the previous law that the parties execute a submission agreement (terms of reference) once the dispute has arisen. Art. 7 provides that:

If the parties have agreed to arbitrate before the occurrence of the dispute (i.e., the arbitration clause), *or* if the arbitration instrument relating to a specific existing dispute (i.e., the submission agreement) has been approved, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation.²⁵⁰

The alternative wording (“*or*”) suggests that no submission agreement is required in the case of an arbitration clause. In addition, the Regulation provides for the appointment of

²⁴⁹ Dr. Eid M. Al-Ghany, *op. cit.*, p. 11

²⁵⁰ Saudi Regulation of 1983, Art. 7

an arbitrator by the Authority originally competent to hear the dispute,²⁵¹ “if the parties have not appointed the arbitrators”.²⁵² This provision makes sense for the arbitration clause only because the submission agreement must contain the names of the arbitrators and be signed by them.²⁵³

However, in accordance with Saudi practice, the disputing parties, who have provided an arbitration clause in their contract, still need to draw up an agreement, and this agreement must be filed and approved by the authority originally having jurisdiction over the dispute.²⁵⁴ On the other hand, from the wording of Decree M/46 it appears that the arbitration agreement should be filed and authorized just before arbitration proceedings are initiated. Hence, there can be no arbitration clause inserted in a contract without initiating and validating an arbitration agreement.²⁵⁵ Articles 9 and 22 of the regulation set time limits for certain procedures of the arbitral process and these provisions regulate that this time limit, whatever the period is, is determined from the day of the approval of the arbitration instrument only. The question which might arise is would Arts. 9 and 22 then imply that the arbitration clause needs to be approved as well? If this is the case, the approval probably must be given on a submission agreement (terms of reference) executed *after* the dispute has arisen, because Art. 7 and the other provisions relate the approval to the arbitration instrument only.

Article 5 of the regulation of 1983²⁵⁶ confirms this view, since it requires that the parties must file an ‘arbitration instrument’ with the Authority but does not define ‘instrument’.

The instrument is to be signed by the parties or their authorized attorneys and the

²⁵¹ Abdul Hamid El-Ahdab, “Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985: Part One”, *Journal of International Arbitration*, Vol. 3, No. 3, 1986, pp. 27-56

²⁵² Saudi Arbitration Regulation of 1983, Art. 10.

²⁵³ Saudi Arbitration Regulation of 1983, Art. 5.

²⁵⁴ Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, 2nd Ed, Kluwer Law International, London, 1999, p. 569

²⁵⁵ Saleh Samir, *op. cit.*, p. 305

²⁵⁶ Parties to a dispute shall lodge the arbitration document with the Authority having original jurisdiction to consider the dispute. This document shall have been signed by the litigants or their duly authorized representatives and by the arbitrators and must show the subject matter of the dispute, name of litigants, names of arbitrators and their approval to consider the dispute. Copies of relevant documents must also be attached.

arbitrators. It must state the subject matter of the dispute, and the names of the parties, the names of the arbitrators must be indicated and their consent to act must be stated. Copies of documents relevant to the dispute are to be attached to the instrument. Some provisions of the Regulations and Rules suggest to the practitioner that the ‘instrument’ could be terms of reference but at least it is substantially more than a notice of arbitration. For instance, Article 9 of the Regulation stipulates that if the ‘instrument’ does not determine the time limit within which the arbitrators must make an award, the award shall be made within 90 days starting from the date the Competent Authority approves the instrument. With regard to the latter it must be noted that provisions concerning time normally are not contained in the notice of arbitration, although they may be found in the arbitration clause in the initial contract, terms of reference or a submission agreement. Moreover, it might be arguable in support of the latter argument that the arbitrators do not sign the notice of arbitration and indeed may not be known at the time a notice is filed – or only the petitioner’s arbitrator may be nominated in the notice. Further, Article 6 of the Regulation characterizes a distinction between the various forms when the article refers to an application for arbitration as well as to an arbitration instrument, illustrating that the instrument is separate from the application, also by stressing that the arbitration instrument is the only form that must be authorised and validated.²⁵⁷ In addition, Article 7 of the regulation indicates that the dispute shall be considered only in accordance with the rules that the parties have agreed upon, whether these rules were agreed prior to a dispute (e.g. by an arbitration clause) or the Authority has approved the arbitration instrument relevant to the particular dispute. Since Article 7 envisages that an ‘arbitration instrument’ is necessary only if there exists

²⁵⁷ Art. 6 “The Authority having original jurisdiction to consider the dispute shall cause the application for arbitration to be entered into the proper register and make a formal declaration accepting the arbitration document”. The legislature intended to clarify that the arbitration application is only a request from the parties to resort to arbitration, whether the arbitration instrument is an arbitration agreement which contains all the arbitral substantive elements or arbitration clause.

no arbitration clause, it may be inferred that the instrument may be a submission agreement.²⁵⁸

In practice, the Competent Authority has proved that there is flexibility concerning the nature of the document filed as an arbitration instrument. In various cases, the Authority is known to have accepted documents variously consisting of the contract in dispute, each party's initial pleadings, formal terms of reference and brief minutes of terms of reference prepared by the designated clerk of the tribunal during an initial meeting of the parties. Essentially, whatever the form of the arbitration instrument, the competent Authority is required to approve it within 15 days of its submission by the parties and must notify the parties and the arbitrators of that approval within a week of the said approval.²⁵⁹ As stated above, however, these time limits are not necessarily adhered to.

Commentators on the Arbitration Regulation of 1983 have argued about whether the arbitration clause by itself comprises a sufficient arbitration mechanism or needs to be validated by the authority initially having jurisdiction over the dispute in order to be legally binding. One commentator points out that according to Article 5 of the regulation, while the arbitration agreement must be filed and validated by the authority originally having jurisdiction over the dispute before the initiation of the arbitral process, there can be no arbitration on the basis of the arbitration clause alone.²⁶⁰ Further, even though the Saudi regulation recognizes the arbitration clause in Article 1 of the regulation, without initiation and validation of an arbitration agreement, it is valueless and insufficient to constitute a mechanism to commence executing the arbitral process.²⁶¹ However, the Regulation is not entirely clear as to whether the arbitration clause also must be approved by the Authority originally competent to hear the dispute.

²⁵⁸ Nancy B. Turck, *op. cit.*, pp. 281-291. Further The Ministry of Commerce appears to view the arbitration instrument as a document which is more than a mere notice of arbitration (which the Ministry appears to consider a fundamental and separate requirement) but less in substance and detail than terms of reference.

²⁵⁹ Implementation Rules of 1985, Art. 7.

²⁶⁰ Yahya Al-Samaan, "The Settlement of Foreign Investment Disputes by Means of Domestic arbitration in Saudi Arabia", *Arab Law Quarterly*, Vol. 9, No. 3, 1994, p. 224

²⁶¹ Saleh Samir, *op. cit.*, p. 305

The wording of Art. 6 seems to require an approval of the submission agreement only: “The Authority originally competent to hear the dispute shall record the application for arbitration submitted to it, and take a decision approving the arbitration instrument”.²⁶²

Submission agreement and arbitration clause are the two forms of the arbitration agreement. Validating and authorising the submission agreement by the competent authority should confirm that the arbitration clause must be similarly authorised.

According to Article 10 of the regulation, the authority originally having jurisdiction over the dispute will have the power to appoint the arbitrator, upon the request of the interested party, if one of the parties refuses or fails to cooperate in the arbitration resulting from the arbitration clause.²⁶³ In accordance with another commentator’s argument on the Saudi Regulation of 1983, the arbitration agreement is set to confirm the authority having the original jurisdiction over the dispute, whereas the arbitration clause obliges the parties to refer the dispute to arbitration, with no need to confirm the authority having jurisdiction, unless the parties fail to comply with the content of the arbitration clause, for instance regarding appointing the arbitrator(s). In such a case, the authority having the jurisdiction can interfere to appoint the arbitrator. The argument went further to the stage that the Regulation of 1983 treats the arbitration clause and the interference of the authority having the original jurisdiction in the same manner.²⁶⁴

4.2.2.1 [A] Juridical Autonomy of the Arbitration Agreement

The issue may arise whether or not an arbitration clause survives the invalidity of the substantive agreement in which it is contained. Does the invalidity of the main contract

²⁶² Saudi Arbitration Regulation of 1983, Art. 6.

²⁶³ *Ibid*

²⁶⁴ Yahya Al-Samaan, *op. cit*, p. 224

adversely affect an arbitration clause contained therein?²⁶⁵ If the question is answered in the affirmative, an arbitrator cannot assume jurisdiction in a situation where one of the parties contends that the substantive agreement containing the arbitration clause is invalid, at least until the validity of the substantive agreement is determined, perhaps by the national court.

It does not take much effort to see that if the validity of the arbitration clause is dependant on the validity of the main contract, a party seeking to frustrate or delay the arbitration process need only plead that the main contract is invalid in order to pre-empt the arbitrator's jurisdiction and seek a court resolution of that preliminary objection. The principle of the autonomy of arbitration agreement is designed, in part, to prevent the use of this kind of tactic in stalling the process of arbitration.

The principle of the jurisdictional autonomy of the arbitration agreement proclaims that an arbitration agreement is autonomous in relation to the contract from which it originates.²⁶⁶ In this sense, an arbitration clause is independent of the commercial agreement in which it is contained, and cannot automatically be affected by the fortunes of the substantive contract. One effect of the principle is that the arbitration clause survives the invalidity of the substantive contract unless it is shown that the cause of the invalidity also specifically applies to the arbitration clause.²⁶⁷

The principle is recognised in many countries. Swiss courts have recognised the principle for a long time. In the Swiss case of *K. K. S. v. M. S. A.*,²⁶⁸ the court, relying on the juridical autonomy of the arbitration agreement, dismissed a challenge to the validity of an arbitration clause which was based on the ground that a fundamental

²⁶⁵ It must be noted that this issue does not arise in submission agreements which are independent arbitration agreements entered into in relation to an existing dispute. The question of autonomy arises only in cases where the arbitration agreement is a clause in larger commercial contract.

²⁶⁶ The main advantage of this principle is that it constitutes a serious bar for a party who desires delay or wishes to repudiate his arbitration agreement, to subvert the arbitration clause by questioning in court the existence and validity of the arbitration agreement. See T. Szurski, *Arbitration Agreement and Competence of the Arbitral Tribunal*, in P. Sanders, UNCITRAL's Model Law on International Commercial Arbitration, Deventer, The Netherlands, Kluwer Law and Taxation Publishers, 1984, p. 76

²⁶⁷ W. Carig, W. Park & P. Paulsson, *Op. cit.*, p. 66

²⁶⁸ 1985, 3 ASA Bulletin 19.

mistake prevented the parties from reaching an agreement on the substantive contract.²⁶⁹

In France, domestic and international arbitration are treated differently in this regard.

The French judicial attitude towards the autonomy principle in international arbitration is most clearly demonstrated by the *Gosset Case*:²⁷⁰

In the matters of international arbitration, the arbitration agreement, whether a separate agreement or included in the judicial act to which it refers, always represents, save in exceptional circumstances which are not alleged in the instance case, a complete juridical autonomy, excluding the possibility of its being affected by the eventual invalidity of the main contract.²⁷¹

French courts have, however, not applied the principle to domestic arbitration.²⁷² Courts in Sweden,²⁷³ Holland²⁷⁴ and the United States²⁷⁵ recognise the principle. However, it has yet to be fully accepted in England. English law draws a distinction between the autonomy of the arbitration agreement in the sense that it continues to exist where the main contract has come to an end due to the performance or frustration, and the autonomy according to which an arbitration agreement survives the invalidity of the main contract. In the latter case, the English position is that where the main contract is invalid, the arbitration agreement contained therein is also invalid:

In English law, no arbitrator can have jurisdiction, however wide the wording of the arbitration clause which the parties or alleged parties insert into their contract, to decide a dispute as to the initial existence or validity of the alleged contract in which the arbitration appears.²⁷⁶

²⁶⁹ This position is codified in the 1987 Swiss Private International Law Act. (A translated version of the legislation approved by the Swiss Arbitration Association is published in 1989, 14 Y. Commercial Arbitration 511), Art. 178(3) of the Act provides that the validity of an arbitration agreement cannot be contested on the ground that the main contract is not valid. It has been suggested that in Switzerland if the main contract is void, the arbitration clause only becomes void where the reason for nullity also applies to the arbitration clause.

²⁷⁰ 1963, *Rev. Crit. Dr. Int'l Pr.* 615

²⁷¹ *Ibid*

²⁷² David Reně, *op. cit.*, p. 193

²⁷³ *AB Norrkoppings Trikafabrik v. AB Per Persson*, 1936, NJA 521

²⁷⁴ *Nederlandse Jurisprudentie*, 1964, No. 43

²⁷⁵ *Prima Paints v. Flood & Conklin*, 1967, 388 U.S. 395; *Robert Muh v. Newburger Loeb Inc.*, 1976, 540 F. 2d 970.

²⁷⁶ *Dalmia Dairy Industries v. National Bank of Pakistan*, 1978, 2 Lloyds's Rep. 233, p. 286; also Redfern & Hunter, *op. cit.*, p. 134

The English courts have therefore held that, absent a subsequent agreement to arbitrate, an arbitration agreement and the main contract must be tested in court in situations where it is alleged that the main contract was invalid as result of its illegality²⁷⁷ or due to the incapacity to one of the parties.²⁷⁸ On the other hand, where the contract comes to an end as a result of its performance or frustration, the arbitration clause is regarded as being executory as long as there are outstanding disputes between the parties with respect to any obligation under the main contract.²⁷⁹

Nevertheless, the approach of referring all challenges of the validity of an arbitration agreement to national courts could be faulted on two grounds. First, it is a ready tool to a party who wishes to stall an arbitration proceeding. By alleging invalidity of the arbitration agreement, such a party can effectively stall the proceedings, thereby causing inordinate delays and adding additional cost to the party who instituted the arbitration proceedings.²⁸⁰ Furthermore, the parties are in no way prejudiced by the arbitral tribunal deciding its own jurisdiction. An arbitral award is still subject to being set aside by the court of the place of arbitration if the arbitrators lacked jurisdiction to hear the case, and the enforcement of the award may be resisted on that ground.²⁸¹

The juridical autonomy of arbitration agreements has led to a trend towards the acceptance of the powers of an arbitral tribunal to determine its jurisdiction. The *kompetenz-kompetenz* rule empowers arbitral tribunals to determine their jurisdiction. The practical implication of the rule is that whenever the jurisdiction of an arbitral

²⁷⁷ *Overseas Union v. AA Mutual International*, 1988, 2 Lloyd's Rep. 63

²⁷⁸ *Slade v. Metrodent Ltd*, 1953, Q. B. 122

²⁷⁹ *Bremer Vulkan V. South Indian Shipping Corporation Ltd*, 1981, A. C. 909, Per Lord Diplock, p. 982

²⁸⁰ Devlin J. in *Christopher Brown Ltd. V. Holzwirtschaftbetriebe*, 1954, 1 Q. B. 8. recognised this potential avenue for delays and was prepared to allow, albeit with some limitation, an arbitral tribunal to determine its jurisdiction where the invalidity of the substantive contract is pleaded.

²⁸¹ Art. 190 of the Swiss Private International Law Act, for example, provides that an award may be set aside where the "arbitral tribunal has wrongly declared itself to have or not have jurisdiction"

tribunal is challenged, the tribunal itself has to determine its jurisdiction, without the need immediately to refer the matter to a national court.²⁸²

This trend, the acceptance of the *kompetenz-kompetenz* rule, is reflected in international conventions and treaties dealing with arbitration. Article 16(1) of the Model Law, for instance, provides:

The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence and validity of the arbitration agreement..... A decision of the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.²⁸³

The rule is also contained in the arbitration rules of institutional arbitration bodies. These bodies pride themselves as places where parties can resolve commercial disputes with limited interference by, or recourse to, national courts. Article 8(4) of the ICC Rules, for example, provides that:

Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas.

Although some states accept the *kompetenz-kompetenz* rule,²⁸⁴ others view it with suspicion.²⁸⁵ The argument against the rule is that where the validity of the arbitration agreement is questioned by one of the parties, the consensus of the parties needed for a

²⁸² Peter Binder, *op. cit.*, pp. 109-110. It should be pointed out that, countries which do not accept the autonomy principle would deny an arbitral tribunal the power to determine its jurisdiction in cases where the validity of the arbitration agreement is in question.

²⁸³ See also Art. V(3) of the European Convention on International Commercial Arbitration, 484 U. N. T. S. 349; also Art. 41(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U. N. T. S. 159

²⁸⁴ An example is Switzerland. Art. 186 of the Swiss Private International Law Act provides that: "Arbitral tribunal shall decide on its own jurisdiction"; see also Art. 1466 of the French Code of Civil Procedure.

²⁸⁵ H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law & Taxation Publishers, Deventer, The Netherlands, 1989, p. 479

valid arbitration is lacking, and that only a court could then determine the consensual basis of the agreement. This point was made by the English House of Lords in *Heyman v. Darwins Ltd.*:²⁸⁶

If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he ever entered into the contract is thereby denying that he has ever joined in the submission.²⁸⁷

As noted above, the English position would promote the use of delaying tactics by parties who wish to frustrate an arbitration. What is needed is a kind of compromise which allows the arbitral tribunal to determine its jurisdiction while reserving to the parties the right to challenge such a ruling in court if they are not satisfied with the tribunal's award. This type of compromise is contained in the Model Law, which reconciles the need for arbitral autonomy with the demands of those who insist on an avenue for judicial rectification of an arbitral tribunal's excess of jurisdiction.²⁸⁸ It allows the arbitral tribunal to determine its jurisdiction subject to the possibility of appeal to a national court. It checks the prospect of unnecessary delays by limiting the time for such appeal, making the court decision final, and giving the arbitrator the discretion to continue with the proceedings while the court review is in progress.²⁸⁹

Another aspect of the autonomy principle is that the substantive agreement and the arbitration clause may be governed by different laws. Even where the parties expressly subject the substantive contract to the laws of a particular country, the autonomy

²⁸⁶ 1942, 1 All E. R., P. 337

²⁸⁷ *Ibid*, p. 342

²⁸⁸ H. Holtzmann & J. Neuhaus, *op. cit*, p. 485

²⁸⁹ UNCITRAL Model Law, Art, 16(3) provides:

The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award

principle and its corollary- the *kompetenz-kompetenz* rule- ensure that the arbitrator does not necessarily have to apply such a law in relation to the arbitration agreement.²⁹⁰

This point was made by the arbitrators in *Dow Chemical France v. Isover Saint Cobain*:²⁹¹

The source of law applicable to determine the scope and effects of an arbitration clause providing for international arbitration does not necessarily coincide with the law applicable to the merits of a dispute submitted to such arbitration. Although this law or these rules of law may in certain cases concern the merits of the dispute as well as the arbitration agreement, it is perfectly possible that in other cases, the latter because of its autonomy, is governed- not only as to its scope, but as to its effect- by its own specific sources of law, distinction from those that govern the merits of the dispute.²⁹²

The arbitrators then went on to hold that, in their opinion, the scope and effect of the arbitration agreement was not intended to be governed by the law which the parties had chosen to govern the merits of the dispute. Rather, they relied on the common intention of the parties as evidenced in the conclusion and performance of the contract, and usages conforming to the needs of international commerce.²⁹³ National courts also recognise that the law applicable to the substantive contract and the arbitration clause may differ.²⁹⁴

The juridical autonomy of the arbitration agreement helps us to view an arbitration clause as a regime independent of the substantive contract. Viewing the arbitration clause as separate from the substantive contract enables us to understand that the legal regime applicable to the former may differ from that applicable to the latter, although this is not invariably the case.

²⁹⁰ USSR Maritime Commission Award No. 24/1984, Cited from *Yearbook of Commercial Arbitration*, Vol. 14, 1989, p. 210

²⁹¹ *Yearbook of Commercial Arbitration*, Vol. 9, 1984, p. 131

²⁹² *Ibid*, p. 133

²⁹³ *Ibid*, p. 134

²⁹⁴ See the case *Black Clawson Ltd v. Papierwerke*, Cited from *Lloyd's Law Report*, Vol. 2, 1981, p. 446

4.2.2.1 [B] Juridical Autonomy under SAR

It is to be noticed that the Saudi Arbitration Regulation distinguishes between arbitration clauses signed before occurrence of the dispute, and arbitration agreements signed after the dispute has arisen, in that the latter is subject to obtaining a sanctioning decision of the authority originally competent. It may be assumed therefrom that this authority may consider requests for avoidance of arbitration agreements. Such agreements are never part of a contract but are contracts in themselves and are restricted to the arbitration, its subject and conditions. The contract which gave rise to the dispute, on the other hand, contained no arbitration clause.

Any request for avoidance, thus, may only attack arbitration agreements and the authority originally competent has to decide this request when the agreement is referred to it for its sanctioning decision. In contrast, arbitration clauses do not need this approval and they produce their effects without any kind of sanctioning decision.

Even though the Saudi Law does not specify the terms of the juridical autonomy in the provision of the arbitration regulation of 1983 and its implementation of 1985, it results therefrom that Saudi Law seems to have adopted the doctrine of the autonomy or severability of the arbitration clause within the framework of a compromise solution. It gave the authority originally competent the power to control the arbitral award and to examine the relation between the arbitration clause and the other clauses of the contract, so that it may set aside the arbitration award if it decides that the contract is void. In order to avoid any unwelcome surprise, especially as the courts are undecided as yet, it would perhaps be best if the parties confirmed in the arbitration clause its severability and its independence from all other clauses in the contract (and signed next to the clause) so that such a clause may become a contract within a contract, as Saudi Law has adopted the principle of free will. Then, the authority originally competent would

continue to control the validity of arbitration clauses, but *a posteriori*, and not *a priori* as is the case with arbitration agreements.²⁹⁵

Consequently, it is therefore highly recommended to consider the autonomy doctrine in a further amendment of the regulation or the implementation, and also for provisions for autonomy to be expressed in an investment agreement or any other contracts.²⁹⁶

4.3 The Validity of the Arbitration Agreement

There are various formalities that the arbitration agreement must fulfil in order to be a valid agreement, as each kind of contract requires certain formalities according to the nature of the contract in order to achieve the aim of that contract. An arbitration agreement, as we have repeatedly emphasised, is a consensual agreement that must fulfil certain requirements. For example, the parties' consent is the most important requirement that the arbitration agreement should indicate. Other issues raised with regard to validity include parties' legal capacity, whether the arbitration agreement must be in writing or can be concluded orally, and what disputes can be arbitrated. The following will discuss deeply and critically all the requirements that validate the arbitration agreement.

4.3.1 Consent of the parties

The basis of the whole of the arbitral process revolves around the voluntary nature of submission of disputes by parties to arbitration. Consent by the parties in dispute therefore becomes the beginning point in that process and for it to bear any worthwhile results the parties must provide such consent before the arbitral tribunal is constituted. The signed arbitration agreement in practice contains the terms of the consent by the

²⁹⁵ Abdul Hamid El-Ahdab, "Arbitration in Saudi Arabia under the New Arbitration Act 1983 and its Implementation Rules of 1985", *Journal of International Arbitration*, Vol. 3, No. 4, 1986, pp.23-60

²⁹⁶Yahya Al-Samaan, *op. cit*, p. 226

parties, since it stipulates the rules under which the parties shall proceed in the arbitral process.

The concept of consent by a party is closely linked to the notion of jurisdiction in the arbitral process itself and it is on the basis of this consent that the limits of the jurisdiction and the validity of the decisions lies. For any tribunal hearing a case, the scope and power of such a tribunal is closely governed by the nature and extent of the consent so provided.²⁹⁷

Expression of consent by a party to a dispute is so essential that in the *Eastern Carelia* case, it was declared that no party would be obliged to submit a dispute to the procedure of arbitration where it had not provided its consent, neither would a party be compelled to submit its disputes to arbitration without its own consent.²⁹⁸

It is therefore crucial for the composition and role of an arbitral tribunal to be dependent on the wishes of the parties to the dispute, as expressed by either a prior treaty or an ad hoc agreement.²⁹⁹ Indeed consent to the referral of a dispute is usually expressed by means of a arbitration agreement or a clause in a larger contract, since the jurisdiction of the tribunal depends on and is defined in relation to the provisions of the two documents.³⁰⁰

Consent, as a precondition for reference of a dispute to arbitration, is a crucial element in the overall arbitral process. This consent must therefore be represented in an agreement, which is in the form of a arbitration agreement. It represents the existence and nature of the mutual consent secured from the concerned party(s). This is necessary especially in the absence of any compulsory international arbitral jurisdiction, which

²⁹⁷ Kenneth S. Carlston, *The Process of International Arbitration*, USA, Greenwood Press Publishers, 1946, p. 62.

²⁹⁸ PCIJ Report, Series B, no. 5, 1923, p. 27; See also, The *Ambatielos* case, ICJ Reports, 1953, p. 19.

²⁹⁹ Louis B. Sohn, "The Future of Dispute Settlement; The Structure and Process of International Law", *Essays in Legal Philosophy Doctrine and Theory*, 1986, p. 1127.

³⁰⁰ Malcolm N. Shaw, *International Law*, 5th Edition, Grotius Publications Limited, Cambridge, 2003, P.650.

many parties would, anyway, have failed to accept.³⁰¹ This would mean that if a party declines to cooperate in the setting up of the tribunal or in establishing a valid arbitration agreement and no remedies are provided for in the case, the judicial settlement of the dispute remains in jeopardy in the absence of any other form of consent from such a party.³⁰²

Indeed the jurisdiction of the tribunal must be within the confines of the consent provided by a party as reflected by the arbitration agreement. Thus, such jurisdiction must be 'based on the consent of the respondent and only exists insofar as this consent has been given'.³⁰³ A tribunal thus draws its life and vitality from the arbitration agreement and respect for its constitutive treaty, both duly consented to by the party, the tribunal acting as a servant, though a little more than that, of the party.³⁰⁴

Arbitration clauses in a large contract could be seen as a subscription of consent of party to so submit their disputes. They constitute a general undertaking to submit disputes to arbitration, whatever the extent of the provisions therein. Although an arbitration agreement would still have to be concluded between them before arbitration may commence, it symbolises a form of commitment by consenting to the main contract itself and could be a source of an arbitration tribunal's jurisdiction.³⁰⁵ A number of cases have seen bilateral treaties forming a basis for Courts' jurisdiction. These included *Haya de la Torre*³⁰⁶, *Ambatielos*³⁰⁷, and *Electricité de Beyrouth*³⁰⁸.

With regard to the parties' consent, it could be said that the authorized representatives of the party must conclude the arbitration agreement, like any other form of contract,

³⁰¹ Karin Oellers-Frahm, "Compromis", *Encyclopaedia of Public International Law*, Vol. 1, 1981, p. 45

³⁰² *Ibid*, p. 46

³⁰³ Kenneth S. Carlston, *op. cit*, p. 63.

³⁰⁴ Kenneth S. Carlston, *op. cit*, p. 64

³⁰⁵ Hazel Fox, "Arbitration", in H. Waldock (ed), *International Disputes: The Legal Aspects*, Europa Publications, London, 1972, pp. 122-123.

³⁰⁶ ICJ Reports, 1951, p. 71.

³⁰⁷ ICJ Reports, 1952, p 28.

³⁰⁸ ICJ Reports, 1953, p. 41.

and must have it duly approved and ratified for it to constitute a legally binding instrument of consent.³⁰⁹

The extent to which a treaty of arbitration will be applicable in any particular case involving a party will closely depend on the terms of the treaty and the provisions therein. If there exist some exemptions, the consent in the agreement will be valid to the extent that the exemption is within the cognisance of such a tribunal so that it does not exceed its jurisdiction.³¹⁰

The arbitration agreement is a consensual contract. The consent is the only constitution of the contract to refer the dispute of the parties to arbitration. For instance, in English contract law, one of the main elements to have a binding contract is offer and acceptance, to prove the presence of knowledge.

Most Islamic scholars consider that the consent is one of the pillars of the contract, without which there is no contract. Therefore, from what has been stated, the arbitration is constituted when the consent of the parties is revealed.

4.3.2 [A] Agreement in writing

The will of the parties to refer the dispute to arbitration is enough to constitute the arbitration agreement, since it is one of the consensual contracts. Hence, agreement in writing is not a compulsory condition unless it is specified in the law governing the arbitration. Arbitral rules differ regarding whether the arbitration agreement must be in writing or not. However, most international arbitration laws require that the arbitration agreement should be in writing, either for the adoption of the agreement and/or for the proof of the agreement.³¹¹

³⁰⁹ *Ibid*, p. 65

³¹⁰ Max Sorensen, *op. cit.* p. 687

³¹¹ Madhar Al-Ambari, "Electronic Arbitration", *Conference on the Modern Direction of Arbitration in Arabic Doctrines*, Damascus, 2001, p. 4, (in Arabic)

Some national laws, such as Kuwaiti and Syrian laws, state that writing is a compulsory condition to have a valid arbitration agreement, as it is necessary to prove it. Therefore, it is unacceptable under these rules to prove an arbitration agreement by testimony of witnesses or by oath.³¹² However, the condition that the agreement must be in writing is not general in these laws, according to which the arbitration agreement can be proved by various methods in some circumstances, such in the case of the loss of the written arbitration agreement or in the case where there is some reason precluding having the arbitration agreement written. In these instances, is it permissible to prove the arbitration agreement by the testimony of witnesses or by oath? It is very doubtful whether having the arbitration agreement concluded by testimony or oath contradicts the rules which specify that the arbitration agreement must be proved in writing. It can be said that having the arbitration agreement proved by other methods does not contradict the general rule of proving the arbitration agreement in writing per se, for the reason that this rule is to ensure that the arbitration agreement is proved without doubt, and having the arbitration agreement in writing removes doubt for the arbitrator, competent authority or the parties themselves.³¹³ In addition, arbitration contracts possess a contractual nature, so requiring the agreement to be in writing would not validate it.

On the contrary, the French and Jordanian legislatures specify that the writing condition is compulsory for the arbitration agreement, not only to prove it, but also in order for it to be valid.³¹⁴ The reason for imposing the condition of writing is to maintain a safeguard for the disputants. This is because the agreement of the parties to arbitrate represents a temporary abandonment of the parties' right to resort to the competent court, which is considered risky. If the parties agreed to resolve the dispute by arbitration without putting such agreement in writing, and one of the parties receded

³¹² Kuwaiti Civil and Commercial Litigation Law, Art. 254; also Syrian Litigation Law, Art. 509.

³¹³ Al-bejad, *op. cit.*, p. 82

³¹⁴ Jordanian Arbitration Rules, Art. 2; also French Code of Civil Procedure, Art 1443 Pare(1)

from the arbitration, this party would not be obliged to revise his withdrawal, because an arbitration agreement is based on the will of the parties. Therefore, writing the arbitration agreement is an essential condition to have a valid contract; the rationale for this is that it firmly proves the will of the parties toward settlement of the dispute. Even if writing is not required for the substantive validity of the arbitration clause, it is generally required for purposes of evidence: the intention of the parties to submit their dispute to arbitration must be sufficiently proved.

This principle has been adopted by many different arbitration laws. For example, the New York Convention defines an 'agreement in writing' saying, "The term agreement in writing shall include an arbitral clause in a contract or in an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".³¹⁵

The question which might arise is that to whether the arbitration agreement concluded by the means of electronic transmission can be considered as "in writing" and how the requirement of signature can be satisfied. The drafters of Model Law are flexible to recognise any form of arbitration agreement as long as it refers to a written form contains an agreement to arbitrate. Thus, this will assure the use of the modern methods of communication, such as fax, telex and email, to be considered as 'in writing'. Article 7(2) of the Model Law indicates that telex and telegram are considered as forms of writing. However, these methods have been replaced by other methods, equivalent to telex and telegram, which are used nowadays, such as fax and email.³¹⁶ The Model Law provides:

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in exchange letters, telex, telegrams or other means of telecommunication which provides a record of the agreement, or in a exchange of statements of claim and defence in which

³¹⁵ New York Convention Article II (2)

³¹⁶ Redfern and Hunter, *op. cit.*, p. 141; Hong-lin Yu & Motassem Nassir, "Can Online Arbitration Exist Within the Traditional Arbitration Framework?", *Journal of International Arbitration*, 20(5), Kluwer Law International, Netherlands, 2003, 455-473, p. 459

the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.³¹⁷

Many countries require the expression of the will in writing. For example, the Italian law requests a clear written agreement and this law is broadened to accept other means of communication, such as telex or fax.³¹⁸ Article 178 of the Swiss PIL-Act provides that, as regards its form, an arbitration agreement shall be valid if made in writing, by telegram, telex, fax or any other means of communication, which permits it to be evidenced by a text. No separate agreement to arbitrate is required, nor need the arbitration agreement be signed, which is *inter alia* evidenced by the reference made to telegrams and telexes, as long as it is clear, based on all circumstances and on the document exchange, if any, that there really existed an arbitration agreement.³¹⁹ Arbitral rules seem to deal with the term “agreement in writing” more liberally, they define the term “agreement in writing” more broadly than in the New York Convention. This is reflected in the ICC Arbitration Rules, which do not require the arbitration agreement to be in writing, nor does the New Zealand Arbitration Act of 1996 which also recognises oral arbitration agreements.³²⁰ The German law requires written agreement unless both parties are businessmen, in which case they may conclude the agreement orally.³²¹

³¹⁷ UNCITRAL Model Law of 1985 Article 7(2)

³¹⁸ The Italian Judicial Code, Art. 708

³¹⁹ Vera Van Houtte, “Consent to Arbitration Through Agreement to Printed Contract: The Continental Experience”, *Arbitration International*, Vol. 16, No. 1, 2000, p. 8

³²⁰ Per Runeland, “International Commercial Arbitration: Arbitration Agreement”, *International Commercial Arbitration*, Conference Sponsored by Arbitration Institute of the Stockholm Chamber of Commerce, Almaty, Kazakhstan, 17 September 2004, pp. 3-4. Found in http://www.sccinstitute.com/_upload/runeland_17_sept_eng.pdf, Accessed on the 28-02-2006.

³²¹ The German Judicial Code, Art. 1027

However, it has been argued that the arbitration agreement must be in writing and signed for the purpose of physical evidence.³²² The question might now arise, whether the written agreement must be signed by the parties in order to be proved. If the answer is yes, then one could argue that the condition of having a written agreement is defective because having the written agreement does not itself provide proof. And if the answer is no, one might also argue that the proof of the agreement is defective, because according to the general rules, any written contract must be signed by the parties to be bound by the contractual obligations. The importance of this issue increases due to the widespread usage of unsigned written documents, such as modern means of communications, especially in international commerce. For example the Article II (2) of the New York Convention stipulates that the term “agreement in writing” shall include the arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Therefore, it is not necessary for the arbitration agreement to be signed. It appears that in the case of concluding an agreement in a written document, the good faith of the parties in the execution of the agreement is essential, even though the agreement is in writing, to produce a smooth dispute settlement via arbitration.³²³

³²² Hong-lin Yu & Motassem Nassir, *op. cit.*, p. 458.

³²³ Vera Van Houtte, *op. cit.*, p. 3; also see Tribunal Federal, “Compagnie de Navigation et Transports v. Mediterranean Shipping Company”, *Yearbook Commercial Arbitration*, Vol. XXI, 16 January 1995, pp. 697-698. Thus, the Swiss Tribunal Federal held that it was not required, for an arbitration clause to be valid, that the general conditions, containing the arbitration clause and printed on the back of the bill of lading, be signed by the parties, or be referred to in any other signed document:

We should not forget that, with the development of modern means of communication, unsigned written documents have an increasing importance and diffusion, that the need for a signature inevitably diminishes, especially in international commerce, and the different treatment reserved to signed and unsigned documents is under discussion . . . We must add that, in particular situations, a certain behaviour can replace compliance with a formal requirement according to the rules of good faith . . . This is exactly the case here. The parties, which have a longstanding business relationship, base it in fact on general conditions containing . . . the arbitration clause at issue. Further, the shipper itself has filled in the bill of lading before returning it to the carrier, which signed it . . . The carrier had the right to believe in good faith that the shipper, its business partner since several years, approved of the contractual

4.3.2 [B] Arbitration Agreement in writing under SAR

In Saudi Arabia the Regulation of 1983 and its Implementation of 1985 did not state that the arbitration agreement should be in writing. However, the legislature may have intended to activate the general rules of the *Sharia* regarding this kind of contracts. In addition, the arbitration agreement need not be constituted in a specific form; however, its constitution must be based on the will of the parties, because it is a consensual contract. Therefore, it is possible to prove the arbitration agreement by various methods. However, since the condition of writing is compulsory, it may be argued that the legislature has implied indirectly that the agreement should be in writing. It requires that the arbitration agreement should contain the subject matter and the names of the parties and the representative and the arbitrators; also that the agreement should be approved by the authority having the original jurisdiction over the dispute.³²⁴ Consequently, the arbitration agreement can be proven only if the arbitration agreement is in writing, even though many academics and practitioners in the field of arbitration, such as Murad, are of the opinion that although writing is an essential condition to prove that there is an arbitration agreement, writing is not a condition for entry into an agreement to accept arbitration.³²⁵ Hence, in addition to writing, it is possible to prove that there is an arbitration agreement by any other means, such as confession and decisive oath. Abu Alwafa furnishes a justifying explanation for this by observing that the substantial rules of evidence do not violate the public order, so that parties may agree to prove their agreement to accept arbitration by any means other than writing, even though the arbitration laws usually state that the agreement to accept arbitration can be proven by its being recorded in writing.³²⁶ In this connection, Carr has stated that the arbitration

documents which it had filled in itself, including the general conditions on the back, among which is the arbitration clause.

³²⁴ Arbitration Regulation of 1983 Art.5

³²⁵ A. Murad, *An Explanation of Arbitration Laws*, Munsha Al-Maarif, Alexandria, 1995, pp. 76-77

³²⁶ A. Abu Alwafa, *Voluntary and Compulsory Arbitration*, Munsha Al-Maarif, Alexandria, 1983, pp. 24-26

agreement may be oral, and this is recognised by the English common law.³²⁷ Furthermore, The Regulation of 1983 and its Implementation of 1985 did not consider other means of communication, such as fax, telex and email, as among the means by which the arbitration agreement can be concluded, where other arbitration laws, such as the UNCITRAL Model Law of 1985 recognise these means.

The Regulation of 1983 and its Implementation of 1985, are silent with respect to the possibility of concluding oral arbitration agreements, as elsewhere. This is no doubt for the reason of the difficulties that might occur, for instance, the difficulty of proving the consent of the parties to resort to arbitration and the difficulties of proving that an oral agreement contains the names of the arbitrators which the parties themselves together agreed upon, unless the oral arbitration agreement can be proved by oath of the parties before the competent authority. Undoubtedly, the Saudi legislature must consider all the other methods of concluding the arbitration agreement, in particular, electronic methods, as electronic arbitration is employed in the business community and several institutions exist to serve the rules of the electronic arbitration, such as the United States' Virtual Magistrate.³²⁸ Therefore, the Saudi legislature should maintain rules of procedure that correspond to the new revolutions in all aspects of life in order to provide businessmen, including foreign investors, with rules of procedure that are more flexible, to meet their interest in resolving their disputes.

4.3.3 [A] Legal capacity to enter into an Arbitration Agreement

The parties to a contract, including an arbitration agreement, must enjoy full legal capacity. The arbitration may be held invalid if one of the parties is under incapacity. Undoubtedly, the arbitral process will lapse if the fact that one of the parties is under any incapacity is revealed to the other party of the arbitral process at the beginning. The

³²⁷ I. Carr, *International Trade Law*, Cavendish Publishing Ltd, London, 1996, p. 207

³²⁸ The address of this institute is <http://www.vmog.vcilp.org>.

requesting party will request the competent authority to discontinue the arbitral process on the ground that the arbitration agreement is void, inoperative or incapable of being performed.³²⁹ In the event that the arbitration is completed, the arbitral award is not recognised and not enforced. If one of the parties discovers that the other party is under incapacity at the end of the arbitral process, the requesting party will ask the competent authority to not recognise and not enforce the arbitral award, on the ground that one of the parties to the arbitration agreement is 'under some incapacity'³³⁰ under the applicable law.³³¹

The rules governing the legal capacity differ from one state to another. Therefore it is essential to look at the private law of the parties to the dispute. Those laws are determined in accordance with the relationship between the party and the state under whose law his activity is conducted. It seems that this private law is either the law of the state of the nationality the party is holding or the law of the state where the party resides. Such is the case in the United States, except in the state of Louisiana, where the legal capacity is governed by the law of the contract. This is the rule to determine the legal capacity of a private party. However, it has been questioned whether the legal capacity of a public entity is subject to the same system applicable to the private party.³³²

The law applicable to the merits of a dispute is not necessarily the same as the law applicable in determining the capacity of the parties.³³³ Since the parties according to the general rules choose the law govern the contractual relationship, it would be irrational to apply such law in determining their capacity, for the reason that the parties could effectively grant capacity to themselves by choosing as the proper law of their

³²⁹ Model Law of 1985, Art. 8(1); New York Convention Art. II. 3.

³³⁰ Model Law of 1985, Art. 36(1)(a); New York Convention, Art. V.I(a).

³³¹ Redfern and Hunter, *op. cit.*, p. 144

³³² Fawzi M. Sami, *International Commercial Arbitration*, 5th ed, Dar Althqafah Lel-nasheer Wa-eltwzeea, Amman, 1997, p. 117. (in Arabic)

³³³ Van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, Kluwer Law & Taxation Publishers, Deventer, Netherlands, 1981, p. 277

contract, one which suits their interests.³³⁴ Therefore, the law chosen by the parties to govern their agreement may differ from the law that governs the capacity of the parties.

With respect to the international level, the New York Convention and the Model Law reflect that the capacity of the parties should be resolved under the conflict rules of the forum where the issue arises. The New York Convention expresses that the award may be refused recognition or enforcement by a state where the parties to the agreement were “under the law applicable to them, under some incapacity”.³³⁵ From the wording of the article, it seems that the Convention does not offer any guidance as to how the law applicable to the parties could be determined. Hence, it is open for the court where enforcement of the award is sought to utilise its conflict rules in resolving the issue. The latter article of the New York Convention has been criticised as being vague and misleading, since from the wording of the article, the capacity could be referred to any of a variety of laws: the nationality of the parties, their domicile or their residence.

The Model Law provides that an award may be set aside if a party to the arbitration agreement was “under some incapacity”. This wording overcomes the vagueness inherent in Article V(1)(a). Therefore, the removal of the words “under the law applicable to them” contained in the late article of the New York Convention is expected to remove the vagueness inherent in these words.³³⁶

As a consequence, under both the New York Convention and the Model Law, the capacity of parties to arbitrate is determined by the conflict of law rules of the forum. This could be the forum where the application for enforcement of an arbitration agreement is sought, where an action is brought to set aside the award, or where recognition and enforcement of the award is requested.

³³⁴ *Cooper v. Cooper*, APP. Cas, Vol. 13, 1888, p. 108. Lord Macnaghten said “it is difficult to suppose that Mrs Cooper could confer capacity on herself by contemplating a different country as a place where the contract was to be fulfilled”

³³⁵ New York Convention of 1958, Art. V(1)(a)

³³⁶ H. Holtzmann & J. Neuhaus, *op. cit*, 916

4.3.3 [B] Legal capacity under SAR

The legal capacity of the parties to enter into an arbitration agreement on the basis of the *Sharia* law is not distinct from the legal capacity of the parties to enter into any other agreements. The legal capacity of all human beings under law of *Sharia* is as follows:

- (i) a potential passive capacity to acquire rights (*ahliyyat al-wujub*)³³⁷
- (ii) an effective capacity to exercise rights and discharge obligations (*ahliyyat al-ada*)³³⁸

According to Saudi law, it is recognised that an arbitration agreement is a consensual contract and as such it is crucial for the parties to have full legal capacity for its conclusion. Therefore, the Arbitration Regulation states that ‘agreement to arbitration shall be accepted only by those who have the capacity to act’³³⁹, which is known as *Ahliyyat Al-ada* in Islamic law.³⁴⁰

4.3.3.1 [A] Capacity of Private Parties

Generally speaking, reference is made to either of two sets of laws in determining the capacity of natural persons to arbitrate. These are the law with which the contract is most closely connected, more commonly used in common law jurisdiction, and the law applicable to the parties, that is, the law of their nationality, domicile or residence. The following examples illustrate this general trend. In Great Britain the law governing the capacity of individuals to arbitrate is either the system of law with which the contract is most closely connected or the law of their domicile or residence.³⁴¹ Capacity may be determined under any of the three laws. Similarly, in Canada the leading view is that the

³³⁷ This is the eligibility of the person to get his or her rights. It includes the right of inheritance or the paying the indemnities from a person’s losses. This qualification is applicable to the young, adults, the sane and the insane. It is also known as the Qualification of Offer.

³³⁸ Under Islamic Jurisprudence it is known as the validity of a person legally capable of saying or of performing a task.

³³⁹ Saudi Arbitration Regulation of 1983, Art. 2; also Art 2 of the Implementation Rules of 1985 stated that ‘An arbitration agreement shall only be valid if entered into by persons of full legal capacity...’

³⁴⁰ Saleh Samir, *op. cit*, p. 302

³⁴¹ L. Collins, *Dicey and Morris on Conflict of Laws*, 13th ed, Steven & sons Ltd, London, 2000, Vol. 2, P. 537

capacity may be determined under an objectively ascertained proper law of the contract, that is, the law with which the contract has its closest connection.³⁴² On the other hand, the general rule in Switzerland is that capacity of individuals is governed by the law of their domicile,³⁴³ although a party lacking capacity under that law cannot rely on such incapacity if the party had capacity under the country where the transaction was made.³⁴⁴

It should be noted, however, that the law governing the capacity of an individual to arbitrate is not very important in international arbitration, because most international contracts involve juristic persons.

4.3.3.1 [B] Capacity of the private persons under SAR

Sharia principles have been engaged in the arbitration regulation of 1983. Since, as mentioned earlier, the arbitration agreement is a consensual contract which sets obligations on the parties to the contract, they should enjoy full legal capacity in order to act legally. A person of full legal capacity can enter into an arbitration agreement unless his capacity gets affected by an impediment such as insanity or prodigality or imbecility.³⁴⁵ In such cases, the capacity of such a person is incomplete and he must have a guardian to decide his legal actions. The same rule would apply to a Minor of the age of reason.³⁴⁶ It is worth mentioning that the acceptability of the action of those persons does not depend only on the decision of their guardian.³⁴⁷ The justification of this argument is that if the action that should be taken by the incapacitated person is

³⁴² L. Castel, *Canadian Conflict of Laws*, 4th Ed, Butterworths, Toronto, 1997, p. 549.

³⁴³ Art. 35 of Switzerland's Private International Law Status of December 18, 1987. Translated and annotated in P. Karrer & K. Arnold, *Switzerland's Private International Law Status 1987*, Denventer, The Netherlands, Kluwer Law & Taxation Publishers, 1989.

³⁴⁴ *Ibid*, Art. 36.

³⁴⁵ According to Saudi law the capacity of the private persons is when the person reaches the age of eighteen years old according to the decree of *Majles Ashwra* no. 114 on 5/11/1374 A. H

³⁴⁶ Monther Al-Fadhul, *The General Rules of Obligations*, Vol. 1, 3rd Ed, Dar Althakafah for publication and distribution, Amman, 1995, p. 152. (in Arabic).

³⁴⁷ Ali R. Azzbaidah, *The General Rules of the Capacity*, 1st Ed, Almonshah Alammah for publication and distribution, Tarablus, 1984, p. 44. (in Arabic).

very crucial and might cause any harm to them, such as the waiver of a debt, the decision of the guardian cannot be effective to decide the matter, and he should obtain approval from the competent authority for his decision in order to be effective. The rationale for this procedure is that the judicial system is committed to protecting the belongings of those persons. However, if the matter is for the benefit of the person, the guardian can take the whole responsibility of the decision. As regards the action of taking part in an arbitration agreement, the guardian should obtain the permission of the competent authority before entering the arbitration agreement.³⁴⁸ This article shows the intention of the arbitration agreement and any misconduct of the procedure could result harm to the parties. Hence, any agreement that departs from the rule stated in the article will be considered null and void, and any person with an interest in the nullity of the agreement will rely strongly on this ground.

A question which might arise is whether a bankrupted person is under any incapacity to enter into an arbitration agreement.³⁴⁹ The bankrupted person is considered under incapacity from the date of declaring the bankruptcy. Therefore, all his legal action is defected.³⁵⁰ At a result of this rule, if a person, after declaring his bankruptcy, entered into an arbitration agreement, such action would not result in nullity of the agreement, but the agreement would not be operative due to the advantages to the creditors. However, they can waive this right if they believe that it is to their advantage.³⁵¹ In contrast, if the time of entering the arbitration agreement is before the date of declaring the bankruptcy, the agreement is considered effective for the reason that the person enjoyed full legal capacity at the time of entering the agreement. However, it must be noticed that in such a situation, another person must take over to continue the arbitral

³⁴⁸ The implementation rules of 1985, Art. 2

³⁴⁹ Article 103 of the Procedure of the Commercial Court issued by the Royal Decree No. 32 on the 15/1/1350 A.H defines the Bankrupted person that any person who his debts higher than his assets

³⁵⁰ Commercial Court Procedure, Art. 110

³⁵¹ Rule of the Settlement of the Bankruptcy prevention issued by Royal Decree No. M/16 on 4/9/1416 A. H, Art. 5.

process, since the relevant person is under incapacity to carry out any legal action from the date of the lack of capacity.³⁵² Accordingly, it can be said that the capacity of any person to enter into an arbitration agreement is not complete unless it is established that the person has reason, has reached adulthood and has not been interdicted for bankruptcy.

Furthermore, it can be argued that a bankrupt is granted full entitlement to enter into an arbitration agreement if the dispute is in relation to his own personal affairs and has no connection to his interdicted money, in other words, arbitration of a non-financial matter, unconnected with any of his creditors.

Another relevant question is whether a condition as to religion is applied to the parties according to the Islamic law, since both the regulation and the implementation are silent in this regard. Non-Muslims have the right to refer their disputes to arbitration, or even to the judicial authority, if they feel it is the appropriate method to settle the dispute.³⁵³

If a person is legally and morally sane, mature and not interdicted, that is to say fully qualified, they may have recourse to arbitration to settle commercial dispute whenever it is possible.

The same question may arise in regard to the issue of gender. It is worth clarifying this issue, in order to avoid the ambiguity regarding the extent to which women have the right to arbitration under Islamic jurisprudence. Since women have the capacity to execute their own business, they have full entitlement to refer their disputes to arbitration freely. In the *Hanafi* School, as with the majority of the other schools, the

³⁵² Edward Eid, *op. cit.*, p. 88; however there are different opinions in the Islamic schools in this regard. For instance the *Hanafi* School says that the behaviour of the interdicted bankrupt is invalid if it invalidates the rights of creditors, such as acts of giving gifts or selling property at less than the correct price. For more read Saleh Alhassan, *The Legal Rules of Arbitration*, Al Narjiss Press, Riyadh, 1996, p. 45. (in Arabic). On the other hand, the *Hanbali* School and some of the *Maliki* school maintain that without exception the behaviour of an interdicted bankrupt is invalid. Further, some of the *Maliki* school and the *Shafii* school claim that the behaviour of the bankrupt is conditioned from the creditors' point view. This seems to be the most appropriate approach since it unites the preserving of the rights of a proprietor on condition that creditors are not affected. It must also be noted that by applying this opinion to arbitration, a bankrupt should not be allowed to arbitrate in the money or property interdicted to him.

³⁵³ *The Encyclopaedia of Islam*, New Ed, Edited by B. Lewis & Schacht, Leiden E. J. Brill London Luzac & Co, 1965, Vol. II, p. 228; also see Ahmed Al Ghazi, *Arbitration in Jurisprudence*, Imam Mohammed Bin Saud University, Riyadh, 1996, p. 39. (in Arabic)

fact of being a woman is not in itself grounds for incapacity. Women have the same rights and duties as men; there is no difference between them at this level. The general rule is the equality of both sexes.³⁵⁴

Therefore, from the above mentioned, it is worth noting that the idea that arbitration in Saudi or in Islamic Law depends on the gender and religion of the parties is not true. Where the case is different is in the issue of capacity of the arbitrator, as will be discussed comprehensively in the next chapter, as there is strong debate as to whether the arbitrator can be non-Muslim or a woman.

Another matter which should arguably be discussed is whether a person who often loses his temper should be considered under any incapacity to enter into an arbitration agreement, on the ground that such behaviour may produce the same consequences as other kinds of incapacity.³⁵⁵

4.3.3.2 [A] Capacity of the State and Public entity

Some national laws forbid the State or legal persons of public law to resort to arbitration. However, these systems are normally found in those laws influenced by the Napoleonic Code.³⁵⁶ In France, all matters involving public policy may not be referred to arbitration.³⁵⁷ However, other commercial public entities must get authorisation to enter into an arbitration agreement. Some states, such as Belgium, prohibit public entities from entering into arbitration agreements. Although a new law has come into force to abolish this prohibition, it retains some restrictions.³⁵⁸ For instance, the modern French judicial system limits this prohibition to national contracts, and gives the public entity

³⁵⁴ Hammudah Abdullatif, *Islam in Focus*, Falah for Transulation, Publishing & distribution, London and Cairo, 1997, p. 358; also see Mohammed Kotb, *Women's Liberation*, Dar Alwatan Ppress, Riyadh, 1990, p. 48

³⁵⁵ Losing temper at the time of entering into the arbitration agreement can result in grievances.

³⁵⁶ Piero Bernardini, "The Arbitration Clause of an International Contract", *Journal of International Arbitration*, Vol. 9, No. 2, 1992, pp. 45-60

³⁵⁷ French Civil Code, Art. 2060

³⁵⁸ Redfern and Hunter, *Op. cit*, p. 146

the right to be a party in arbitration agreements concluded as part of an international contract.³⁵⁹

At the conventional level, the New York Convention allows the recognition and enforcement of the arbitral award in a dispute between parties regardless of the nature of the parties whether private or public.³⁶⁰ One French scholar commented that the wording of the New York Convention indicates that all disputes of public entities and government as well as arbitration between the state and private persons were in the minds of the drafters of the New York Convention at the time of the drafting.³⁶¹ However, Article 5 of the Convention gives discretion in deciding the capacity of the public entity to the member state.³⁶² The European Convention takes the position in favour of the capacity of the persons of the public law to enter into an arbitration agreement.³⁶³ However, paragraph 2 of the same article emphasises that states have the right to limit capacity to enter into an arbitration agreement for private persons or the public legal persons or both. From the above it can be said that in the general rules, the person of public law is not under an incapacity to enter into an arbitration agreement unless the member states declare the contrary, either in all cases, or for certain disputes or certain persons of the public law.

In support of the position of the capacity of persons of public law or public entities to enter into an arbitration agreement, the Washington Convention of 1965 covers certain disputes which arise between states and private persons of other states, where the state

³⁵⁹ Fawzi M. Sami, *Op. cit*, pp. 117-118

³⁶⁰ New York Convention of 1958 of the Recognition and Enforcement of the Foreign Arbitral Award, Art. 1.

³⁶¹ Wil, P. *Problemes relative aux contrats passe's entre un E'tat et un particulier*.R.C.A.D.I. Tom 128, pp. 128 ets. Translated into Arabic in Fawzi M. Sami, *op. cit*, p. 119

³⁶² Especially for the state prohibiting the public entity from concluding arbitration agreements.

³⁶³ Art. 2 (1) "in the cases referred to in Article I, Paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements"

or its public entity can be party to the dispute and the other party can be private persons or corporations or persons of public law of another state.³⁶⁴

It is worth mentioning that most of the developed countries still exercise judicial immunity for the state and its public entity. Therefore, those states do not allow dispute to be adjudicated under any other state's judicial system, to maintain the state immunity from foreign adjudication interference. Moreover, they exercise full immunity for all their assets and their public entity's assets, over which a foreign award could be enforced. Arbitration, like foreign adjudication, could affect the state immunity. Dr. Sami expressed two opinions in regard to the enforcement of the arbitral award on a state or one of the public entities of a state in the case where the state has agreed to resort to arbitration; the first opinion is that the state or the state public entity waives its immunity if the state agrees to resort to arbitration and therefore the state is obliged to obey the arbitral award and cannot refuse to recognise the award on the basis of the state immunity. The second opinion is that the state does not waive its immunity if the state agrees to resort to arbitration, since the state is agreeing by its will to resort to foreign adjudication, which is the foreign arbitral award. Therefore, the state must be obliged to enforce the arbitral award and cannot refuse on the ground of maintaining immunity.³⁶⁵

As the French court of appeal argued, the arbitration clause in the contract obliges the foreign state to accept the adjudication of the arbitrators.³⁶⁶

4.3.3.2 [B] Capacity of States and Public Entities under SAR

As a result of the Aramco case, the government of Saudi Arabia issued decree No.58 which prohibits the government and its agencies from entering into any contract with a

³⁶⁴ Introduction and Art. 1(2) Washington Convention of the Investment Dispute Settlement of 1965 between States and Foreign Investors;

³⁶⁵ Fawzi M. Sami, *op. cit.*, pp. 120-121

³⁶⁶ *Journal du droit International*, Paris, 1987, p. 120

third party containing an arbitration clause.³⁶⁷ The debate is whether the prohibition is restricted to national arbitration or whether the decree was intended to apply to any arbitration, national and international.³⁶⁸ The Arbitration Regulation of 1983 abolished this prohibition; however, it restricts the capacity of the government and its agencies to enter into any contract containing an arbitration clause or arbitration agreement. They may not do so without permission from the President of the Council of Ministers.³⁶⁹ This article did not specify any kind of disputes that the state and its agencies are prohibited from referring to arbitration. Therefore, any dispute arising from any contract to which the state and its agencies are party can be arbitrated, in general, regardless of the nature of the other party, or the nationality, whether Saudi or foreign, and whether in or outside the Kingdom.

In the same article, the authorisation for the government bodies to resort their disputes to arbitration is subject to the approval of the Prime Minister. This restriction is to ensure that the disputes arbitrated are not contrary to the general rules of the state. For instance, disputes regarding any issue of the state immunity and disputes that are appointed to be heard at a specific court are barred from arbitration on the ground that these disputes enjoy judicial immunity. Nevertheless, if the nature of the dispute does not jeopardise the general rules of the state, there will be no reason to prevent the government bodies from settling the dispute by arbitration. Therefore, the state and its agencies should benefit from the advantages of arbitration in such disputes, especially in technical disputes where the participation of experts is very effective, or when the subject-matter of the dispute requires certain qualifications or experience that the judge does not possess. In such cases it is to the benefit of the disputants to refer the dispute to arbitration, after obtaining the approval of the Prime Minister.

³⁶⁷ Abdul Hamid El-Ahdab, *op. cit.*, p.575

³⁶⁸ Abdul Hamid El-Ahdab, "Arbitration in Saudi Arabia under the new arbitration act, 1983 and its Implementation Rules of 1985 (Part One)", *Journal of International Arbitration*, 1986, p. 10

³⁶⁹ Saudi Regulation of 1983, Art. 3

Further, Article 8 of the Implementation Rules set out the procedures to be fulfilled by the public entities at the stage of requesting permission to arbitrate the dispute. Accordingly, the public entity must draft a memorandum of the request which should contain the nature of the dispute and the reason why the public entity wishes to resort to arbitration. Also, the memorandum should contain the name of the disputants. Then, the public entity should be ready to submit the request to the Prime Minister for consideration.³⁷⁰

Hence, from the wording of Article 8 of Implementation Rules, a public entity can insert an arbitration clause into a contract. In this case, the public entity would follow the same procedure given in Article 8.

Accordingly, the capacity of the state and its agencies in Saudi to resort to arbitration is similar to the case of a private person of incomplete capacity, that is, subject to approval of the guardian. This is to say that the capacity of a state and its agencies is an incomplete capacity, and it cannot make the decision to enter into an arbitration agreement until the permission of the Prime Minister is received.

The Saudi legislature, in this article, is trying to reduce the prohibition against government agencies concluding contracts containing arbitration clauses, because he grants the Council of Ministers the power to amend this position without the need for the approval of the King.³⁷¹

Moreover, Article 3 of the Implementation Rules of 1985 allows a civil servant to act as an arbitrator, with the provision that he should obtain permission from his government employer.³⁷²

³⁷⁰ Implementation Rules of 1985, Art. 8

³⁷¹ Richard D. Jordan, "Saudi Arabia; Arbitration Rules Introduced", *International Financial Law Review*, November, 1983, p. 43

³⁷² Implementation Rules of 1985, Art. 3

4.4 [A] The legal effects of the Arbitration Agreement

It has been felt necessary not to allow adjudication to monopolize the settling of disputes, but, in particular disputes, to allow arbitration to share with adjudication in this important task, as a regulated form of adjudication suitable to modern times. If adjudication is applicable to all disputes, what, one may ask, is the importance of the agreement to accept arbitration, if one of the parties ignores this agreement and resorts directly to adjudication?

In fact, the agreement to accept arbitration means, in the first place, that the parties have abandoned their right to resort to adjudication and have set arbitration in the place of adjudication. However, in an attempt to counter existence of an agreement to accept arbitration, one of the parties might perhaps argue that resorting to adjudication is a fundamental constitutional right, so that the agreement to accept arbitration must be set aside if that party wishes to resort to the court, even if he has already agreed to accept arbitration. If the argument of such a party is accepted, this renders the arbitration system meaningless and not immune from outreach. In this regard, various arbitration laws³⁷³ share the same attitude, that the moment the parties agree to resort to arbitration, it is implied that the judicial jurisdiction is no longer for adjudication but for the arbitral tribunal as agreed upon.

Most of the international arbitration institutions provide that where there is an arbitration agreement, whether an arbitration clause or a submission agreement, the competent court should refuse to exercise any kind of jurisdiction. Therefore, the disputing parties will refer their dispute to arbitration. In such a case, the court should refer the dispute to arbitration when there is an arbitration agreement, arbitration clause

³⁷³ Bahraini Code of Civil and Commercial Procedure No. 12 of 1971, Art. 236; Kuwaiti Code of Civil and Commercial Procedure No. 38 of 1980, Art. 173; United Arab of Emirates Federal Code of Civil Procedure No. 11, Art. 203; Omani Board for Settlement of Commercial Disputes, issued by Sultanic Decree No. 84/32 of 1984, Art.38; Qatari Code of Civil and Commercial Procedure No. 19 of 1990, Art. 7

or submission agreement, unless these agreements are null and void. Also the UNCITRAL Model Law of 1985 shares this attitude. It provides:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.³⁷⁴

Moreover, the ICC Arbitration Rules expressly state that the arbitration will proceed, even if one of the parties refuses or fails to take part in it, provided there is an arbitration agreement containing the wishes of the parties to submit the dispute to arbitration by the International Chamber of Commerce.³⁷⁵

The practice is adopted in many countries that the competent authority stays the proceedings at the request of one of the parties to the dispute. For example, the Belgian Judicial Code provides:

The judge seized of a dispute which is the subject of an arbitration agreement shall, at the request of either party, declare that he has no jurisdiction, unless, insofar as concerns the dispute, the agreement is not valid or has terminated, this exception must be proposed *in limine litis*.³⁷⁶

A question might arise concerning the event where the court notes that the arbitration agreement is expired, ineffective or does not cover the dispute referred to it. Will the parties have the right to proceed to arbitration, or is the court obliged to interfere and cease the arbitration if the parties have begun the process, and will the court be granted the jurisdiction to take over the dispute? Most of the arbitral rules failed to contain a provision, such as the Model Law, that grants the court the jurisdiction to take over the dispute in the event that the arbitration agreement is ineffective, or a provision to regulate the process of renewal in the event of the expiration of the arbitration

³⁷⁴The UNCITRAL Model Law of 1985 Art. 8 (1)

³⁷⁵ ICC Rules, Art. 8(2)

³⁷⁶ The Belgian Judicial Code, Art. 1679(1)

agreement.³⁷⁷ The new Yemeni Arbitration Act states that the court will have the jurisdiction over the dispute at the case if the parties to the dispute agree to continue the judicial proceedings before the court, then the arbitration agreement is considered not to exist.³⁷⁸

In addition, a question might arise, to what extent does the arbitration agreement have an effect on the third party? The Egyptian Court of Appeal took an effective position in several cases. For instance, the General Authority of the Provision of Imported Foodstuffs vended the goods imported to another authority, which had a contract with a traditional company for transportation, which contained an arbitration clause. The argument arose whether the arbitration clause contained in the transfer contract applied to the bill of sale or not. The Court of Appeal refused to impose the arbitration clause found in the transfer contract on the purchaser. It held that, even though the third party was connected to the economic operation, he was not bound by the arbitration clause.³⁷⁹

Further, the legal effect of the arbitration agreement may be inferred by the conduct of the parties, as in the case of *Gvozdenovic v. United Air Lines, Inc.*³⁸⁰ This case demonstrated that a party, who was not party in the arbitration agreement, and had not executed the arbitration agreement, might bind itself to arbitration by its conduct. The case concerned flight attendants who had worked previously with Pan Am and commenced employment with United Airlines after the latter purchased the former. A dispute arose between the flight attendants and United in regard to the crediting of their former employment with Pan Am. The record showed that the flight attendants had designated a committee to represent them in the arbitration and the committee had, in turn, selected counsel to represent them and argued vigorously that they should receive

³⁷⁷ UNCITRAL Model Law of 1985, Art. 8(1)

³⁷⁸ The new Yemeni Arbitration Act of 1992, Art. 19

³⁷⁹ Braham M. Ata-Allah, "Arbitration Agreement under the Egyptian Arbitration Act No. 27 of 1994", *Journal of Arab Arbitration*, Vol. 2, January 2000, pp. 19-20. (in Arabic)

³⁸⁰ U.S., 9 F.3d 1060, 1064 (2d Cir. 1993). 663 F.2d 4 (2d Cir. 1981).

full credit for their prior employment. The flight attendants appealed, after both parties had referred the dispute to arbitration, to vacate the arbitral award granting them only partial credit in the seniority list for the period that they had worked with Pan Am. The flight attendants appealed, arguing that the trial inappropriately dismissed their petition to vacate the arbitral award on the ground they were not a party to the agreement providing for arbitration. On the basis that the agreement to arbitrate "may be implied from a party's conduct", the 2nd Circuit found that the flight attendants were bound by their conduct, on the ground that they had voluntarily and actively participated in the arbitration process.³⁸¹

4.4 [B] The legal effect of the Arbitration Agreement under SAR

In Saudi Arabia, the Arbitration regulation of 1983 provides that the dispute should be submitted to arbitration when the parties have agreed to submit their disputes to arbitration, in either an arbitration clause or a separate agreement.³⁸²

After the adoption of the new Arbitration Regulation of 1983 and its Implementation of 1985, the arbitration agreement became a binding contract and parties are obliged to respect its contractual obligations. In addition, since the new act was introduced, the main effect of the arbitration agreement is that a dispute brought before the tribunal in violation of the agreement must be referred to arbitration. This effect is implicitly provided in Article 7 of the Arbitration Regulation which lays down that "if the parties have agreed to arbitrate before the occurrence of the dispute (i.e., arbitration clause), or if the arbitration agreement relating to a specific existing dispute has been approved by

³⁸¹ Charles Lee Eisen. "What arbitration agreement?: Compelling non-signatories to arbitrate", *Dispute Resolution Journal*, New York, May-Jul 2001, Vol.56, Issue. 2, pg. 40, 6 pgs, found on http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:pqd&rft_val_fmt=info:ofi/fmt:kev:mtx:journal&genre=article&rft_dat=xri:pqd:did=74818506&svc_dat=xri:pqil:fmt=html&req_dat=xri:pqil:pq_clntid=25727

³⁸² Abdul Hamid El-Ahdab, *op. cit.*, p. 611

the Court, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation".³⁸³ However, the effect of an arbitration agreement is somewhat uncertain, due to the fact that the Regulation provides that the parties to a dispute must 'send the arbitration request to the court of original jurisdiction. The arbitration request shall be signed by all parties, or their authorised representatives, and by the arbitrators'³⁸⁴. The court is then required to register and approve the arbitration request.³⁸⁵ Subject to the foregoing, the ordinary Saudi courts will refuse jurisdiction in respect of a dispute in respect of which there is a valid arbitration agreement.³⁸⁶ It is unclear what the effect will be if one of the parties declines to send off or sign the arbitration request: will the arbitration agreement still remain valid or does the provision cease to have effect?³⁸⁷

However, the new Arbitration Regulation of 1983 grants some power to the court to hear disputes in special circumstances. For example, if the arbitral tribunal fails to render the award within ninety days, the court will have the jurisdiction over the dispute. In contrast, Article 17 implies the principle of incompetence of a Court to hear the merits of the dispute in case the parties have agreed to arbitrate. The Regulation does not specify whether a party should invoke the arbitration agreement or whether a tribunal may on its own motion stay judicial proceedings and refer the dispute to arbitration. The generally prevailing view in other countries is that a party must invoke the arbitration agreement, and this should be done before taking any other steps in the court proceedings.³⁸⁸ This was shown in the case of *Mr. R. M. R. v. Comm. S. A. R. Co. & R. H. Co.* when the Board of Grievances refused to hear the dispute because of the

³⁸³ Arbitration Regulation of 1983 Art. 7; for more see Abdul Hamid El-Ahdab *Op. cit.*, p. 7

³⁸⁴ Saudi Arbitration Regulation of 1983, Art. 5

³⁸⁵ Saudi Arbitration Regulation of 1983, Art. 6

³⁸⁶ Saudi Arbitration Regulation of 1983, Art. 7

³⁸⁷ Julian D.M. Lew, "The recognition and enforcement of arbitration agreements and awards in the Middle East", *Arbitration International*, Vol. 1, No. 2, 1985, pp. 161-178

³⁸⁸ Nancy B. Turck, "Saudi Arabia", *International Handbook on Commercial Arbitration*, J. Paulsson(ed) and Van Den Berg gen. eds., suppl. 17 January, 1994.

existence of an arbitration clause in the main contract.³⁸⁹ El-Ahdab argued that the arbitration regulation of 1983 enables parties to invoke the arbitration agreement at any stage of the court proceedings. However, if the party invokes the arbitration agreement at the final stage of the court proceedings, the arbitration agreement may be voidable unless good reason is provided by the party.³⁹⁰ According to practice, when one or both parties invoke the arbitration agreement or at the event parties agree to a stay of court proceedings and refer the dispute to arbitration, the competent authority having original jurisdiction over the dispute will refer the dispute to arbitration, as in the case of *Nal. Co. for Adm & Serv. Ltd v. S. Co. Ltd.*³⁹¹

Some laws hold that, if one of the parties to the arbitration agreement resorts to the court, while the other party is willing to resort to arbitration, the arbitration agreement becomes void if the party does not do so. In contrast, other laws hold that 'the agreement to arbitrate is of public order and that the court itself must invoke presence of such agreement and declare itself incompetent as soon as it knows of such agreement and at any stage in the proceeding'.³⁹² The Saudi Arbitration Regulation of 1983 and its Implementation of 1985 failed to determine this point and remained silent in this regard. In addition, it may be argued that the new act failed to determine whether the party should invoke the arbitration agreement at the beginning of the court proceedings or whether the court itself should stay proceedings and refer the dispute to arbitration.

The Regulation does not specify, either, on which grounds a Saudi Arabian tribunal may refuse the request for a stay of proceedings and referral to arbitration. These grounds are usually, in other countries, the invalidity of the arbitration agreement and the incapability of the subject matter of the dispute to be resolved by arbitration. Moreover,

³⁸⁹ The Arbitral Award No. 1733/K 1411, dated 25/09/1412 A. H (1992 A. D.)

³⁹⁰ Abdul Hamid El-Ahdab, *op. cit.*, p. 612

³⁹¹ The Arbitral Award No. 1107/K, dated 22/08/1408 (A. H.) (1990 A. D.)

³⁹² Abdul Hamid El-Ahdab, *op. cit.*, p. 8

the parties may insert a provision in their contract to set a time limit for the disputing parties to recourse to arbitration at the event of the violation of the main contract. At the expiry of this time limit, the competent authority will refuse to stay the court proceedings, and will also refuse to resort to arbitration. According to practice, if the parties participate in several sessions of the arbitral process after the time limit lapses, the parties will lose the right of referring the dispute to the competent authority, for the reason that the interested party did not invoke the expiry of time limit at the first session. This happened in the case of *Civ. W. Co. v. Inr'l. Gen. Ins. Co.*, where one of the parties requested the arbitral tribunal to stay the arbitral proceedings for the reason that the party had resorted to arbitration after the expiry of the time limit. The arbitral tribunal rejected the request on the ground that the requesting party had participated in several sessions of the arbitral process, and failed to invoke the provision of the time limit at the first session.³⁹³

4.5 [A] Arbitrability

The doctrine of arbitrability is designed to draw the lines beyond which the cart of arbitration may not cross. It is the tool by which society proclaims those interests which it considers so vital and sensitive as to be removed from the scope of private arbitration.

Objective arbitrability, then, answers the question: what can be arbitrated?

The decision as to what matters should be removed from the ambit of arbitration is evidently subjective to respective national legal systems. What is considered so fundamental as to be non-arbitrable in one country may be viewed as amenable to the process of private arbitration in another country. The permissible limit of arbitrable matters consequently varies among countries.

³⁹³ The Arbitral Award No. 15/1407, dated 18/10/1408 A. H. (1988 A. D.)

It has been suggested that the New York Convention should be amended to include a list of non-arbitrable subject matters for each contracting state or a list reflecting judicial and legislative practice in all member countries.³⁹⁴ The suggestion is erroneous in implying that it is possible to distil a list of non arbitrable matters reflective of the law in all contracting states. Additionally, it is hardly helpful for the Convention to list non-arbitrable matters in each contracting state. As indicated above, arbitrability encapsulates the present perception of each country as to matters which could be left to arbitration. The scope of arbitrable matters therefore varies according to the changing views of each country as to where the line between public interest and private adjudication should be drawn. A convention, which is not easily amended to change, is therefore ill-suited to contain a synopsis of flexible national practice.³⁹⁵

Both the New York Convention and the Model Law recognise the doctrine of arbitrability. Article 11 of the New York Convention provides that each contracting state shall recognise an arbitration agreement “concerning a subject matter capable of settlement by arbitration” Article V(2)(a) of the Convention equally allows contracting state to refuse recognition and enforcement of an award where “the subject matter of the difference is not capable of settlement by arbitration under the law of that country”. Similarly, by virtue of Article 1(5) of the Model Law, the Model Law does not affect those laws of a contracting state by virtue of which certain disputes “may be submitted to arbitration only according to provisions other than those of [Model Law]”. Under Article 34(2)(b)(i) of the Model Law, an award may be set aside if the subject matter of the dispute is not capable of settlement by arbitration under the law of the contracting state involved.

³⁹⁴ I. Neslor, “Problems Concerning the Application and Interpretation of Existing Multilateral Convention on International Commercial Arbitration and Related Matters”, *UNCITRAL Yearbook*, Vol. 3, 1972, p. 244.

³⁹⁵ H. Holtzmann & J. Neuhaus, *op. cit*, p. 39

The critical issue here is to determine the law that governs arbitrability. As mentioned elsewhere, the issue of arbitrability may arise at any of different stages, either before the arbitral tribunal, or before a judge from whom enforcement of the arbitration agreement is sought, or before a judge who is requested to enforce the award, or before a judge to whom an application is made to set aside the award.

The jurisdiction and authority of arbitrators is founded on the arbitration agreement. It may well be argued that where a party contends that an arbitration agreement is void as a result of objective non-arbitrability, there is no basis for the arbitral tribunal to exercise jurisdiction, and that it must therefore refuse to hear the case. As we have seen, the Separability doctrine, coupled with the *kompetenz-kompetenz* rule, enable the arbitral tribunal to determine its jurisdiction. Thus, an arbitral tribunal is entitled to hear any preliminary objection relating to the arbitrability of the subject matter, and to rule on such an objection.

Some commentators have suggested that an arbitral tribunal should be guided by the law applicable to the arbitration agreement in making a ruling on arbitrability.³⁹⁶ This view is consistent with the trend towards the recognition of the doctrine of party autonomy and the need for contractual security.³⁹⁷

There is yet another problem in this regard. The law applicable to the agreement may be different from the law of the forum where the arbitration is conducted. Is an arbitral tribunal in such a case entitled to disregard the law of the forum in favour of the law applicable to the arbitration agreement? First, a preliminary point should be made. An arbitral tribunal owes a duty to the parties to render an enforceable award.³⁹⁸ This duty flows directly from the very goals and essence of the arbitration process, and the

³⁹⁶ W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 2nd Ed, Ocean Publications Inc, New York, 1990, p. 39

³⁹⁷ Art. 6(2) of the European Convention on International Commercial Arbitration, the article stipulates the law chosen by the parties as having priority in determining arbitrability.

³⁹⁸ Art. 26 of the ICC Rules of Arbitration, for example, requires an arbitrator to “make every effort to [ensure] that the award is enforceable at law”

intention of the parties in utilizing the process. This duty should be juxtapose against the fact that an award may be set aside under the Model Law where the subject matter of the award is not arbitrable under the law of the forum.³⁹⁹ The implication of the award being set aside is very far-reaching, in that it constitutes a ground for other jurisdictions to refuse to recognise or enforce the award.⁴⁰⁰ This result is regrettable, in that the seat of arbitration may not be substantially connected with the parties' transaction. For example, where a Canadian and French party enter into an agreement for the construction of an industrial complex in France, and an arbitration between them is held in Britain, it makes little sense for the arbitrability of the subject matter to be determined according to British law. It is to be hoped that in this kind of instance (where the transaction has no connection with the seat of arbitration), the courts of the seat of arbitration would refrain from setting aside an award on the ground that the subject matter is non-arbitrable in accordance with its national laws.

4.5 [B] Arbitrability under SAR

The arbitration regulation and its implementation rules distinguish the matters that are arbitrable. Art.1 of the implementation rule stated that: "Arbitration in matters wherein conciliation is not permitted such as *Hudud Lian* between spouses, and all matters relating to the public order, shall not be accepted".⁴⁰¹ Therefore, the general rule regarding the arbitrability under the Saudi regulation is that unconciliable matters and matters regarding public policy are excluded.⁴⁰²

However, the Saudi legislature did not specify the cases where conciliation is prohibited.

The article in question mentions some matters that are unconciliable as examples, rather

³⁹⁹ Model Law, Art. 34(2)(b)(i).

⁴⁰⁰ New York Convention, Art. V(1)(i) and Model Law, Art. 36(1)(v)

⁴⁰¹ Implementation Rules of 1985, Art. 1. *Hudud*, are the crimes of murder, injury, adultery, drunkenness, theft and robbery which are specifically provided for in the Muslim Holy Book, the *Quran*, *Lian*, is a court procedure under which a confrontation between spouses takes place and through which they terminate their marital relationship after either spouse directs an accusation of adultery against the other

⁴⁰² As we mentioned earlier that conciliation is an abandonment of part of the right from the parties

than defining the limitation of such matters.⁴⁰³ It seems, therefore, that the legislature intended to refer the issue of these matters to the general rules of *Sharia*.

By referring to the general rules of the *Sharia*, we must notice that conciliation and arbitration are prohibited to be applied to any matter that is relating to the Right of God.⁴⁰⁴ These matters relating to the Right of God are enforced for the sake of protection of all mankind, not a specific individual. Therefore, arbitration and conciliation are not as appropriate as adjudication.⁴⁰⁵ Moreover, as the nature of the arbitration and conciliation is mainly to compromise and to look for settlement on the basis of will of the parties, whereas, extinction or remission of any Right of God is not under any authority and cannot be determined by any persons, adjudication functions to decide such matters, where the judge derives the award from what Allah says, rather than the parties' willingness to compromise.

From the above mentioned, it seems that arbitration is allowed for matters that are related to mankind's rights only if these rights do not contradict the sources of *Sharia*,⁴⁰⁶ and do not infringe the right of other people outside the dispute. The rationale for the admissibility of arbitration in such matters is to give the freedom to the people either to resolve their dispute or to abandon their right.

It can be noticed from the above mentioned, that it is not permissible to agree about arbitration at the stage of deciding the criminal responsibility, or to decide whether a person is guilty or not, or to decide on punishment for crime, whether by amputation, or stoning or flogging. On the other hand, even though these matters cannot be arbitrable, the sum of compensation payable to the plaintiff can be agreed by arbitration for the reason that defendant can negotiate the amount of sum with the plaintiff.

⁴⁰³ such as *Hudud and Lian*.

⁴⁰⁴ Zeyad Alqurashi, "Arbitration under the Islamic *Sharia*", *Oil, Gas & Energy law Intelligence*, Vol. 1, Issue 2, March 2003. Found on http://www.gasandoil.com/ogel/samples/freearticles/article_63.htm on the 13/07/2004.

⁴⁰⁵ Mohammed Al-Bejad, *op. cit*, p. 46

⁴⁰⁶ These sources were discussed earlier, in chapter two. They are *Quran*, *Sunnah* (the Prophet's Traditions, *Ijma* (consensus of opinion) and *Qiyas* (analogy).

Furthermore, Art.1 of the implementation rule states at the top of the *Hudud* that *Lian* between spouses is not arbitrable, nor are matters related to the determination of the legal capacity,⁴⁰⁷ or patrimonial rights. The *Quran* also excludes certain matters, such as guardianship of orphans, also the rights of husband and wife in consequence of divorce, which must be referred to courts of law.⁴⁰⁸ However, all financial issues can be arbitrated because the payee has the right to waive the money that is awarded to him. For example, a wife is granted the right from God to get paid, therefore it is not allowed to resort to arbitration to determine whether she has this right or not, for the reason that this right from God. However, arbitration can take the role of determining the amount of money that the wife should receive from the husband, for the reason that she is entitled to waive her right freely.

The regulation and its implementation prohibited arbitration in the issues related to the public policy. These are all the matters related to the public interest of the society which are necessary to maintain stability and justice for everyone. The general rule of the public policy in Saudi Arabia is what is stated in the *Sharia*. As the *Sharia* is a very comprehensive framework, public policy extends to various areas of rules such as civil, commercial, administrative, economic and social.⁴⁰⁹

What happens if the subject matter being arbitrated is related to the public policy? According to practice, the arbitration is null and void and the competent court is obliged to adjudicate the nullity on its own self-determination, contrary to most issues where the parties should raise the issue to the court. The rationale behind the prohibition of arbitration and conciliation in matters related to public policy is the relationship between these issues and the public interest of the society. Thus, they must be brought before the judicial authority, which has jurisdiction over these issues.

⁴⁰⁷ The matters that are to determine whether the person has reached to the reasoning age or under any incapacity or his capacity is defective

⁴⁰⁸ Zeyad Alqurashi, *op. cit.*

⁴⁰⁹ Mohammed Al-Bejad, *op. cit.*, p. 48

It must be borne in mind that the establishment of the courts and the judicial committees for dispute settlement does not mean that arbitration is not effective in settling the issues for which these courts and judicial committees are designated.⁴¹⁰ However, those issues that are settled by these judicial organs are considered to be matters of public policy.

Accordingly, arbitration is not allowed in determining an issue related to nationality, since a designated authority specialises in this issue.⁴¹¹ On the same ground, arbitration is permissible on the issues of resignation and allocation of an employee, or the issue of the dismissal or the challenge of the judges, also the issue of deciding the judicial procedure that should be applied before the court. A question that might arise here, is whether a foreign arbitral award conflicts with the competence of the national court, since it is prohibited to arbitrate issues that are under the jurisdiction of any court.

In addition, arbitration is not permissible in some cases when the dispute arises from a contract involving interest or gambling, for the reason that these contracts contradict the principles of *Sharia*, which is the supreme law of the Kingdom of Saudi Arabia.

As a result of specific provisions or some administrative practice, it seems that certain disputes are not allowed to be referred to arbitration. These disputes are as follows:⁴¹²

4.5 [B](i) Disputes between partners of a company or between a company and its partners

In 1980, the Ministry of Commerce issued a decree which prohibited the Department of Commercial Register from registering any company whose articles contain an arbitration clause to refer any disputes, between the partners or between the partners and

⁴¹⁰ Such as the SAMA Committee for Banking Disputes, the Primary and Supreme Committee for Labour Dispute, The Committee for the Settlement of Commercial Disputes and the Commercial Paper Committee.

⁴¹¹ Mohammed N. Al-Bejad, *Arbitration in The Kingdom of Saudi Arabia*, Ma'ahad Al Edarah Al A'ammah, 1999, p. 49

⁴¹² Abdul Hamid El-Ahdab, *op. cit.*, pp. 573-574

the company, to arbitration outside Saudi Arabia unless the Ministry of Commerce issued an authorisation.⁴¹³

[B](ii) Disputes relating to commercial agency contracts

Commercial agency contracts have been regulated in Saudi Arabia for the sake of the protection of the Saudi agents. The regulation requires that such contracts should be registered by the commercial registrar. The Ministry of Commerce issued implementation rules for this regulation which include the content of the agency contract. These rules do not prohibit the parties from placing an arbitration clause in the agency contracts, nor do they prohibit the Department of Commercial Register from registering any contract containing an arbitration clause. The Ministry of Commerce has issued a standard form of agency contract containing an article which provides: 'any dispute will be brought before the Board for the settlement of commercial disputes'. The Department of Commercial Register has refused to register any commercial agency company which does not conform with this form.⁴¹⁴

4.5 [B](iii) Disputes between foreign contractors

The Regulation of Saudi Arabia stipulates that the Commission for the Settlement of Commercial Disputes has jurisdiction over any disputes that might arise between foreign contractor and any of its Saudi agents.⁴¹⁵

The Ministry of Commerce refuses to register any agency contract, concluded between a foreigner and its Saudi agent, which contains an arbitration clause stating that any disputes will be referred to arbitration outside the Kingdom of Saudi Arabia

⁴¹³ *Ibid*, p. 574

⁴¹⁴ *Ibid*, pp. 574-755

⁴¹⁵ *Ibid*, p. 575

4.6 Summary

The cornerstone of the arbitral process is the arbitration agreement, as it organises and accumulates the essential elements that the whole process of arbitration derives its direction. This chapter has discussed the position of some international laws as well as the position of the Kingdom of Saudi Arabia regarding the arbitration agreement, with special reference to the provisions of the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

As there are two main types of arbitration agreement, firstly submission agreement to refer specific existing disputes to arbitration, secondly arbitration clause which to submit a potential dispute to arbitration. The Arbitration Regulation of 1983 explicitly recognises the different types of arbitration agreement. Recognition of an arbitration clause is considered one of the main changes adopted by the Arbitration Regulation, since the concept of arbitration clause before this Regulation was unknown in Saudi legal regulations and the judicial authorities. However, the arbitration clause does not function properly, since the regulation requires that the arbitration instrument must be filed even if the main contract contains an arbitration clause. Therefore, it is suggested that the legislature consider a distinction between the two types of arbitration agreement and leaves the burden on the arbitration clause drafters to include the essential elements that should be found in the submission agreement or arbitration instrument. Consequently such approach of the regulation will resist the court to direct the dispute to arbitration when there is an arbitration clause at the first instance. However, it is suggested that the Saudi legislature reviews the regulation and inserts a provision, which confirms the juridical autonomy of an arbitration clause from the main contract.

It is argued, as we addressed earlier, that the regulation requires the parties to the dispute to prepare an arbitration instrument, whether arbitration is based on an arbitration clause or a submission agreement, and to have this instrument approved by a

competent authority before the commencement of the arbitration proceedings. If either party to the dispute refuses to cooperate with the other party to prepare such an instrument, the competent authority will intervene at the request of the other party and request the refusing party to respect the arbitration agreement and to participate in preparing an arbitration instrument. However, this requirement may lead to an increase in the intervention of the courts and to delay in the commencement of the proceedings.

There are some provisions as to the validity of the arbitration agreement, such as agreement in writing, capacity of the parties to the disputes and arbitrability. The Saudi Arbitration Regulation of 1983 imposes certain conditions. It requires implicitly that an arbitration agreement should be in writing, because any arbitration instrument must contain the names and signatures of the parties and arbitrators, the subject-matter of the dispute and so on. It is recommended that the Saudi legislature recognise the validity of an arbitration agreement concluded by one of the modern means of communication, such as fax or telex or email or orally, particularly as the importance of these methods is increasing rapidly in the commercial sphere.

The Arbitration Regulation expressly requires the parties to have full legal capacity to refer a dispute to arbitration. Although this regulation has reduced the scope of prohibition of the Saudi government or one of its agencies to settle disputes by arbitration, it is recommended that the Saudi legislature abrogates this prohibition in general, or at least in domestic arbitration, as there are many Governmental Agencies which participate in economic and commercial activities as a result of owning a percentage of the capital in leading companies.

The main effect of the Arbitration Regulation is that a dispute brought to the court must be submitted to arbitration where there is an arbitration agreement. This step constitutes a significant improvement on the former situation where the arbitration agreement was unenforceable. However, the Saudi Regulation is silent in respect of the time by which

either party to the dispute should invoke the arbitration agreement before the court. It would be helpful if the Saudi legislature stipulated the production of an arbitration agreement before taking any step in the court proceedings. Otherwise, the party loses the right to stay these proceedings on the existence of an arbitration agreement if he has participated in them.

The Regulation explicitly states that all disputes on any matter of law may be resolved by arbitration, except matters which cannot be resolved by a settlement, such as crimes or any matters relating to public policy. Consequently, arbitration is not allowed in respect of disputes arising out of the contract dealing with usury or gambling, because these contracts are not allowed in *Sharia* law.

It was evident in this chapter that the arbitration agreement determines the arbitral process such as the arbitral tribunal constitution, place of arbitration, method of appointing the arbitrators and the expenses of the arbitration. Each of these features will be discussed analytically in the next chapter.

CHAPTER FIVE

ARBITRATOR

5.1 Introduction

Once a dispute is referred to arbitration, the establishment of the arbitral tribunal must be initiated. The difference between an arbitral tribunal and a national court is that the former needs to be brought into being before it will be able to implement any jurisdiction over the dispute, whereas the latter is a standing body, which can take adjudication over a dispute at almost any time. This can be clearly seen when a dispute arises, the parties have failed to reach settlement, and one of the parties requests legal action. If that case is brought to the court, the claimant only needs to follow the appropriate process, whatever is the system in the court, in order for it to take cognizance of the case. On the other hand, if the dispute is to be referred to arbitration, the parties cannot submit the case before the arbitral tribunal unless that tribunal is established. Normally, the establishment of the arbitral tribunal and its preparation to start the process to solve the dispute take time, whether the establishment is commenced by the parties' agreement or by the rules of an arbitral institution. In the case of institutional arbitration, the arbitration will be conducted according to the rules of the selected institution, which will determine the method of appointing the arbitrators. The institution normally holds a list of registered arbitrators who are specialists in law and commercial transactions and in different fields of knowledge. The parties to the dispute are free to select from the list of arbitrators registered with the institute or to select from elsewhere.⁴¹⁶ Arbitral institutions follow the same general principles in order to approach their aims, but they may adopt different rules.

⁴¹⁶ F. Sami, *International Commercial Arbitration*, Dar Al-Thaqafa, Amman, 1992, p. 137

This chapter will discuss the main aspects concerning the arbitrators themselves, such as their number and the methods of their appointment, whether by the parties to the dispute themselves or by a third party, such as a specialist arbitral institution. In addition, it will discuss the major qualifications required in a person who wishes to act as an arbitrator. For instance, he must have a full legal capacity by which he is capable of conducting the arbitral process, he should have experience in dealing with the subject-matter of the dispute, and he must be and remain impartial and independent throughout the process. Also, this chapter will analyse the circumstances in which the arbitrator can be subject to dismissal; challenge of arbitrators, particularly reasons for challenge, its time limit, the procedure and effects resulting from the challenge, and the fees and expenses of arbitrators, with a focus on the methods of assessing fees and expenses.

5.2 [A] Appointment of Arbitrators

The first step in the establishment of the arbitral tribunal is the appointment of its members. As a general rule, the parties are free to appoint the arbitrator(s) by themselves; they are free to constitute the arbitral tribunal in a manner suitable to their dispute, and also to determine the number of arbitrators. Moreover, most national arbitration statutes generally grant parties autonomy to agree to procedural mechanisms for the appointment of arbitrators and will typically enforce those mechanisms.⁴¹⁷ Consider, for example, Article 11 of the UNCITRAL Model Law and Article 179 of the Swiss Law on Private International Law.⁴¹⁸ Despite the wide autonomy given to the parties in selection of arbitrators, however, there is a proviso, in most national and international laws, that the parties are not free to compose the arbitral tribunal of an

⁴¹⁷ G.A. Born, "Selection of Arbitrators in International Arbitration", *International Commercial Arbitration*, 2nd ed, Part Two: Chapter 9, 2001, pp. 615-652

⁴¹⁸ See also *ATSA of California, Inc. v. Continental Insurance, Co.*, 754 F.2d 1394 (9th Cir. 1985); also *McMahon v. Shearson/American Express Inc.*, 709 F.Supp. 369, 373 (S.D.N.Y. 1989).

even number of arbitrators.⁴¹⁹ There are a few exceptions, such as Swiss and English law, where it is acceptable to establish a tribunal that consists of an even number of arbitrators.⁴²⁰ Other countries, such as France and Holland, adopt a compromise approach, whereby, if the arbitration agreement contains an even number of arbitrators, an extra arbitrator shall be appointed.⁴²¹ However, views differ with regard to this matter; whether the additional arbitrator should be appointed immediately, or the appointment of the additional arbitrator can be executed at any time during the course of the procedure. Other rules, such as FOSFA Article 1 (b), hold that the designation of the additional arbitrator is only to be made if the arbitrators cannot agree on making the award.⁴²² The drafters of the Model Law give the parties the freedom to determine the number of the arbitrator(s). However, they seem to require indirectly that the number of the arbitrators should be uneven, although the arbitral tribunal will be legitimate if the parties agree upon an even number of arbitrators.⁴²³ The Model Law approach is to compromise between the effectiveness of the uneven number of arbitrators and the will of the parties, which might be the option of an even number.

The parties to the dispute, sometimes, appoint a sole arbitrator who constitutes the arbitral tribunal. Often, however, the arbitral tribunal is composed of three arbitrators. In such cases, normally each party appoints an arbitrator and the third arbitrator is appointed by the party-appointed arbitrators or by mutual agreement of the parties themselves.

⁴¹⁹ David Reně, *op. cit.*, p. 227

⁴²⁰ Peter Sarcevic, *Essays on International Commercial Arbitration*, Graham & Trotman, London, 1989, p.68; also an even number of arbitrators is permissible in Argentina, Chile, Ecuador (for the arbitration of the code of civil procedure), Mexico and Peru.

⁴²¹ French Code of Civil Procedure of 1980, Art. 1454; also The Netherlands Arbitration Act of 1986, Art. 1026 (3) as it reads "If the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chairman of arbitral tribunal"

⁴²² David, Reně, *op. cit.*, p. 228; Federation of Oil, Seed, and Fats Association in its Arbitration and Appeal Art. 1 (b) stated that: "If two arbitrators have been appointed they shall, if and when they disagree, appoint an umpire from the Arbitration and Appeal Panel. If the arbitrators fail to agree on the appointment of an umpire, they shall notify the Federation which shall appoint an umpire from the Arbitration and Appeal Panel"

⁴²³ UNCITRAL Model Law of 1985, Art. 10.

If the parties to the dispute fail to agree upon the appointment of a sole arbitrator or the party appointed arbitrators fail to agree upon the third arbitrator, the competent authority having jurisdiction over the dispute will have the power to appoint the arbitrator. However, this competent authority should take into consideration any qualifications required of the arbitrator in the agreement of the parties to the dispute.⁴²⁴

The arbitration clause does not contain the names of the arbitrators, but may contain the manner in which the arbitrators are to be chosen.⁴²⁵ In addition, the ICC Rules state that the dispute shall be settled by either a sole arbitrator or three arbitrators. If the parties fail to appoint their arbitrator within the stipulated time, the court of the ICC will then make the appointment of the arbitrator(s) (to be discussed in detail later in this chapter).⁴²⁶ Redfern and Hunter argue that it is difficult to choose an appropriate arbitrator at the time when the dispute has not taken place, since there are several questions that may arise before choosing the right arbitrator or arbitrators. What is the nature of the dispute? Does it require an expert? It is very difficult to answer these questions and fulfil the conditions that should be found in an arbitrator before the dispute has arisen.⁴²⁷

Parties have the right to appoint the arbitrators by themselves or to agree on appointment by a third party. Nevertheless, some restrictions are applied on the freedom of the parties; the appointment of any arbitrator needs the consent of both parties, or at least a mutual agreement should be drawn to determine the manner of the appointment of the arbitrator.⁴²⁸ In some countries the arbitration agreement is null if the agreement does not contain the names of the arbitrators or at least the method and manner of

⁴²⁴ Fraser Davidson, *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, W. Green, Edinburgh, 1991, p. 65

⁴²⁵ J. Collier and V. Lowe, *The Settlement of Disputes in International Law*, Oxford University Press, Oxford, 1999, p. 219

⁴²⁶ ICC Arbitration Rules of 1998, Art. 8, also see Collier and V. Lowe, *op. cit.*, p. 220

⁴²⁷ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd Ed, Sweet & Maxwell, London, 1999, pp. 190-191

⁴²⁸ David Renč, *op. cit.*, p. 229

appointment and the number of the arbitrator(s).⁴²⁹ The French Code of Civil Procedure, for example, provides that:

A submission is null unless it establishes the object of the disputes, subject to the same sanction, it must either appoint the arbitrator or arbitrators or set forth the manner in which they are to be appointed⁴³⁰

In addition, some countries have adopted the provision that if the disputing parties have not designated the arbitrator(s) in the arbitration agreement, the court will have the power to appoint them. The Netherlands Arbitration Act stipulates that if the appointment of the arbitrator or arbitrators is not completed within the specified period of time, at the request of one of the parties the arbitrator shall be appointed by the President of the District Court.⁴³¹ An example is the case of *Astra Footwear Industry v. Harwyn International* where the parties had an agreement to refer any disputes that might arise between them to arbitration. Paragraph 12 of the agreement provided that ‘Disputes: for all claims of disputes arising out of this agreement which could not be amicably settled between the parties, is competent the arbitrage for export trade at the Federal Chamber of Commerce in Beograd.⁴³² [sic] in the case that the buyer is the accused, the Chamber of Commerce in New York is competent’. The petitioner requested to refer the arbitration before the International Chamber of Commerce, on the ground that the ICC has an office in New York. The respondent pointed out that the agreement referred to the New York Chamber of Commerce, which had become ineffective to arbitrate any disputes in 1973, before the dispute took place, by merging to become the New York Chamber of Commerce & Industry. The respondents’ argument was that the naming of the NYCCI was “an integral part of the substantive rights bargained for by Harwyn,” and on the ground of the NYCCI’s inability to hear

⁴²⁹ *Ibid*, p. 227; The same approach applies in Belgium and Italy

⁴³⁰ The French Code of Civil Procedure of 1980, Art. 1448

⁴³¹ Netherlands Arbitration Act of 1986, Art. 1027(3)

⁴³² *Inc.*, 442 F.Supp. 907 (S.D.N.Y. 1978)

the dispute, the petition to refer the dispute to the ICC should be dismissed. As the NYCC could not arbitrate disputes and the ICC was not designated as the body to hear the dispute in the agreement, the petitioner then asked the court to appoint the arbitrator.⁴³³

5.2 [B] Appointment of Arbitrators under SAR

The Saudi Arbitration Regulation of 1983 and its Implementation of 1985 contain provisions which deal with the appointment of the arbitrator. They grant full freedom to the parties to nominate their arbitrator and establish their arbitral tribunal. It appears that there are two methods of appointment of the arbitrator. The first is that the parties to the dispute will appoint the arbitrator. The Implementation Rules of 1985 provide: ‘The appointment of an arbitrator or arbitrators shall be completed by agreement between the disputing parties in an arbitration instrument’⁴³⁴

The parties can choose the number of arbitrators, which must be odd according to Article 4 of the Arbitration Regulation of 1983. The regulation expresses this provision to avoid complexity of the procedure, on the basis that an arbitral tribunal consisting of an even number of arbitrators might result in a split decision, making the dispute impossible to arbitrate. Therefore, the arbitration regulation of 1983 does not allow the parties to establish an arbitral tribunal consisting of an even number of arbitrators. The competent authority having jurisdiction over the dispute must make sure before approving the arbitration instrument that the number of arbitrators is odd.⁴³⁵

The second method of appointing the arbitrator or arbitrators and choosing their number is when a competent authority having jurisdiction over the dispute executes the nomination of the arbitrator(s). The Arbitration Regulation of 1983 regulates and

⁴³³ Gary B. Born, *International Commercial Arbitration Commentary and Materials*, 2nd Ed, Kluwer Law International, , Netherlands, 2001, pp. 631-634

⁴³⁴ Implementation Rules of 1985, Art. 6

⁴³⁵ Mohammed Al-Bejad, *op. cit*, pp. 124-125

explains the circumstances when the competent authority can appoint the arbitrator. For instance, the Board of Grievances will have the power to appoint the arbitrator or arbitrators if the parties to the dispute are unable to agree upon them, or if either of the parties does not nominate his arbitrator. As the Regulation provides:

If the litigant fails to appoint the arbitrators or if any of them fail to appoint its arbitrator or arbitrators, or if any one or more of the arbitrators has refused or is prevented from acting as an arbitrator or has become disabled or has been dismissed, and if the litigants have not agreed otherwise, the Authority having original jurisdiction to consider the dispute shall appoint the necessary arbitrators upon request by the expediting litigant provided that it be in the presence of the other party, or, if he is absent after he has been invited to attend a meeting to be held for this purpose. The number of arbitrators to be appointed shall be equal to the number agreed upon by the litigants or complementary thereto and the decision in this respect shall be final.⁴³⁶

It is obligatory to implement Article 10 of the Regulation if any of the circumstances listed in the article applies. Moreover, the parties to the dispute must have agreed that in the case of the dismissal or challenge of the arbitrator, another person will be appointed in his stead. The existence of this stipulation or agreement obliges the parties to implement it. Therefore it also prevents the competent authority from exercising its right to appoint the arbitrator.⁴³⁷

According to the decision of the Board of Grievances, the competent authority should make the appointment in accordance to the agreement between the parties regarding the number of the arbitrators. However, if the parties did not mention the number of arbitrators in their agreement, the competent authority will then have the right to choose the number of arbitrators, after taking into consideration the opinions of the parties. In addition, the competent authority will have the same right when the number of the arbitrators is even and the parties have not agreed upon the umpire.⁴³⁸ The decision of

⁴³⁶ Saudi Arbitration Regulation of 1983, Art. 10

⁴³⁷ Mohammed N. Al-Bejad, *op. cit.*, p. 126

⁴³⁸ Board of Grievances Decision No 22/D/TG/1 1417 A.H., also Decision No 92/D/TG/1 1417 A.H.

the competent authority regarding the appointment of the arbitrator is final and is not subject to appeal or to challenge for any reason.⁴³⁹

The Arbitration Regulation of 1983 and its Implementation of 1985 do not specify any definite time within which the parties to the dispute should appoint their arbitrator. This results in uncontrolled interference, after different periods from case to case, by the competent authority to impose the appointment of the arbitrator if one of the parties fails to cooperate. Imposing a time limit on the regulation would avoid this, but would also avoid vexatious delay by parties unwilling to appoint their arbitrator. Such a situation arose in the dispute between *M. M. Group v. B. S. W Company* when the former submitted a request to the Commercial Circuits of the Board of Grievances claiming that the latter should comply by appointing his arbitrator. Therefore the Committee issued an award obliging the defendant to appoint the arbitrator. Also, the Supervision Committee of the Board issued an award in support of the wording of the award.⁴⁴⁰ Moreover, in the case between *M. S. D. v. M. W. & A. W.*, in a memorandum to the Board of Grievances, the plaintiff demanded that the defendant take quick action regarding the appointment of his arbitrator and showed that the defendant had not complied with the request for appointment from the beginning.⁴⁴¹ To avoid such problems, it is crucial for the Saudi legislature to review the Regulation and its Implementation to fill this gap. This would be in line with other international arbitration regulations, which have adopted provisions which set a specific time limit for the parties to appoint their arbitrator, which justifies the interference of the competent authority in the case of unreasonable delay or refusal of the parties to appoint their arbitrator.

⁴³⁹ Mohammed N. Al-Bejad, *op. cit.*, p. 127

⁴⁴⁰ Arbitral Award No. 290/3/Q on 1419 A. H (1999 A.D), The Award of the Supervision Committee No. 3/T/3 on 1420 A.H (2000 A.D)

⁴⁴¹ Case No.1132/2/Q on 1411 A.H (1991 A.D)

5.3 Number of arbitrators

According to the general rules, the will of the parties to the dispute is the fundamental basis in determining the number of the arbitrators, whether the arbitration is based on an arbitration clause or a submission agreement. However, there might be restrictions imposed by the arbitration rules controlling the will of the parties. For instance, the majority of arbitration rules stipulate that the number of arbitrators must be odd. In this respect the parties to the disputes should abide by this provision, otherwise the establishment of the arbitrators will be invalid.

The ICC Rules, as well as other international arbitration rules, clearly stipulate that the number of the arbitrators must be odd. The ICC Rules provide:

The disputes shall be decided by a sole arbitrator or by three arbitrators..⁴⁴²

In addition, certain national arbitration rules have adopted such a provision. For example, the Netherlands Arbitration Code states that:

The arbitral tribunal shall be composed of an uneven number of arbitrators. The arbitral tribunal may also consist of a sole arbitrator.⁴⁴³

The same provision was adopted in the Saudi Arbitration rules of 1983 which stipulates that if the arbitrator appointed is more than one, the number must be odd.⁴⁴⁴ Before the adoption of this law, the Saudi law was silent regarding the number of arbitrators required, but custom dictated that the parties should choose an odd number.⁴⁴⁵

From the above and according to practice the arbitral tribunal normally consists of a sole arbitrator or three arbitrators. There are examples, as in the case of the Iran-US claims, where the tribunal consisted of nine arbitrators. However, this is very rare.

⁴⁴² The ICC Rules. Art. 8 (1)

⁴⁴³ The Netherlands Arbitration Act of 1986, Art. 1026

⁴⁴⁴ ‘..If more than one arbitrator is appointed, their number must be odd’ Arbitration Regulation of 1983, Art. 4

⁴⁴⁵ Abdul Hamid El-Ahdab, *Arbitration With the Arab Countries*, 2nd Ed, Kluwer Law International, The Hague, 1999, p. 577

5.3.1 Tribunal composed of a Sole Arbitrator

The arbitral tribunal composed of a sole arbitrator is often selected by the parties to the dispute, whether the arbitration is *ad hoc* or institutional. However, the parties to the dispute may agree to refer the dispute to a specialist arbitral institution for monitoring the arbitral process. This institution may determine the appointment of the sole arbitrator by itself without the need to consult the parties to the dispute.

There are advantages in referring disputes to a sole arbitrator, as the arrangement of the hearings and the appointment is much easier than with arbitral tribunals consisting of three arbitrators.⁴⁴⁶ The dispute will be settled quickly since a sole arbitrator will not have to spend time in consulting with colleagues in an endeavour to reach an agreed determination of the aspects in dispute. Moreover, when the parties refer a dispute to a sole arbitrator, the arbitration will be cheaper, because the parties to the dispute will only have to bear the costs of one arbitrator, not three. In some instances, an arbitration heard by a sole arbitrator may be free, when the arbitrator is a common friend of the parties to the dispute or when the arbitration is heard under the supervision of social or professional organisations which offer their arbitration services for nothing to their members or even to any person requiring them.⁴⁴⁷ Redfern and Hunter hold that ‘if the parties to an international commercial arbitration are able to agree upon the appointment of a sole arbitrator in whom they both have confidence, it makes sense for them to do so’.⁴⁴⁸

However, there are certain disadvantages in referring a dispute to a sole arbitrator, since the sole arbitrator is the only person responsible to decide a case containing different aspects of discipline (legal, financial ...etc). Moreover, a sole arbitrator may face some difficulty in rendering the arbitral award because there may be some differences between the parties in their language, culture, economics and politics. A further problem

⁴⁴⁶ Alan and Hunter, *op, cit*, p. 192

⁴⁴⁷ David Renč, *op, cit*, p. 224

⁴⁴⁸ Redfern and Hunter, *op, cit*, p. 192

arises if the dispute is to be determined by a sole arbitrator, when the parties have failed to agree upon the arbitrator, and under various rules an arbitrator is imposed upon the parties, whether by the national court or by a designated appointing authority such as one of the specialized arbitral institutions. The arbitrator is selected by a third party who is not involved in the dispute. Such an arbitrator may or may not carry out the task as well as if the sole arbitrator had been chosen by the parties themselves.⁴⁴⁹

5.3.2 [A] Tribunal Composed of Three Arbitrators

In international commercial arbitration, there is a preference for referring a dispute to arbitral tribunal consisting of three arbitrators, unless the dispute is small.⁴⁵⁰

Some international arbitration rules lay down that if the parties have not agreed upon the number of the arbitrators in their agreement, whether an arbitration clause or submission agreement, by default the arbitral tribunal will be composed of three arbitrators. This provision shows that an arbitral tribunal consisting of three arbitrators is generally preferred and it is the most suitable alternative in the case of the silence of the parties regarding the number of the arbitrators. This provision is adopted, for example, in the UNCITRAL Arbitration Rules, which provide:

If the parties have not agreed on the number of the arbitrators, and if within 15 days after the receipt by the respondent of the notice of the arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.⁴⁵¹

Where tribunals composed of three arbitrators are selected by the parties themselves, each party selects one arbitrator and the third party is selected by mutual agreement of the parties or by the two appointed arbitrators. This scheme maintains the confidence of the parties in the arbitral proceedings, since the arbitrators nominated by them represent

⁴⁴⁹ *Ibid*, p. 193

⁴⁵⁰ *Ibid*

⁴⁵¹ UNCITRAL Arbitration Rules, Art. 5

the parties' background, language, politics and economic development. This is important, since the parties to the dispute may come from different societies. Further, if the parties have confidence in the arbitrators nominated by them, they are more likely to trust and obey the arbitral award rendered by the latter.

It has often been debated why the method of choosing the tribunal of three arbitrators is more superior to the method of a sole arbitrator. Renč points out that the main reason why this method is regarded as preferable is because it smoothes the progress of composition of the arbitral tribunal, since each party nominates one arbitrator and the two nominated arbitrators designate the third arbitrator, or the umpire,⁴⁵² whereas, in a single-arbitrator tribunal, differences may occur among the parties where each party is trying to impose requirements for the sole arbitrator which suit their background.

The ICC Rules provide that in the case of referral of the dispute to an arbitral tribunal consisting of three arbitrators, each party should nominate one arbitrator; if the parties fail to nominate an arbitrator, the court shall execute appointment of the arbitrator. The third arbitrator, who will act as the chairman of the arbitral tribunal, will be appointed by the court unless the parties have agreed upon another procedure.⁴⁵³

It has been argued in favour of the arbitral tribunal consisting of three arbitrators that it brings together in the tribunal different experts and qualifications relative to the subject matter, which might enrich the hearing of the case, as well as the discussion of the arbitrators before rendering the arbitral award. However, as David holds, this might not be considered as an advantage for all cases, as in some cases it can be difficult to reach co-operation between persons of different backgrounds.⁴⁵⁴

On the other hand, the arbitral tribunal consisting of three arbitrators is more expensive than an arbitral tribunal with a sole arbitrator. Moreover, the process until the award is rendered is longer than with a sole arbitrator, because the arbitrators may not necessarily

⁴⁵² David Renč, *op, cit*, p. 225

⁴⁵³ The ICC Rules, Art. 8(4)

⁴⁵⁴ *Ibid*

live in the same cities or even in the same countries, which may cause difficulty in the arrangement of suitable dates for hearings.⁴⁵⁵ Hence, the main advantage of resorting to arbitration, which is quicker adjudication, is lessened in the case where the arbitral tribunal is composed of three arbitrators from different places.

5.3.2 [B] Tribunal Composed of Sole or Three Arbitrator(s) in SAR

The Arbitration Regulation of 1983 explicitly requires that the number of arbitrators must be uneven. It states: "If there are several arbitrators, their number must be uneven."⁴⁵⁶ The regulation safeguards the arbitral tribunal from any differences among the parties which may take place in the case of establishing an arbitral tribunal composing of an even number, since the arbitral award will be rendered by a majority vote. Nevertheless, a question may arise regarding the validity of the arbitration agreement when the parties to the dispute have agreed upon an even number of the arbitrators in their agreement. In practice, the parties usually fulfil the requirement imposed by the Arbitration Regulation of 1983 and its Implementation of 1985. However, if they agree upon an even number, the authority having jurisdiction over the dispute will require the parties to the dispute to adjust the arbitration agreement and reappoint an uneven number of arbitrators before the authority approves the arbitration agreement. It was stated in the award of the Commercial Circuits of the Board of Grievances (*Al-dairah Altejareah*) that the two arbitrators should appoint a deciding arbitrator, just to bring the procedure of the arbitration into conformity with the procedural rules of the Arbitration Regulation⁴⁵⁷. One of the senior judges of the Commercial Circuits of the Board of the Grievances pointed out that any nullity of the arbitral process would invalidate the whole process of the arbitration. If the authority

⁴⁵⁵ *Ibid*, p. 225

⁴⁵⁶ Arbitration Regulation of 1983, Art. 4

⁴⁵⁷ Arbitral Award No. 39/T/4 on 1416 A.H (1996)

originally having the jurisdiction over the dispute, the Commercial Circuits of the Board of Grievances, recognised the arbitral award, the Supervision Committee of the Board of Grievances (*Haeat Altadqeq*) would appeal the award and return the case to the Commercial Circuits of the Board of Grievances to consider the rules on procedure.⁴⁵⁸

It seems from reviewing the provision concerning the number of arbitrators in the Arbitration Regulation of 1983 that the number of the arbitrators can be determined according to the complexity of the case and the sum involved in the case. In some cases, a sole arbitrator is more suitable for the case because of its circumstances. In practice, there are certain cases which have been decided by a sole arbitrator, such as *Mr. S.A.A (Sudanese natural person) v. A. Co. Ltd (Insurance Company)*⁴⁵⁹ and *M. Co. for Con. (Construction company) v. S. Ins. C & Comm. Co. Ltd (Insurance company)*.⁴⁶⁰

However, in some cases an arbitral tribunal consisting of three arbitrators is preferable because of the complexity of the case and also of the large sums involved in the dispute, as in the cases of *A. Co (Construction company) v. Sh. J. Co. for Ins. (Insurance company)*⁴⁶¹ and *R. R. Co. (Subcontracting company) v. A.C.C.Co. for Con. Ltd (South Korean Construction company)*⁴⁶². Therefore, the Regulation prefers to be flexible regarding the number of arbitrators and not to impose either one or three arbitrators. Such an imposition is considered impractical and inappropriate since parties need to know the details of the case before choosing the arbitrators, their number and qualifications.

⁴⁵⁸ Fahad Al Hugbani, "The General and Modern Rules of the Saudi Commercial Arbitration", *The Fourth Conference of the Arabic Arbitration Union*, Sana'a, 14-15 September 2002. pp.9-10

⁴⁵⁹ The Arbitral Award issued on 16/09/1406 A.H (1986 A.D)

⁴⁶⁰ The arbitral Award No. 8/1408, dated 29/08/1408 A. H (1988 A.D)

⁴⁶¹ The arbitral Award No. 5/1407, dated 11/04/1410 A.H (1990 A.D)

⁴⁶² The arbitral Award No.4/1408, dated 13/08/1408 A.H. (1988 A.D)

5.4 [A] Qualifications of Arbitrators

It has been said that any natural person can act as an arbitrator. The only general rule is that the arbitrator must have the legal capacity to carry out his responsibility. Some legal systems require that the arbitrator must be a man and others require that he or she must be of a certain religion, while other laws require that the arbitrator must be a lawyer and also must be a citizen, but all these requirements are exceptional and the general rule is that any natural person can be an arbitrator

However, arbitral rules differ in the requirements they impose regarding the qualifications, physical and intellectual, of a person who acts as an arbitrator. Most arbitral rules, institutional or domestic, are similar in respect of the essential qualifications, such as that the arbitrator must possess legal capacity, awareness and experience of matter of the dispute, and independence and impartiality. However, other national laws, such as those of Spain and Portugal and some Latin American countries, say that the arbitrator should have, on top of the above mentioned qualifications, experience in law or be a qualified lawyer. Generally, lawyers, or at least legally trained persons, are the most appropriate arbitrators in international commercial disputes, for the reason that the arbitral awards are usually required to set out the reasoning of the tribunal and lawyers are well qualified to do this. Judges too, who are also legally qualified, must determine the validity and enforceability of awards if challenged; and difficult questions of jurisdiction, applicable law and statutory interpretation often arise.⁴⁶³

It is also the case that the field of international commercial arbitration is dominated by lawyers and, accordingly, it is more difficult for a non-lawyer or non-legally qualified person to establish him or herself as an experienced arbitrator in international arbitration.

⁴⁶³ Wendy Miles, "Practical Issues for Appointment of Arbitrators (Lawyer vs Non-Lawyer and Sole Arbitrator vs Panel of Three "or More").", *Journal of International Arbitration*, Vol. 20, No. 3, 2003, pp. 219-232

Respected arbitrators usually begin their careers as arbitration counsel or judges in their own jurisdictions. The former gain experience representing parties and move on to act as arbitrators. This 'career path' leads to the situation whereby most experienced and respected international arbitrators are, or have been at some stage, lawyers.⁴⁶⁴

A more specific restriction is imposed by the Iranian law where "a list of candidates for the function of Arbitrator", is provided and the arbitrator(s) must be chosen from among those listed.⁴⁶⁵ This approach can be problematic, in the case where there is a mismatch between the specialities of the arbitrators on the list and the area of the subject-matter of the dispute. However, this approach can be carried out successfully with the collaboration of the authority responsible for the task of choosing the list, to take into consideration the qualifications of the arbitrators in terms of covering all the relevant areas of law, though this can sometimes be a difficult task.

Like the national laws, the arbitral institutions set up minimal qualifications as to who may be an arbitrator. Thus, those used in the commodity and shipping trades and the insurance and reinsurance industries require that the arbitrator must possess qualification and experience in the subject matter of the dispute or be a member of its panel of arbitrators. For instance, the GAFTA Rules state that the arbitrator must be "a qualified Arbitrator Member of the Grain and Feed Trade Association".⁴⁶⁶ Other legal systems have restricted the requirement more precisely providing, for instance, that the arbitrator or the umpire arbitrator must be "commercial men", "members of the same association" in the FOSFA Arbitration and Appeal Rules.⁴⁶⁷ The Canadian Superior Court of Quebec ruled that arbitrators cannot be criticized for expressing themselves as commercial men and not as lawyers. Where the agreement between the parties does not

⁴⁶⁴ *Ibid*

⁴⁶⁵ David, Reně, *op, cit*, p. 250

⁴⁶⁶ Redfern and Hunter, *op, cit*, p. 204; GAFTA Arbitration Rules of 1997, Art. 125

⁴⁶⁷ The FOSFA Arbitration and Appeal Rules, Art. 1 (c), reads "At any time of their appointment arbitrators and umpire shall be members of the Arbitration and Appeal Panel of the Fedration"

specify the form of the award, that form is governed by article 31(2) of the Model Law.⁴⁶⁸ This criterion, however, may cause a grievance against the arbitral proceeding and the arbitral award, since commercial men may not be experts on the legal aspect of any case that might occur. Therefore, it can be argued that if the arbitral proceeding is determined by commercial men, the arbitral tribunal will neglect the legal side of the case, even though arbitration is a legal method of settling the disputes. Moreover, one might argue that it is not possible for the parties to predict who would be appropriate persons to be arbitrators before the dispute has arisen. Therefore, including in the arbitral agreement any phrase in advance, before the dispute has arisen, which specifies the qualifications the arbitrator must possess, would jeopardise the proceedings of the arbitral tribunal and the award. According to this view, the appointment of 'commercial men' can only be practical if their qualifications are suitable to the details of the case. By contrast, it can be argued that since the idea of arbitration is a flexible method of resolving disputes, in practice there is no reason not to incorporate the provision that the arbitrators can be commercial men into an agreement, on the ground that the arbitration is not intended to be a mirror image of the proceedings of the national court.

A sole arbitrator, or in the case of disputes involving three arbitrators, at least one of the arbitrators, should be a lawyer and the other arbitrators can be specialists in any area pertaining to the subject matter of the dispute. There is no necessity for all the arbitrators to be lawyers unless the dispute particularly involves issues of law. In disputes involving matters of a technical nature, it may be more appropriate to appoint someone expert in the particular technical matters, and have a lawyer as the president of the arbitral tribunal. A problem may arise in situations where the arbitral tribunal is composed of two lawyers acting against one technical expert. This might cause bias among the arbitrators in the discussion upon the subject matter of the dispute, and an unjust award, as the party who nominated the lawyer will surely win the cases since the

⁴⁶⁸ *Rapports Judiciaires de Quebec*, 1987, 1346

president of the arbitral tribunal is a lawyer. Therefore, it is highly recommended that in the case of a dispute involving matters of a technical nature, the two arbitrators should possess the same qualification if the umpire is a lawyer. On the contrary, whatever the parties intend, whether to restrict the qualification to lawyers or commercial men, the effect in English law, however unwise, is to exclude practising members of the legal professions from selection as arbitrators.

The Model Law drafters do not specify any professional qualifications that should be possessed by the arbitrators, such as legal capacity, experience and status. According to the Model Law, any person can act as an arbitrator unless national law of one or the other party prohibits him. Therefore, the Model Law leaves the national law of each country to lay down suitable conditions as to the qualifications which the arbitrator should possess.

5.4 [B] Qualification of the Arbitrator under SAR

In Saudi Arabia, the *Sharia* requires that the arbitrator should possess the same qualification as a judge.⁴⁶⁹ A judge, according to *Sharia*, must be of age, of sound mind, male, Muslim, fair, free not a slave, and knowledgeable in *Sharia* law.⁴⁷⁰ However, other Islamic scholars are of the opinion that the arbitrator need not have the same qualifications as a judge. Among them are some of the *Shafi* and *Hanbali* Schools. Ibn Jozeah said, "If two parties make a man as an arbitrator between them, they are bound to this arbitration".⁴⁷¹ Ibn Jozeah did not put conditions on the arbitrator. In fact he only

⁴⁶⁹ Among those Islamic schools of jurisprudence that have accepted the fact that an arbitrator should possess all the qualifications required of a judge, are the *Maliki* and Twelfth *Shiite* schools. See Saleh Alhassan, *The Legal Rules of Arbitration*, Al Narjiss Press, 1996, p.47(in Arabic) ; also see S. H Amin, *Commercial Arbitration in Islamic and Iranian Law*, Billing Sons Ltd, Worcester, 1948, pp. 80-84.

⁴⁷⁰ Saleh, Samir, *Commercial Arbitration in the Arab Middle East*, Graham & Trotman, London, 1984, pp. 36-38

⁴⁷¹ Ibn Jozeah, *Code of Legal Rules*, Dar Al Alem Umalleein, 1994, p. 325 (in Arabic)

referred to 'a man', which explicitly indicates that the arbitrator does not need to be qualified as a judge in order to have his arbitration accepted. This would appear to be proof that it is enough for the arbitrator to have knowledge of the subject of the dispute in order to settle it correctly.

It seems that the latter opinion is the most appropriate, because it ties the arbitrator only to having knowledge of the subject of the dispute. The modern frameworks of arbitration apply this approach, and many arbitrators are chosen because they have special or technical knowledge relating to the dispute in question.⁴⁷² It is the custom in some disputes for an expert arbitrator to look at the matter without the assistance of witnesses or lawyers to help decide the case. Such disputes usually concern arguments over quality. For example, an arbitrator may be asked to decide whether a consignment of coffee beans is of equal, lesser or greater quality than an approved sample.⁴⁷³

In addition, the Arbitration Regulation of 1983 and its Implementation of 1985 lay down certain specific qualifications which arbitrators must fulfil before the parties appoint them. Thus, the Regulation states: 'The arbitrator must be selected from amongst experts and must be of good conduct and of full legal capacity'.⁴⁷⁴ This Article provides the necessity of the arbitrator having experience, the rationale being that the selection of such an experienced person would smooth the progress of the decision on the subject of the dispute. If a dispute were referred to an inexperienced arbitrator, an expert person would be needed to study the case and submit a report about the dispute, which would delay the decision of the case.⁴⁷⁵ Depending on the subject of

⁴⁷² Saudi Arbitration Regulation of 1983, Art. 4 and Art. 14 of Amman Arab Agreement for International And Commercial Arbitration which was signed by a group of Arab countries in Amman City, Jordan on January 11th 1997; also see Hamza Haddad, Amman Agreement, *Journal of Arab Arbitration*, Vol. 1, May 1999, p. 24; also Art. 11 of the law of Arbitration, Centre for Arab Gulf Countries (GCC)

⁴⁷³ Harold Crowter, *Introduction to Arbitration*, 1st Ed, LLP Publishing, London, 1998, pp. 34-35

⁴⁷⁴ Arbitration Regulation of 1983, Art. 4

⁴⁷⁵ Hassan Al Mulla, "The Essential Characteristics of the Arbitration System in Saudi Arabia", *The Conference on the Modern Direction of the Arbitration in the Arab Statutes*, Damascus, Syria, 28-30 August 2001, p. 3 (in Arabic)

the dispute, the experience of the arbitrator could be in the field of *Sharia*, engineering, accounting or commerce. Alhugbani argued that the term “expert” in the context of Article 4 seems to be vague, since it is not made clear in the regulation whether the arbitrator should be expert in the area of arbitration or in the subject-matter of the dispute.⁴⁷⁶

A controversy may arise as to which qualifications should be fulfilled, the qualifications specified by the Arbitration Regulation or by the *Sharia* Law. Some commentators on this point have argued that there is no need to impose the qualification of the *Sharia* Law, since the Regulations have laid down the qualification necessary; also, the parties usually appoint arbitrators is whom they have confidence⁴⁷⁷. However, the qualifications specified in the *Sharia* Law do not conflict with those imposed by the Arbitration Regulation of 1983 and its Implementations of 1985. By reviewing Article 12 of the Regulation it can be said that the Arbitration Regulation requires the same qualification as the *Sharia* Law, that the arbitrator should possess the same qualification as the judge, as it states:

“The arbitrator shall be stopped for the same reasons of estoppels of the Magistrate”⁴⁷⁸

In practice, when it comes to ratifying the arbitral award, the competent authority such as the Board of Grievances will refuse to do so if the arbitral award is rendered by an arbitrator not qualified as a judge.⁴⁷⁹ Yet, this practice contradicts the main advantage of arbitration, especially in comparison with the adjudication system, that in arbitration parties to the dispute are free to determine the qualifications that arbitrators should

⁴⁷⁶ Interview on the 15 Feb 2004 with Dr. Fahad Alhugbani, Senior Judge in The Board of Grievances also Member of the Saudi Arbitration Team.

⁴⁷⁷ M. J. Nader, *Conciliation and Arbitration in Saudi Arabia Under the Chamber of Commerce and Industry*, Jeddah, The Kingdom of Saudi Arabia, Sahar Printing Press, Undated, pp. 12-13

⁴⁷⁸ Arbitration Regulation of 1983, Art. 12

⁴⁷⁹ Hushan, Mohammed, “The Arab Gulf Countries”, *A Paper Presented by the Euro-Arab Arbitration Conference Held in Port EL Kantaoui, Tunisia, 24-27 September 1985*, Lloyd’s of London Press Ltd, London, 1987, p. 23

possess, since parties know the nature of the dispute better, which might be far from the speciality of the court judges. Surely, the appointment of an arbitrator, in terms of qualification should suit the nature of the dispute, which would result in the satisfaction of the parties as well as enforceability of the award.

A compromise approach is provided by Article 3 of the Implementation Rules, which provides that if the arbitral tribunal consists of three arbitrators, the presiding arbitrator must be aware of the *Sharia* and the commercial regulation of Saudi Arabia. That is to say, in the constitution of the arbitral tribunal, the presiding arbitrator should represent the side of the *Sharia* and legal regulations in Saudi applicable to the subject matter of the case, whereas the other arbitrators will represent the technical side of the subject matter of the case. This is in the interest of the speed of the proceedings, as the arbitral award would be subject to challenge if it contradicted the *Sharia* and the regulation of Saudi Arabia.⁴⁸⁰

The question which may arise is whether the presiding arbitrator should have formal qualifications in of *Sharia* and the commercial law of Saudi Arabia. In practice it seems that the presiding arbitrator needs to have experience in *Sharia* and commercial regulations and the custom of Saudi, rather than to have graduated from the college of *Sharia*. The wording of Article 3 only indicates that the arbitrator should be experienced in the *Sharia* and commercial regulation, which is different from the requirement for hiring a judge, who must have graduated from a college of the *Sharia* or the equivalent. Therefore, according to the above, it is possible to argue that the arbitrator should not be treated as a judge, even though it is stated in Article 10 of the Regulation that arbitrators may be dismissed on the same ground as judges. The Saudi legislature should reconsider the wording of the regulation and make a distinction between judges, who must have graduated from the *Sharia* college and arbitrators, who should have

⁴⁸⁰ The Implementation Rules of 1985, Art. 3

experience of *Sharia* law, but could be drawn from other disciplines such as engineering, medicine, etc.

A further ground for criticism of Article 3 of the Implementation is that the article specifies only the need for the arbitrator to have experience of commercial rather than other regulations, yet the arbitration regulation and its implementation are applicable in most sorts of dispute. Therefore, it would be preferable not to specify the sphere of experience and awareness of the arbitrator in a fixed regulation; rather, the parties to the dispute should have a role in determining what experience is needed of the arbitrator. For instance, an arbitrator whose experience has been solely in commercial arbitration may not be the best person to appoint in a labour dispute. On the other hand, the alternative is to put into practice Article 5 of the Implementation Rules, which has not yet been applied, providing that:

...a list containing the names of arbitrators shall be prepared by agreement between the Minister of Justice, the Minister of Commerce, and the Chairman of the Grievance Board. The Courts, Judicial Committees and Chambers of Commerce and Industry shall be informed of such lists and the respective industry shall be informed of such lists and the respective parties may select, arbitrators from these lists or from others.⁴⁸¹

Unfortunately, the Saudi authority has so far failed to activate this article, which might be very effective in speeding the appointment of the arbitrator. A particular advantage of the provision is that different authorities would cooperate in making the list. If a single authority was appointed to make the list this would tend to restrict the choice. For example, if the list was compiled by the competent court it would no doubt be dominated by judges, but in having the list drawn up by different authorities, different characteristics would be more likely to be encompassed. Furthermore, this approach is

⁴⁸¹ The Implementation Rules of 1985, Art. 5

different from that taken by the Iranian law,⁴⁸² for the reason that the Saudi legislature has been more careful in the wording of this article, since the parties “may select” from the list rather than that the arbitrator “must be selected” from the list. Also, arbitrators may be selected “from others”. This shows the flexibility of the article, because the list would not necessarily be suitable for the subject-matter of the dispute. In view of the obvious advantages of the Article 5 provision, the Saudi authority is advised to set this article in motion.⁴⁸³

5.4.1 [A] Legal Capacity

Most national laws require that the arbitrator should exercise full legal capacity in order to conduct the arbitral process. Thus, French law says that

Mission of arbitrator may be entrusted only to a natural person, who must have full capacity to exercise his civil rights⁴⁸⁴

Similarly the Dutch Arbitration Act provides that “Any natural person having legal capacity may be appointed as arbitrator”⁴⁸⁵

The arbitral process is conducted by a natural person only. A purely legal person cannot itself be an arbitrator in an arbitral tribunal, although it can organise the arbitral process, since the director or the chairman of this legal person represents it before the court and the third party, and this third person may change at any time. Consequently, in this case, it is difficult to carry out the arbitral process. Some national arbitration laws, such as the French and the Dutch laws, expressly provide that the function of arbitrator will be given to a natural person only.⁴⁸⁶

⁴⁸² discussed *Supra*, that the arbitrator must be selected from the list of approved arbitrators.

⁴⁸³ This view received strong support from Dr. Fahad Alhugbani, Senior Judge at the Board of Grievances and member of the Saudi Arbitration team, in an interview conducted on the 15th of February 2004

⁴⁸⁴ New French Code of Civil Procedure, Art. 1451

⁴⁸⁵ The Netherlands Arbitration Act, Art. 1023

⁴⁸⁶ The French Code of Civil Procedure of 1980, Art. 1451; also the Dutch Arbitration Act of 1986, Art. 1023

According to the various laws, the arbitrator should not be an incapacitated person, such as someone insane, a minor, a prodigal or an imbecile, because the relationship between the arbitrators and the parties to the dispute is mostly, according to one theory, a contractual relationship, which entails rights and obligations.⁴⁸⁷

If the incapacity of one of the arbitrators appears to one of the parties before the nomination takes place or after the nomination, the competent authority having jurisdiction over the dispute may prevent the execution of the appointment or challenge or replace the incapacitated person.⁴⁸⁸

The Model Law is silent regarding the legal capacity of the arbitrator, whereas most arbitration rules expressly make reference to the legal capacity of the arbitrator. It could be considered as one of the weaknesses of the provision that any person can act as an arbitrator, regardless of the capacity of that person, since there is the possibility of referring the dispute to an incapacitated person. In such cases, there would be an effect on the whole arbitral process because one of the arbitrators would lack credibility, which is one of the main characteristics of arbitration. However, it could be argued that, just because there is no provision in the Model Law expressing the legal capacity of the arbitrators, it does not mean that an incapacitated person can act as an arbitrator.

5.4.1 [B] Legal capacity of the Arbitrator in SAR

According to the Saudi Law, in order to have effective appointment the arbitrator should have full legal capacity. The same rule as applies regarding the legal capacity of the parties to the dispute, explained in the previous chapter, applies to the arbitrators.

The arbitrator would have full legal capacity if he has reached the age at which he is legally responsible for himself and his money with full freedom, sound of mind, and not

⁴⁸⁷ Murray L. Smith, "Contractual Obligation Owed by and to Arbitrators: Model Terms of Appointment" *Arbitration International*, Vol. 8, No. 1, 1992, pp. 17-40

⁴⁸⁸ Mauro Rubino-Sammartano, *International Arbitration Law*, Kluwer Law & Taxation Publisher, Netherlands, 1990, p. 205

in quarantine. A person without full legal capacity cannot be appointed as an arbitrator. A Minor cannot be an arbitrator, nor can a bankrupted person, unless an award has been issued by the court to clear his name, as stated in Article 4 of the regulation and Article 4 of the implementation rules. The reason for that is that people who cannot hold responsibility over themselves and their money do not have the ability to decide upon differences between businessmen. The same thing would apply to the insane, prodigals, imbeciles, infants, intoxicated persons and those below the age of reason. The question might arise, as to the effect of the legal capacity of one of the arbitrators disappearing during the execution of the arbitral process. The Saudi regulation is silent regarding this issue, as are most arbitral rules.

5.4.2 [A] Ethics of Arbitrators

An arbitral tribunal must not only be fair-minded, but also be perceived by the parties as such. When speaking about the standards that arbitrators must maintain, the most commonly used terms are “independence” and “impartiality.”⁴⁸⁹ It is not easy to give a direct definition of the independence and impartiality of the arbitrator, because to prove the impartiality of the arbitrator is difficult, whereas the opposite is very straightforward, for the reasons that the deviation of the arbitrator from impartiality is very noticeable and only occurs in unusual circumstances.⁴⁹⁰

Arbitrators must remain impartial and independent during the arbitral process until the arbitral award is rendered. Moreover, none of the arbitrators, including those appointed by the parties, should be predisposed towards any of the parties and, on the contrary, all the arbitrators should be in a position to carry out their functions impartially and without bias.

⁴⁸⁹ UNCITRAL Model Law of 1985, Art. 11(5)

⁴⁹⁰ Dr. Abdul Hamid El-Ahdab, “The Arbitrator”, *Encyclopedia of Arbitration (International Arbitration)*, Vol. II, Dar Al-Maaref, 1998, p. 217 (in Arabic)

Independence differs from impartiality, because independence ‘involves primarily a state of mind which presents special difficulties of measurement’.⁴⁹¹ In some cases confusion might take place between independence and impartiality. Impartiality is sometimes said to concern the relationship between the arbitrator and the subject-matter of the dispute, whereas independence concerns the relationship between the arbitrator and the parties. However, there is, as yet, no internationally-accepted classification of “independence,” and the term independence may sometimes also be used in a broader sense to refer to an arbitrator’s independence of mind. Nevertheless, as Jean Robert noted in 1975, the term independence is intended to indicate the absence of “close relations” between an arbitrator and a party. As Stephen Bond, a former Secretary General of the ICC Court, recently described, the fundamental characteristic of independence is the absence of a “close, substantial, recent and proven relationship” between a party and a prospective arbitrator.⁴⁹²

However, impartiality under some circumstances may be defined from the angle of nationality, meaning that the presiding arbitrator must not be of the same nationality as either of the parties to the dispute.⁴⁹³ We shall not dwell on the distinction between the notions of independence and impartiality; the concepts appear clear, although they are difficult to distinguish from closely related concepts such as neutrality and lack of bias.⁴⁹⁴ Thus, one distinguished commentator held the view that neutrality is the appropriate term to refer to national neutrality, where the sole or the presiding arbitrator should be of a different nationality from the parties to the dispute.⁴⁹⁵ Although under US law a non-neutral arbitrator is permitted, in *Metropolitan Property v JC Penney cas Ins Co*. the court stated that even where an arbitrator is not considered to be neutral,

⁴⁹¹ Redfern and Hunter, *op. cit*, p. 212

⁴⁹² Y. Derains and E. Schwartz, “Chapter 4 - The Arbitral Tribunal (Articles 7-12)”, *A Guide to the ICC Rules of Arbitration*, Kluwer, 1998, pp. 107-196

⁴⁹³ Abdul Hamid El-Ahdab, *op. cit*, p. 218

⁴⁹⁴ Guillermo Aguilar Alvarez, “The Challenge of the Arbitrator”, *Arbitration International*, Kluwer, vol. 6, No. 3, 1990, pp. 203-225

⁴⁹⁵ Redfern and Hunter, *Op, Cit*, p. 212

such arbitrators are not “excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest and good faith manner”.⁴⁹⁶

Under some circumstances the parties may waive the right of the impartiality of the arbitrator in the case where the presiding arbitrator is of the same nationality as one of the parties to the dispute, but parties do not under any circumstances agree to waive their right to impose the independence of the arbitrator and will not continue the arbitration when the arbitrator has a relationship with one of the parties.⁴⁹⁷

An arbitrator could be impartial in the sense of not being of the same nationality and religion as one of the parties, yet not independent; on the contrary, he could be partial in representing the same nationality and culture or civilisation as one of the parties, but however still carry out his responsibility with full independence.

It is often argued that when disputes arise between a foreign company and a company from one of the developing countries, and this company appoints its arbitrator from among their employees or experts or judges, there is a question in respect of the impartiality of these arbitrators. Nevertheless, the arbitration court of the International Chamber of Commerce which requested a declaration of the impartiality and independence of the arbitrators recognises these arbitrators notwithstanding the legal connection with the party. Therefore, it could be said that impartiality simply means nationality is not influential in the result.⁴⁹⁸

The UNCITRAL Model Law has realized that the place where the arbitrator holds its nationality does not indicate the impartiality of the arbitrator and is not an essential element of that impartiality. It states:

⁴⁹⁶ 780 F Supp 882, 892 (D Conn 1991) found on M. A. Marinelli, *Ensuring the Neutrality of Arbitrators in International Arbitrations*, 2001. Found on <http://www.hklaw.com/publications/otherpublication.asp?article=1141&print=yes>. (Accessed 13/08/2003)

⁴⁹⁷ Abdul Hamid El-Ahdab, *op. cit.*, p. 218

⁴⁹⁸ *Ibid*, pp. 218-219

No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.⁴⁹⁹

However, nationality is considered as an effective measure of the impartiality of the arbitrators. For instance, if a dispute occurs between an English company and a German company, the third arbitrator or the umpire should be from a neutral nationality or one other than the nationality of the two companies. According to the custom and practice of international arbitration, the arbitrator should be from a neutral nationality, different from the nationalities of all the parties to the dispute, and UNCITRAL has adopted this stance when it states:

The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.⁵⁰⁰

The UNCITRAL Model Law seeks to achieve this by imposing the requirement in Article 11 (5) that every arbitrator must be “independent,” although the article does not explain what is meant by “independence,” nor does it, unlike the corresponding provision in many other arbitration rules and laws, explicitly set forth a requirement of impartiality. Because of the Rules' failure to explain what is meant by “independence,” or to mention “impartiality” together with the reference to “independence,” the nature of the requirement now set forth in Article 11(5) has been the subject of confusion and controversy.

The question which still may need to be answered is whether an arbitrator who has declared a previous relationship with one of the parties can still be impartial, regardless

⁴⁹⁹ UNCITRAL Model Law of 1985, Art. 11(1)

⁵⁰⁰ UNCITRAL Model Law of 1985, Art. 11(5)

of nationality. An arbitrator is obliged on appointment to reveal any relationship with the party who appointed him which may affect his impartiality. If the other party accepts the declaration of the arbitrator and does not question his impartiality, then the impartiality of the arbitrator becomes immune. Moreover, when the arbitrator is making a declaration about his relationship with the party, he should also declare all the grounds which may cause his dismissal.

As we have seen, an arbitrator is very like a judge in terms of his authority. Consequently, it is not surprising that the duty of independence imposed by legislation and case law originated from an assimilation of judges and arbitrators. Accordingly, many national laws set forth the same grounds of challenge for both. Indeed, the laws of many countries enable judges and arbitrators to be challenged when certain objective considerations exist (*e.g.*, interest in the case, participation in judging the dispute in a lower court or family and friendship ties which may call their independence and impartiality into question).⁵⁰¹

Therefore, each of the parties has the right to challenge any arbitrator who does not remain impartial and independent. For example, in the case of *Mission Insurance* in the USA, one of the parties challenged the impartiality of the umpire arbitrator because it was discovered that this arbitrator had spent two nights in the hotel room of the female lawyer representing the other party in the arbitration.⁵⁰²

As has been mentioned, the arbitrator should disclose all facts which may cause his disqualification before he accepts the task and he should also disclose any circumstances that arise during the arbitral process which may give rise to any doubts as to his impartiality and independence of the parties to the dispute. However, the parties' selection of the arbitrator is an expression of ties of confidence, which may sometimes arise from previous relationships. For this reason, clearly real impartiality will be

⁵⁰¹ Guiliermo Aguilar Alvarez, *op. cit.*, pp. 203-225

⁵⁰² *Mission Insurance Case*, Wall Street Journal, dated 14/02/1990. p. 1

difficult to guarantee. The arbitrator will often arrive with a predisposition in favour of the position of the party who nominated him. He may be under the impression that his role is to defend that party. This is the heart of the problem.⁵⁰³

5.4.2 [B] Ethics of the Arbitrator in SAR

After revising the Saudi Arbitration Regulations, it appears that the regulation explicitly requires ethical behaviour on the part of the arbitrator, including that he should be impartial and independent during the arbitral process. The Arbitration Regulation of 1983 states: "The arbitrator shall have expertise and be of good conduct and behaviour"⁵⁰⁴

The article does not contain any direct reference to independence and impartiality and in this regard it can be suggested that the legislature should replace the vague terms used in this article with ones that more specifically denote the ethics that the arbitrator should possess, for example, independence and impartiality. This would bring the article into line with other international arbitral rules, such as Articles 11 and 12 of the UNCITRAL Model Law, and so assure potential foreign investors of a similar standard of ethics.

Despite the vague wording of Article 4 of the Arbitration Regulation, it may be understood to encompass impartiality and independence, since Article 4 of the Implementation of 1985 laid down the fundamental principle of the impartiality and independence of the arbitrator. It is explicitly required that in order to maintain the conduct of the arbitrator with a good level of impartiality and independence, he should not have any interest in the dispute or he may be challenged by either of the parties to the dispute.⁵⁰⁵ The article does not specify the type or nature of the interest which the arbitrator could gain from the dispute which would bar him from settling the dispute.

⁵⁰³ Guiliermo Aguilar Alvarez, *op. cit.*, pp. 203-225

⁵⁰⁴ Arbitration Regulation of 1983, Art. 4

⁵⁰⁵ Yahya Al-Salmaan, "The Settlement of Foreign Investment Disputes By Means of Domestic Arbitration in Saudi Arabia", *Arab Law Quarterly*, Vol. 9, No. 3, 1994, p. 228

Hence, 'interest of the arbitrator' can be interpreted as having a general meaning. Therefore, any arbitrator who has a financial interest in the dispute or in relation to either of the parties or has a relationship with one of the parties, such as being a relative or friend, which would affect his impartiality and independence as well as his performance shall be disqualified from acting as an arbitrator under the Saudi arbitration regulation and its implementation. Moreover, Article 12 of the regulation goes further by equating arbitrators with judges, and providing that an arbitrator can be challenged on the same grounds as a judge. Consequently, any person can be disqualified from acting as an arbitrator or a judge in the situation where he has an interest in the dispute for himself, his spouse, his descendants or his ancestry.⁵⁰⁶

It must be noted that the custom in Saudi is that each party to the dispute names his lawyer or a member of his family as an arbitrator. However, the custom requires that the presiding arbitrator in the arbitral tribunal consisting of three arbitrators should be independent from the parties and have no interest in the dispute. Moreover, the authority originally competent presumes that the arbitrators are of good conduct and morals until proved to the contrary, on the ground that the parties to the dispute choose the arbitrator on the basis that they have confidence in him to act as an arbitrator. Article 12 of the regulation sets forth the procedure when the impartiality and independence are disproved. If one of the parties to the dispute has justifiable doubt concerning the impartiality and independence of the arbitrator, the party should challenge that arbitrator before the competent authority having the original jurisdiction within five days from the day on which the reason of challenge occurs.⁵⁰⁷

The provisions contain a number of loop-holes. Appointment of a family member as arbitrator could mean that, in practice, the arbitrator is involved in the dispute. It is unwise to appoint the arbitrator from among the disputant parties. In addition, the

⁵⁰⁶ Abdul Hamid El-Ahdab, *op. cit.*, p. 579

⁵⁰⁷ *Ibid*

appointment of a presiding arbitrator who proves to have greater difference of opinion with one of the arbitrators to the dispute than the other may cause prejudice to the party whose arbitrator is not of a common mind with the presiding arbitrator. It is important that the Saudi legislator should explicitly lay down all requirements and the circumstances which could affect the impartiality and independence of the arbitrator, because that is one of the fundamental requirements provided by most laws and rules governing arbitration.

The Saudi rules put certain other classes of person at the same level as the person who has an interest in the dispute in being disqualified from acting as an arbitrator. These persons are: (1) any person who has been sentenced for a *hud*⁵⁰⁸ crime or a crime of dishonour (2) any person who has been dismissed from a public position following a disciplinary order (3) any person who has been adjudicated as bankrupt, unless reinstated.⁵⁰⁹

5.4.3 [A] Who arbitrates: Question of Nationality

Countries differ regarding the nationality of arbitrator. In some countries, foreigners are not allowed to handle the role of the arbitrator or take any position of dispute settlement in the arbitral tribunal. Thus, Portugal requires that the arbitrator must be a Portuguese national. However, some other countries allow foreigners to act as arbitrators although there are differences in the extent of the privilege accorded in each country.⁵¹⁰ For instance, in some countries, like Iran, the parties to the dispute may appoint foreigners as arbitrators, but if they are unable to agree upon the arbitral tribunal and the competent authority, such as the court, is required to nominate arbitrators, it must appoint persons

⁵⁰⁸ *Hud* is the singular of *hudud*. *Hudud* are the major crimes with penalties specified by the Holy *Quran*, i.e., murder, injury, adultery, drunkenness, theft and robbery.

⁵⁰⁹ Implementation Rules of 1985, Art. 4

⁵¹⁰ David, Renč, *op, cit*, p. 247

who must have their residence within its territorial competence.⁵¹¹ It could be argued that this provision might ensure the awareness by the arbitrator of the customs, economic sphere and commercial regulation of the country of the competent authority. Such an understanding would facilitate a better decision of the arbitral award in the dispute. However, in some other countries it is permitted for foreigners to act as arbitrators without any restriction such as being resident in the country of the authority or having full awareness of the law of the country, because the appointment of the arbitrators is based on the will of the parties to the dispute.

A different attitude is taken by the UNCITRAL Model Law regarding the nationality of the arbitrator, which is intended to promote non-discrimination, and explicitly to criticize some national rules which preclude foreigners from acting as arbitrators even in cases of international arbitration.⁵¹² It takes the view that the nationality of the arbitrator is immaterial and that to focus on it is inappropriate, whereas the qualification, experience and ethics of the arbitrators are the factors that should be depended on.⁵¹³

The Model Law provides:

No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.⁵¹⁴

However, the Model Law drafters not only indicated in the previous article that every person can be arbitrator regardless of his nationality; but the disputing parties are also granted the freedom to choose the nationality of the arbitrator. However, in international commercial arbitration according to the current practice, the sole or the presiding arbitrator is certainly of a different nationality from any of the parties to the dispute.

⁵¹¹ *Ibid*; also see Jahanbakhsh Nouraei, *Commercial Arbitration*, Iran Chamber of Commerce, Industries and Mines (ICCIM), http://www.nourlaw.com/guide_to_iranian_market/Commercial%20Arbitration.html. Accessed on the 18th January of 2006.

⁵¹² Peter Sarcevic, *op, cit*, p. 72

⁵¹³ Redfern and Hunter, *op, cit*, p. 215

⁵¹⁴ UNCITRAL Model Law of 1985, Art. 11(1)

Most international commercial arbitration rules have such a provision.⁵¹⁵ The Model

Law for example provides:

..In the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.⁵¹⁶

The International Court of Justice consists of 15 independent judges, known as "members" of the court. They are elected "from among persons of high moral character" without consideration of nationality, except that no two judges of the same nationality may serve concurrently.⁵¹⁷ No more than one judge of any nationality may serve simultaneously, and judges are in all respects required to act as independent magistrates.

However, the statute of the ICJ verifies that a judge has the right to sit on a case in which his own country is a party. Furthermore, any country that is a party to a case before the court may add a person to sit as judge on that case if there is not already a judge of its nationality on the court. If there are "several parties in the same interest," they may add only one judge to the bench. Such ad hoc judges are chosen by the respective states themselves and may, or may not, be nationals of the states choosing them.⁵¹⁸

This neutrality provision may sometimes result in difficulty, for instance, in cases where the law applicable in the dispute is the law of one of the parties, particularly if the place of the arbitration is the country of the applicable law, and the presiding or sole arbitrator of different nationality, has no experience in the system of law.⁵¹⁹

⁵¹⁵ The ICSID Arbitration Rules, Art. 3, also The ICC Arbitration Rules, Art. 2 (6).

⁵¹⁶ UNCITRAL Model Law of 1985, Art. 11(5)

⁵¹⁷ The Status of the International Court of Justice, Art. 2, 3.

⁵¹⁸ <http://www.nationsencyclopedia.com/United-Nations/The-International-Court-of-Justice-SIGNIFICANCE-OF-NATIONALITY-OF-JUDGES.html>

⁵¹⁹ Redfern and Hunter, *op, cit*, p. 215

However, in the view of the researcher, it is necessary to take into consideration the culture, religion and other background factors in choosing the arbitrator, as these factors may affect the neutrality of the arbitrator from an ideological perspective. The issue of nationality from the cultural and ideological perspective was raised in the case of arbitration before the arbitration court of the ICC between Moroccan and German parties, when the court appointed the third arbitrator from Greece. The Moroccan appealed before the French Court that the Greek nationality is part of the European nationality. The Court denied the appeal and issued a decision that the court can not intervene in the arbitral tribunal's competence if the arbitral procedures are applied in accordance with the rules. It can be noticed here that the French court avoided answering the claim of the Moroccan party that nationality has ideological and cultural meanings.⁵²⁰

5.4.3 [B] Who Arbitrates under SAR: Question of Nationality

From reviewing the Saudi Regulation it seems that the legislature does not restrict the nationality of the arbitrator. However, a special characteristic is required of a foreign arbitrator to undertake the task of settling disputes. The arbitrator must be of Muslim faith, as the Implementation Rules state: "The arbitrator shall be a Saudi national or Muslim expatriate".⁵²¹ This stipulation should not be considered as reflecting fanaticism or obscurantism. The practical reason behind it is that the applicable law in the dispute is often the *Sharia*. The reason this characteristic is only required of foreign arbitrators is that all Saudi citizens are Muslim.

The effect of this provision can be seen in various cases where the arbitral tribunal contained a foreign Muslim arbitrator, such as the case of *Mr. R. M. R. (Saudi natural*

⁵²⁰ Abull-Hamid El-Ahdab, *op. cit.*, p. 221

⁵²¹ Implementation Rules of 1985, Art. 3

person) v. *Comm. S. A. R. Co (Contracting Company) & R. H. Co. for Cont. (Subcontracting Company)* in which one of the members of the arbitral tribunal was a foreign Muslim⁵²², also the case of *S. E. Co. Ltd (Construction Company) v. Mr. F. A. N. (Saudi natural person)* where, too, a foreign Muslim was one of the members of the arbitral tribunal.⁵²³ However, the appointment of a non-Muslim arbitrator would result in rejection of the request for arbitration, as in the case between the *Dutch O CO. v. The University of King Abdullaziz*, where the Supervision Committee issued an award rejecting the request for the arbitration, among the reasons being that one of the arbitrators was not Muslim.⁵²⁴

The question which may arise in the case of an arbitral tribunal consisting of three arbitrators concerns the legality of having all members Muslim foreigners. According to the practice, the sole or the presiding arbitrator must be Saudi, whilst other arbitrators may be Muslim foreigners. This is because Saudi arbitrators tend to have better knowledge of the Muslim *Sharia*, and would certainly have more experience concerning the commercial regulations and customs applied in the Kingdom of Saudi Arabia. In a case before the Appellate Review Committee of the Board of Grievances, the arbitration agreement between two companies stated that the arbitrators should be Saudis or Muslims licensed to work in Saudi Arabia. However, one party refused to obey this requirement and insisted on appointing an arbitrator who had no licence to work in Saudi, even though he was Muslim. Finally, the court issued a decision refusing to ratify the arbitration agreement.⁵²⁵ It would appear from the previous case that the practice of arbitration has gone beyond regulation, to a stage which makes it undesirable for businessmen, especially foreigners, to seek arbitration in Saudi. It would appear that the rule is different in cases where all parties are Muslim, where it could be considered as

⁵²² The Arbitral Award No. 1733/1/K 1411, on the 25/09/1412 A. H (1992 A. D)

⁵²³ The Arbitral Award No. 5/1407, on the 19/09/14707 A. H (1987 A. D)

⁵²⁴ Award of Supervision Committee No. 102/T/1 on 1422 A.H (2002 A.D)

⁵²⁵ Award of the Supervision Committee No. 1112/10 on 1416 A.H(1996 A.D)

national arbitration. According to the best opinion of Islamic Jurisprudence, if the arbitration parties are all Muslims, the arbitrator must also be Muslim.⁵²⁶ The majority of scholars in the various schools of jurisprudence emphasize that the arbitrator should be Muslim if arbitration takes place between Muslims. However, Abassaoud Al *Hanafi*⁵²⁷ has said that the arbitration of a non-Muslim may be allowed between Muslims provided that Islam has been acknowledged in order to accept a decision. This is the philosophy of the *Hanafi* School, which distinguishes the necessary conditions and appointing of an arbitrator.⁵²⁸

The majority of scholars appear to be correct. If arbitration is local, inside an Islamic country and between Muslim parties, the arbitrator must be Muslim.⁵²⁹

As previously mentioned, most Arab and Islamic legislation does not stipulate the necessity of Islam in the arbitrator. Freedom of choice remains and it is left to the disputants to choose and agree on their own arbitrator who must be just and fair.⁵³⁰

So far we have considered to what extent a non-Muslim arbitrator can arbitrate in a dispute between Muslim parties. However, another question which arises is to what extent a non-Muslim arbitrator can arbitrate between non-Muslim parties, when the arbitration is national. Can the parties select an arbitrator with the same background? According to Islamic law, Jews and Christian (*Ahl Al Dhimmah*) are allowed to live in an Islamic country, and Islam preserves their rights; no harm should be done to them, and they should be offered a peaceful life within the Muslim society.⁵³¹ Not only that,

⁵²⁶ Ahmed Al Ghazi, *Arbitration in International Dispute*, Higher Institute for Judicial Authority, Saudi Arabia, 1992, p. 61, see also Esmail Alstl, *Arbitration in Sharia*, 1st Ed, Dar Altawfiq, Egypt, 1986. p. 6

⁵²⁷ Mohammad Mustapha Al Hanafi took the position of a judge in Constantinople. He wrote many books, see Ahmed Al Ghazali, *op. cit.* P. 283.

⁵²⁸ See p. 85, *Supra*.

⁵²⁹ S.H Amin said that the number of principles in legislation are proof against non-Muslim arbitration, *op. cit.* P. 78.

⁵³⁰ For example – the law of Arbitration in Egyptian Commercial and Civil Articles, 40.27 of 1994, The law of Jordanian Arbitration, N° 18 of 1953, The Law of Arbitration in the Tunisian Republic, No. 130 of 1959 etc.

⁵³¹ Bat Ye & Djimmitude, "Jews and Christians under Islam", *a Monthly Jewish Review*, Vol. 43, Midstream, 1997, p. 9; also the Islamic Declaration of Human Rights in Art. III(c) provides that ' No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language'

the Compact of Al-Madinah, established by the Prophet, gave a full picture of the Islamic democracy as it allowed for the non-Muslim minorities to be governed by their own religious laws.⁵³² The Prophet Mohammed (Peace be Upon Him) said about the situation of non-Muslim citizens in the Islamic state that “*They have the same rights as we do and the same obligations as we have*”⁵³³. The Prophet also warned against any infringement of the rights of non-Muslims when he stated, “*Beware that I myself shall be the opponent, on the Day of Judgement, of any one who is unjust to a covenanted person, or burdens him with something he cannot bear, or takes something from him, or makes him suffer a loss without his valid consent*”.⁵³⁴ The question which might arise is whether this is still the case. From these two statements we can indicate that the Prophet (Pbuh) emphasized the duties and obligations of Muslims toward *Dhimmies*, which is the opposite of the case nowadays. The successors of the Prophet, the caliphs, safeguarded these rights and sanctities of non-Muslim citizens, and the jurists of Islam, in spite of the variation of their opinions regarding many other matters, are unanimous in emphasizing these rights and sanctity.

It is claimed that *Ahl Al Dhimmah* may choose an arbitrator whose judgement should be executed.⁵³⁵ This opinion has been adopted by the *Hanafi* School.⁵³⁶ Although the people and government in Saudi Arabia follow the *Hanbali* School, it could be argued

⁵³² The Compact of Madinah established a number of important political principles that, put together, formed the political constitution of the first Islamic state, and defined the political rights and duties of the members of the newly established political community, Muslims and non-Muslims alike, and drew up the political structure of the nascent society. See Louay Safi, *Overcoming the Religious-Secular Divide: Islam Contribution to Civilization*, <http://lsinsight.org/articles/Current/SecularReligiousDivide.htm>, accessed on the 4th of January of 2006, also see Imad-ad-Dean Ahmed, *Reconciling Secular Government with Islamic Law*, A paper for the 6th Annual Conference of the Centre for the Study of Islam and Democracy: Democracy and Development-Challenge for the Islamic World, April 22-23 2005, Washington DC. Also see Editorial, *American Journal of Islamic Social Sciences*, Vol. 19, No. 3, Summer 2000, pp. i-iii.

⁵³³ Al Kasani, *Badai Alsanai*, Vol. VII, Al Istiqamah Press, Cairo, 1956, p. 100; also see Al Shawkani, *Nayl Al Awtar*, Vol. VII, p. 13

⁵³⁴ Abu Dawud, *Sunnan*, Vol. II, p. 265; Further the Prophet emphasised this in another Hadith where he stated “Whoever annoys a Dhimmi, I shall be a litigant against him on the Day of Judgement” Al Suyuti, *J. Al Jami Al Saghir*, 4th Ed, Vol. II, Cairo, Mustafa Al Babi Al Halabi, 1954, p. 473.

⁵³⁵ Abdul Hamid El-Ahdab, *op, cit*, p. 35; also see Said Ramadan, *Islamic Law, its Scope and Equity*, Malaysia, 2nd Ed, 1970, 152

⁵³⁶ Masad Al Borgani, *Arbitration in Sharia*, 31st Ed, Dar Aleaman press, Almadinah, 1994, p. 154 (in Arabic)

that a non-Muslim can be an arbitrator between non-Muslim parties in Saudi on the basis of the *Hanafi* School's opinion, since the Saudi legislation is reluctant to allow non-Muslims to arbitrate between Saudis; further, on the basis that the *Hanbali* School does not require an arbitrator to have the same qualification as a judge.⁵³⁷ However, the opinion of the *Hanafi* School is countered by other schools of Islamic jurisprudence, such as the *Shafi*⁵³⁸ School and the *Twelfth Shiite* School⁵³⁹. The opinion of the *Hanafi* School, that *Ahl Al Dhimmah* should be allowed to conduct arbitration among themselves and to choose any arbitrator they see fit for their case, is more appropriate, since the arbitration laws of most Islamic countries provide for liberty to choose an arbitrator.

Also, the other issue that shows controversy among the scholars of Islamic jurisprudence is when the arbitrator is non-Muslim and the parties to arbitration are Muslim and non-Muslim. There are many points to be considered around this issue. Some scholars of the *Hanafi* School claim that if a Muslim and a *Dhimme* person decide between themselves on a *Dhimme* arbitrator, this arbitration is applicable only to the *Dhimme* person and not to the Muslim.⁵⁴⁰ In reality, on looking more deeply into this issue, it does not appear to be feasible. For example, the *Hanafi* School allow a non-Muslim to arbitrate in cases where a dispute occurs between a Muslim and non-Muslim. They ascertain the correctness of a judgement by its results. However, this attribution is not accepted because sound judgement depends on appointing an appropriate arbitrator. If the arbitrator appointed is correct, in so far as qualifications are concerned, the arbitration will then be correct, regardless whether the arbitrator is Muslim or non-Muslim. For this reason, the opinion that a non-Muslim arbitrator's decision does not apply to Muslim parties appears to be weak.

⁵³⁷ See *Supra*, Qualification of the Arbitrator

⁵³⁸ Ahmed Al Ghazali, *Arbitration in Jurisprudence*, University of Imam Mohammed Bin Saud, Riyadh, 1996, p. 235. (in Arabic)

⁵³⁹ S. H. Amin, *op. cit.*, p. 75

⁵⁴⁰ Ibrahim Atta, *op. cit.* P. 150, Qahtan Al-Dawri, *p. cit.* P. 197.

Some *Hanafi* jurists would add that a non-Muslim who satisfies the requirements necessary to be a witness may also be an arbitrator.⁵⁴¹

The other opinion is that a non-Muslim is allowed to arbitrate between the Muslim and the non-Muslim.

Professor, M. Abu-Elnein has said:

‘Modern trends in Islamic law expressed by authorities on the subject would not require that an arbitrator be Muslim. Some authorities on the subject reached this conclusion by using the analogy of the case of arbitration between a husband and wife. If the wife is non-Muslim, the Quran states that the Hakam (arbitrator) appointed by the wife- whether a conciliator or arbitrator – be from her family who is supposed to be non-Muslim. Depending on this clear wording of the verse, they have concluded that non-Muslim may be appointed as arbitrators.’⁵⁴²

Before agreeing or disagreeing with the above statement, it is important to bear in mind what other ancient scholars have said on the matter of Islamic Jurisprudence, particularly on the subject of two arbitrators between a married couple as stated in the *Quranic* verse. This issue has brought about two schools of thought from the scholars.

1. The two arbitrators must belong to the family of the married couple: The *Maliki*,⁵⁴³ some of the *Hanbali*,⁵⁴⁴ and some of the Twelfth *Shiit* Schools⁵⁴⁵ have adopted this opinion.

2. The two arbitrators, as mentioned in the *Quranic* verse, need not belong to the family of the married couple, but it is better if they do: This opinion has been adopted by the *Hanbali* School⁵⁴⁶ the *Shafii* School and the majority of the Twelfth *Shiite* School.⁵⁴⁷

⁵⁴¹ M.I.M Abu-Elnein, “Liberal Trends in Islamic Law on the Peaceful Settlement of Disputes”, *paper presented in a seminar on “The Practice of International Arbitration*, Oxford, 13th July, 1999, p. 22. It is worth mentioning that the Hanafi School distinguishes between appointing and undertaking directly the position of judge. They proclaimed the capacity of the Non-Muslim to be judge, but said that his judging is not acceptable, see Ismeal Al Astal, *op. cit.*, p. 89.

⁵⁴² M.I.M Abu-Elnein, Oxford, *op. cit.* P. 22.

⁵⁴³ Qahtan Al-Dowri, *op. cit.* P. 414.

⁵⁴⁴ Ibn Kodama, *op. cit.* Vol. 8, P. 166.

⁵⁴⁵ Zainddin Al Ameli, *Al roudah Al Bhiba*, Vol. 2, Dar Al Ketab Al Arabi, Egypt, 1378, P. 133.

⁵⁴⁶ Ibn Kodama, *op. cit.* Vol. 8, P. 170.

⁵⁴⁷ Qahtan Al-Dowri, *op. cit.* P. 420.

The second opinion is considered most fitting since the two arbitrators need not necessarily belong to the family of the married couple because Islamic jurisprudence, in general, aims at achieving reconciliation between husband and wife and the preservation of family unity. For this reason, the more experienced and fair the arbitrators are, the more likely it is that family unity will be preserved. Hence, if no conciliator exists within the families of the couple, it is better to find other arbitrators who will seek to benefit the husband and wife.

It is possible to dispute the views of M. Abu-Elnein on the *Quranic* verse (given above), which he claims as proof of two arbitrators being required from inside the family, by introducing the following points:

a) The arbitrator mentioned in the holy verse was chosen for a family disagreement. If a non-Muslim arbitrator is allowed here, this does not mean that he is allowed to arbitrate in commercial and financial transactions.

b) The two arbitrators, as we have seen, do not necessarily have to belong to the couple's family. Some authorities would require that non-Muslim arbitration be either Christian or Jewish. According to them, arbitrators of religions other than the three main religions, i.e. Islam, Christians and Judaism, may not be arbitrators.⁵⁴⁸

This rule apparently only arises when arbitration is international because no book of Islamic jurisprudence appears to support the issue. Additionally, Muslims men are permitted to marry Christians or Jews but not members of other faiths.

This opinion does not allow non-Muslims to arbitrate if the parties in dispute are Muslim and non-Muslim. The *Shafii*,⁵⁴⁹ *Maliki* and *Hanbali* schools⁵⁵⁰ and the *Twelfth*

⁵⁴⁸ M. Abu-Elnein, *op. cit.*, P. 22.

⁵⁴⁹ Yahya Al Nawawi, *Riyadh Al-Saliheen*, Commentary in English by Hafiz Yousef, 1st Ed, Dar Alsalam, Saudi Arabia, 1998, P. 96.

⁵⁵⁰ Ibn Kodama, *op. cit.*, Vol. 9, PP. 39-40.

*Shiite School*⁵⁵¹ have adopted this opinion. They support their views from in the following *Quranic* verse:

‘And never will Allah grant to unbelievers a way (to triumph) over the believers’⁵⁵²

Looking at the legislation and laws of other Arab and Islamic countries, it is apparent that they do not stipulate the necessity of Islam in arbitrators. They leave the matter to disputants regardless of their religions. The parties to arbitration choose the most suitable arbitrator to settle their dispute.

It is clear from the above that being a Muslim is required in national arbitration, as the commercial Circuits of the Board of Grievances issued an award before pursuing the task of the arbitrations stating that the arbitral tribunal was not legitimate for the reason that one of the arbitrators was not Muslim.⁵⁵³ However, will the ruling of a Muslim arbitrator be applied in the case of international commercial arbitration? In the view of some writers, the rules differ if the arbitration is international, as it is irrational to insist on a Muslim foreign arbitrator settling the dispute if the applicable law is foreign, unless the Muslim foreign arbitrator has proven capability of dealing with the applicable foreign law. It would appear from the Islamic jurisprudence that the rule is the same as in the case of all parties to the arbitration being Muslims in national arbitration. According to the best opinion of Islamic jurisprudence, if arbitration parties are all Muslims, the arbitrator must also be Muslim.⁵⁵⁴

In the case where a non-Muslim is an arbitrator in an international commercial arbitration between Muslim and non-Muslim parties to what extent is the non-Muslim allowed to arbitrate? In the light of the preceding, it is necessary to return to the discussion about the characteristics of arbitration between a Muslim and non-Muslim

⁵⁵¹ S.H Amin, *op.cit*, P. 84.

⁵⁵² The Holy Quran, Surat Al Nessa, Verse 141, English Translation, *op. cit*, P. 262.

⁵⁵³ Arbitral Award No. 102/T on 1422 A.H (2002 A.D)

⁵⁵⁴ See also Esmail Al Astal, *op. cit*, P. 89, Ahmed Al Ghazi, *op. cit*, P. 61.

party. It can be hypothesized that each belongs to a different country but they have a commercial relationship. These two parties agree to settle a dispute, if any occurs, by arbitration.

What is being dealt with in such a case is international commercial arbitration. Consequently, the answer differs if arbitration is national and not international. An attempt will be made here to understand the attitude of Islamic jurisprudence, which stipulates that “*necessity allows what is forbidden*” and also that “*there is peace after crisis*”.⁵⁵⁵ This is a well-known rule in Islamic law and it means can still be found. This is because Islamic jurisprudence endeavours to facilitate the lives of people in times of difficulty.

With the subject of current international commercial arbitration and with the interaction of commercial relationship and financial transactions among individuals and a variety of companies, and also with the increasing number of international commercial centres of arbitration that do not rely most of the time on a specific law, but rather on the principles of justice, the necessity of entering the world of commercial agreements and accepting international commercial arbitration arises.

The *Maliki* School has, as already noted, said that a non Muslim is not allowed to arbitrate between a Muslim and non-Muslim, except where necessary.⁵⁵⁶ Modern and liberal writers would claim that there can be no condition or requirements on a non-Muslim to be an arbitrator. They see arbitration conditions as a must in modern times and as becoming inevitable in light of the immense developments that have taken place in international relations recently, especially in trade and investments. They add that it would be more appropriate and more coherent in terms of the real nature of arbitration.⁵⁵⁷

⁵⁵⁵ Mustapha Zarqa, *Explanation of Rules of Jurisprudence*, Dar Al Qalam Press, Damascus, 1993, PP. 163-185.

⁵⁵⁶ Esmail Al Astal, *op. cit.* 258.

⁵⁵⁷ See M.I.M Abul-Enein, *op. cit.* P. 23.

Some have objected to this opinion, claiming that its scope is too wide in so far as necessity is concerned. Ancient scholars, although in favour of necessity, have said it should be estimated and not left to too broad a reasoning.⁵⁵⁸

Some researchers have gone so far as to say - "*A contract is the law of the contracting parties.*" Also, the rules governing the structure of the arbitral tribunal procedure, arbitral award, and notification and enforcement, all implement the basic principles which conform to what is valid within Islamic jurisprudence. Hence, emphasis is placed on the issued award, not the type of arbitrator and whether he is Muslim or not, an approach similar to the rules applied in Euro-Arab Arbitration Rules.⁵⁵⁹

A single arbitrator or an entire arbitration panel may be either completely Arab or completely European or mixed. However, although not required by the Euro-Arab Arbitration Rules, if the arbitration panel includes a Muslim, this would add legitimacy ensuring that arbitral award in question would be in conformity with *Sharia* rules generally.⁵⁶⁰

Naturally, the contents of Euro-Arab Arbitration Rules are not sufficient proof of the existence of the necessary legislation for the non-Muslim to be an arbitrator, but these contents emphasise the existence of the need to modernise commercial interactions.

Consequently, in different international transaction of commerce, it can be seen that each party desires to choose an arbitrator known to be trustworthy and capable. In such commercial transactions, it is important to have an arbitrator who is of the same nationality as the arbitrants, whether or not they are Muslim. This is important only to ensure the justice and neutrality of the arbitration.⁵⁶¹

⁵⁵⁸ Esmail Al Astal, *op. cit.* P. 259.

⁵⁵⁹ Shehabuddin Al Sharif, *Euro- Arab Arbitration System and Islamic Sharia Law*, The University of Salford, Mphil Thesis, 1990, P. 23. and the Euro-Arab Arbitration Rules are intended to offer any European or Arab individual, as well as other parties, parity in so far as they are directly or indirectly involved with Arab Countries. See *Euro-Arab Legal Newsletter*, N°.3, published by Arbitration System of the Euro-Arab Chambers of Commerce, Paris, 1990, p. 3.

⁵⁶⁰ *Ibid.*

⁵⁶¹ See Articles (5.2) and (6-1) London Court of International Arbitration (LCIA), *op. cit.* PP. 5-6, see also Article 346 of the 1983 Civil Procedure Code in Iran, A.H. Amin, *op. cit.* PP. 138-139.

According to the practice of Saudi Arabia, an arbitral award issued by international arbitration may be enforced in the Kingdom of Saudi Arabia despite one or more of arbitrators not being Muslim. That is the case following the ratification in January 1994 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In this regard, a question which may arise is why the Saudi authority prohibits non-Muslims being nominated as arbitrators in the Kingdom, according to the regulation, yet recognises foreign arbitral awards, according to the New York Convention of 1958, a high percentage of which are rendered by non-Muslim arbitrators. According to practice, the Board of Grievances abandons the formalities for a foreign arbitral award, but assesses it and makes sure it is in accordance with *Sharia* law, as in the case of arbitration by women. From the above, it can be argued that the stipulation that the arbitrator should be Muslim is one of the weaknesses of the regulation, since recognition of arbitral awards made by non-Muslims is subject to their being in keeping with the *Sharia* law. Thus, it may be preferable to require that the arbitral award should be in accordance with the *Sharia* law, rather than that the arbitrator must be a Muslim, since Saudi Arabia became a fully WTO member on 11th December of 2005⁵⁶², where most commercial disputes will involve foreigners and non-Muslim parties. The latter will surely rely on arbitrators with the same background rather than selecting an arbitrator according to his religion. It is therefore, arguable that the Saudi legislature should reconsider the expression of the arbitrator's qualification in terms of religion and impose a provision to islamicise the award instead rather than islamicise the qualifications of the arbitrator, since this approach is applied with foreign awards. This would be conducive to attracting foreign investors and maintaining a safeguard for them, since the international commercial arbitration framework, although not ideal, is a reliable system from the foreign investor's point of view in comparison with some

⁵⁶² The Official website of the World Trade Organisation, found on http://www.wto.org/English/thewto_e/acc_e/al_arabie_saoudite_e.htm. accessed on 12th of January 2006.

developed countries' systems. In addition, business opportunities tend to involve countries applying the international system. Moreover, it is important to maintain equality between all disputants, Muslim or non-Muslim, in choice of their arbitrator, since the most crucial point is to have an award with justice, which is what *Sharia* commands.

In brief, it seems apparent that non-Muslims may be allowed to arbitrate in international commercial disputes on the basis of the Known legal rules of necessity.⁵⁶³

5.4.4 [A] Who arbitrates? Question of Gender

After the discussion of the legal capacity of the arbitrator, a question may arise as to whether a woman can act as an arbitrator or whether an arbitral tribunal containing of a woman arbitrator is considered valid.

In earlier times, a number of laws placed women under some disabilities, particularly in respect of testimony. For example, one Swiss region, at the beginning of the nineteenth century, held the testimony of two women equivalent to half that of one man.⁵⁶⁴

In many parts of the world, women's organisations, networks and movements have grown in number and strength and have begun to influence local, national and international politics. At the same time, a few individual women have attained high political office. Despite these gains, gender discrimination remains a formidable barrier to women's participation in formal decision-making processes and their control of material and political resources.⁵⁶⁵ The United Nations Development Fund for Women

⁵⁶³ Ibrahim Atta, *op. cit.* P. 150. See also The Prophet Hadith No. 2103 in Shek Albakari and *The Encyclopaedia of Alhadith*, websit <http://al-islam/display/hier.asp? Do=0&n=3547>. acceded on (14/5/2004).

⁵⁶⁴ Abdul Hamid El-Ahdab, *op. cit.*, p. 580

⁵⁶⁵ Kaufman, Natalie Hevener and Lindquist, Stefanie A., *Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination Against Women, Women's Rights Human Rights*, Edited by Peters, Julie and Wolper, Andera, *Introduction, Women's Rights Human Rights*, Routledge, New York, 1995, pp. 114-120.

reported that there is still no country in the world where women enjoy political status, access or influence equal to that of men.⁵⁶⁶

The question whether women can be appointed as arbitrators has lost its importance nowadays, since the disadvantages of women in many countries have disappeared, and since their rights of participation in the social, political and economic sphere are protected.⁵⁶⁷ The reason for this is that women are currently becoming more educated, in the same way as men and they are equally treated.⁵⁶⁸

By looking at the international arbitration rules, it is noticed that some of them indicate that there is no difference if the arbitrator is male or female, whereas others have not referred to it, because there is no such requirement on the basis of gender. For example, in the LCIA Rule the arbitrator is referred to as both masculine and feminine.⁵⁶⁹ Further, the Egyptian Arbitration Rules stated that it is not required that the arbitrator should be of a specific gender, where the legislature stressed that the matter is referred to the will of the parties.⁵⁷⁰ UNCITRAL Model Law or ICC set the rules for the composition of the arbitral tribunal with no attention to direct the qualification of the arbitrator to one gender.

Otherwise, these rules will breach the free will of the parties to choose an arbitrator whom they trust, whether he/she is male or female. The general rule that everyone can

⁵⁶⁶ Indeed, some countries, including those that are undergoing fundamental political, economic and social changes, have seen a significant decrease in the number of women represented in legislative bodies. Owing to their limited access to the traditional avenues to power, such as the decision making bodies of political parties, employer organisations and trade unions, women have gained access to power through alternative structures, particularly in the non-governmental organisation sector. Through non-governmental organisations and grass-roots organisations, women have been able to articulate their interests and concerns and have placed women's issues on the national, regional and international agenda. See Katarina Tomasevski, *Women and Human Rights*, Zed Books, London, 1993, pp. 103-112; see also K. Haq, "The Role of United Nations for Advancement of Women-A Proposal Development", *Journal of SID*, , No. 4, 1989p.51.

⁵⁶⁷ David Renč, *op. cit*, pp. 246-247

⁵⁶⁸ Among those people who hold this opinion is Mohammed Jaber Nader, *Conciliation and Arbitration in Saudi Arabia*, Chamber of Commerce and Industry, pp. 15-16 (in Arabic)

⁵⁶⁹ LCIA Rules of 1998, Art. 5(1). As it reads "The expression "the Arbitral Tribunal" in these Rules includes a sole arbitrator or all the arbitrators where more than one. All references to an arbitrator shall include the masculine and feminine. (References to the President, Vice-President and members of the LCIA Court, the Registrar or Deputy Registrar, expert, witness, party and legal representative shall be similarly understood).

⁵⁷⁰ The Egyptian Arbitration Rules, Art, 16 (2).

be an arbitrator, on the basis of equality of sex, race and nationality, if the legal capacity is attained.⁵⁷¹

In general, in practice it is rare for an arbitral tribunal to contain a woman. However, in most countries, no arbitration agreement has been voided and no arbitral award set aside because the arbitral process was conducted by an arbitral tribunal which contained a woman as one of its members.⁵⁷²

5.4.4 [B] Who Arbitrates under SAR: Question of Gender

Women cannot under any circumstances act as arbitrators under the umbrella of the Saudi Arbitration Regulation and its implementation, since they employ the general rules of the Islamic *Sharia* which prohibits women's authority in dispute settlement. Thus, if women were appointed as arbitrators, the final arbitral award would be considered null and void. A hermaphrodite is debarred similarly to a woman, because of the possibility of being a woman; only when the gender is not in doubt is the arbitral award authentic.⁵⁷³ However, the Arbitration Regulation and its Implementation drafters do not require that the arbitrator should be male per se, but they employ the consensus of the canonists of *Sharia*, who do not allow women to hold any position in dispute settlement.⁵⁷⁴ In practice, there has been no case resolved by an arbitral tribunal

⁵⁷¹ This principle was derived from the universality of the human rights which requires that equality of the gender, both *de jure* and *de facto*, is considered a basic human right, as nowadays the equality of man and women, including the right to full participation in all areas of life, is becoming recognized as a basic right in both national and international legal instruments. There is noticeable international effort to maintain equality among all people, for instance, the Universal Declaration of Human Rights and the Covenant on Economic, Social and Cultural Rights as well as the Covenant on the Civil and Political Rights are officially addressed to be applicable to every one. However, the Convention on the Elimination of all forms of Discrimination against Women is the specific text to address the importance of participation of women in decision-making in general and in politics in particular. See Monique Leijenaar, *How to Create a Gender Balance in Political Decision-Making*, European Commission, March 1996, pp. 11-15.

⁵⁷² René David, *op. cit.*, p. 247

⁵⁷³ Qahtan Al-Dawri, *op. cit.*, p. 202

⁵⁷⁴ Dr. Mohammed Al Zuhaili, *The Judicial System of the Sharia Doctrine and its Implementations in The Kingdom of Saudi Arabia*, Dar Alfeker, Damascus, 1982, p. 56 (in Arabic); Dr. Abdulkareem Zedan, *The Judicial System of Sharia Doctrine*, 1st Ed, Dar Albasheer, Amman, 1995, p. 30 (in Arabic); Dr. Saleh

containing a woman arbitrator. The authority originally having jurisdiction over most commercial disputes, which is the Board of Grievances, will not approve the arbitration agreement when the arbitral tribunal contains a woman arbitrator and it will not issue an enforcement order for any domestic arbitral award made by a female sole arbitrator or by an arbitral tribunal composed of women .⁵⁷⁵

Debate exists regarding whether an arbitrator is a judge or not. However, the vast majority of the schools of Islamic jurisprudence take a different attitude, holding that there is an analogy between arbitration and judicial authority, so that an arbitrator should have the same qualifications as a judge. There is also confusion arising from the equation of arbitrators with judges. Despite these arguments, there are still those who hold that women's authority is confined to the private sphere, such as authority over the mortmain and guardianship of orphans; some argue that public authority requires a high level of proficiency and that it is difficult for women, by their nature, to meet this level of proficiency.⁵⁷⁶ They support their view by referring to the verse of the *Holy Quran* "Men are the protectors and maintainers of women, because Allah had made one of them to excel the other..."⁵⁷⁷

However, these scholars differ regarding whether a woman can take the role of a judge. If they can, they can also be arbitrators, according to the analogy. Argument in favour of arbitration by women is based on Imam *Shafi's* view that arbitration is permissible and that the act of arbitration is an act of *fatwa*.⁵⁷⁸ The practice of *fatwa* in the period of the Prophet Mohammed, Peace be upon him, shows that women took a very effective role in giving *fatwa*, a prominent example being Aysha, the wife of the Prophet. Therefore, according to this argument woman can take a role in arbitration, since it is permissible

Alhassan, *The Restraint Norm of the Arbitration*, 1st Ed, Alnarjes Publisher, Riyadh, 1997, p. 47 (in Arabic)

⁵⁷⁵ This is the practice of the Commercial Circuits in the Board of Grievances

⁵⁷⁶ Dr. Mohammed N. Al- Bejad, *op. cit*, p. 137

⁵⁷⁷ Surah An-Nisa, verse. 34

⁵⁷⁸ Fatwa is religious advice or opinion.

for her to give a *fatwa*.⁵⁷⁹ Another example of woman being accepted to participate at the executive level is the Queen of Saba whose story is told by Allah in the *Quran*. She led her nation to happiness and well-being in this and the other life and submitted herself with Prophet Sulaiman to Allah, Controller of the Worlds. The late example referred to presidency, whereas the task of arbitration is less onerous. As Shaikh Yusuf Al-Qaradawi says, "Women's ineligibility under *Sharia* to hold the caliphate or head the state is owing to the great burdens of such a huge responsibility which in most cases outweigh the capacity of the woman (and the man) and conflicts with the natural disposition of the woman as mother. This does not exhaust all possibilities since we are aware that some women could be even more capable than some men. Nevertheless, rules are not formed on the basis of rare occurrence but on the frequency of it. Thus the scholars establish that generally "the rare does not constitute a rule." But for the woman to be a manager, dean, director, member of parliament, minister, etc., is all very well so long as it weighs the interests."⁵⁸⁰

In reality, some Islamic schools of jurisprudence draw a link between occupying the position of a judge and the mission of an arbitrator, as has been shown. Some claim that a woman is not allowed to arbitrate because these schools have widened the scope of arbitration. Other schools have said that arbitration includes everything presented to judicial authority. This makes it clear that the latter schools consider there is an analogy between arbitration and judicial authority.

In fact, there are three different groups of thought on the capability of women to arbitrate or judge:

⁵⁷⁹ Bin Rushid Al qurtobi, *Aljamee Le Ahkam Al Quran, Tafseer Alqurtobi*, Vol. 5, 6, Dar Alhadith, Cairo, 1996, p.

⁵⁸⁰ Al-Qaradawi, Yousef, *The Status of Women in Islam*, Witness Pioneer A Virtual Islamic Organisation, 2002, Available on line, http://www.witness-pioneer.org/vil/Books/Q_WI/misconception.htm#Judiciary%20and%20political%20corps. Accessed on 03-01-2006.

The first group does not allow women to judge in any cases. This opinion was adopted by some of the *Maliki*, *Shafii*, and *Hanbali* Schools,⁵⁸¹ and by some of the *Twelfth Shiite* School.⁵⁸² They support their opinion as follows:

Abi Bakra was told by the Prophet (peace be upon him), when he learnt that the people of Faris had appointed a woman as queen: '*A nation appointing a woman to look after its affairs will not triumph.*'⁵⁸³

This evidence can be objected to on the grounds that the prophet meant the presidency or the ruling of a woman, rather than judging or arbitration.

Secondly, the following *Quranic* verse is given as proof: '*Men are the protectors and maintainers of women.*'⁵⁸⁴

For a woman to take the position of judge can be seen as a matter of qualification, which contradicts the above verse. In fact, it is possible to object to the fact that women can hold the position of judge even among women only. This means there will be no objection to the verse, according to one's attitude.

Thirdly, another difficulty facing the conduct of judgeship by women is that the *Majales* (the place where dispute settlement takes place) of dispute settlement is a place for men, and Islam prohibits women from entering it. In addition, in settling disputes the arbitrator or the judge under some circumstances needs to be in a place with one of the parties or the arbitral secretary privately, or to consult experts privately, and Islam forbids women to mix with strangers in this way.⁵⁸⁵

It becomes apparent that this argument can be opposed because it is not sufficient to prevent women from acting as judges. This has no bearing on the connection with the work of women, but it has a relationship with many things that could be reviewed,

⁵⁸¹ Ibn Kodama, *op. cit*, Vol. 9, P. 40. also see Yahya Al Nawawi, *op. cit*, Vol. 11, P. 95, Kasa Qatoura, *Arbitration in the Light of Legislation*, 1st Ed, Jeddah Chamber of Commerce, Jeddah, 1994, P. 71.

⁵⁸² Kadam Al-Haeri, *The Judicial System*, 1st Ed, Iran, 1995, P. 68.

⁵⁸³ Al-shawkani, *Nayl Al Awtar Washarh Montaqqa Al Khbar*, principleship of Scientific and Preaching Research Administrations, Riyadh, Vol. 8, P. 273; Qahtan Al Dawri, *op. cit*, P. 202.

⁵⁸⁴ The Holy Quran, Surat Al Nassa, Verse, 34, English Translation, *op. cit*. P. 219.

⁵⁸⁵ Saud Aldreb, *The Judicial System in The Kingdom of Saudi Arabia in The Light of Sharia and The Judiciary*, 1st Ed, Hanifah Publisher, Riyadh, 1993, p. 380

things for which solutions could be found. For example, women could serve as of judges among women, with precautions taken so they do not have to mix with men.

The second view is that women can judge in all cases. This opinion was adopted by the Al Thahiria and the Al Tabari and some of the *Twelfth Shiie* school.⁵⁸⁶ Advocates of this opinion consider that it has been proved by the following:

(i) They claim that there is an analogy between judicial authority and preaching. Since women are allowed to preach, they should also be allowed to judge and therefore to be arbitrators.⁵⁸⁷

In reality, this proof can be opposed since there is a difference between preaching and judicial authority. The former informs about legal rules whereas the latter performs the same task but, in addition, obliges the parties in conflict to accept the judge's ruling.

(ii) They also claim that proof is shown by the fact that judicial authority is concerned with ordering the good and warning against evil. This deed can be performed by women. However, this analogy is not accurate because the position of a judge differs from that of a preacher in many areas. All Muslims are ordered to preach good deeds and warn against evil but judicial authority treats disputes in accordance with legal rules.

The third group allows women to judge only in cases where their testimony is acceptable. The *Hanafi* School has adopted this opinion on the ground that where the matter of testimony is accepted, judicial authority is also accepted.⁵⁸⁸ The *Hanafi* School contends that women's testimony is accepted in cases where an offence carries a severe punishment, including beheading.

It seems that there is a difference between testimony and judicial authority. The witness is required to tell what he has witnessed, but a judge is required to be scientifically qualified to give sound judgement in settling disputes. If the witness presents

⁵⁸⁶ Imam Tabari is Mohamed bin Al Tabari (died 310 H/ 923 A.D.) He wrote many books. See Qahtan Al-Dawri, *op. cit.*, P. 22.

⁵⁸⁷ Ibn Hazem, *The Prophetic Bibliography*, Vol. 9, Mecca Press, 1970, PP. 429-430.

⁵⁸⁸ Ebrahim Ali Fadel, *Lisan Al Hokam fi Marefat Al Ahkam*, 2nd Ed, Abab Library, Egypt, 1973, p. 224; Alaadin Al Tarablussi, *op. cit.* P. 25.

information which supports the case of one of the conflicting parties, his deed is totally different from the task of judging, where proofs are deeply investigated before judgement is given.

From the evidence of these three opinions, it seems that women are not precluded from the position of judge within Islamic jurisprudence. They may take the position of judge in matters that concern women in general because women know each other well in comparison to men. Equally important, the nature of a society in which women hold the position of judge should be taken into account.

The aim of this section has been to come to a conclusion in the matter of whether women can arbitrate or not. The points raised and discussion of all the divergent views on this issue have led the author to the opinion that women can arbitrate. Women are shown to have the capacity to undertake positions such as judges and the position of arbitrator is somewhat lower than a position held within the judicial authority. Disagreement about women being arbitrators is simpler than disagreement about them holding position as judges.

For this reason, those who claim that women are not allowed to arbitrate, confuse arbitration with judicial authority. They consider judges' qualifications to be necessary also for arbitrations, which is not logical. According to the opinion of Ibn Jozeah, an arbitrator does not need to have the same qualification as a judge.⁵⁸⁹ If women have the legal knowledge of the general rules of Islamic jurisprudence and have the full capacity to deal with the intricacies of arbitration, they may conduct the task of arbitration and the settlement of disputes.

Supporting this opinion is Omar Ibn Al Khatab, the Second Caliph after the Prophet, who authorized a woman to supervise the city market. The woman, Al Shefa, belonged

⁵⁸⁹ see *Supra* The Qualification of the Arbitrator

to a group of intellectual women and was the judge of the market.⁵⁹⁰ Various historians have also mentioned the life of the Prophet's companion, Samra bint Nahik Al Asdya, who was supervisor of the market in the era of the Prophet (peace be upon him).⁵⁹¹

Even though the position in Saudi Arabia is different from the above cases, the judiciary system does not explicitly state that a judge must be a male, but, that is the effect of its employing the general rules of *Sharia*, although the system only requires explicitly that the judge should be only Saudi.⁵⁹² Nevertheless, there is dispute over the view that the arbitrator must be a man. Firstly, the provision does not explicitly state that the arbitrator must be a man; secondly, it is no longer reasonable to exclude women from acting as judges on the ground of the imperfection of their legal capacity, because of unfamiliarity and lack of experience, since women nowadays are as educated as men.⁵⁹³ Further, in the case of a foreign arbitral award rendered where one of the arbitrators is a woman, according to the practice in Saudi Arabia in relation to foreign arbitral awards, the authority having the jurisdiction to review and recognize the award, which is the Board of Grievances, is not concerned with the formal composition of the tribunal, but only with whether the award is in accordance with *Sharia* law and does not contradict the regulations in Saudi.⁵⁹⁴ For instance, if a foreign award contains part which opposes the *Sharia* law or the general regulation, the competent authority, the commercial Circuits, will recognise the award with the exception of that part.⁵⁹⁵ This happened in the case of *T Company for Construction .v. H Company for Engineering*, where the competent authority issued the recognition of an arbitral award, with the exception of a

⁵⁹⁰ M.I.M Aboul Enein, *Liberal Trends in Islamic Law (Sharia) On Peaceful Settlement of Disputes*, Research presented to the seminar of the Practice of International Arbitration, Oxford, July 31st 1999, p. 24. See Ismail Al Astl, *Althkim fi Alsharih*, 1st Edn, Dar Al tawfiq Press, Egypt, 1986, p. 91. and some researchers said there is a weakness in narrating this story.

⁵⁹¹ Ahmed Al ghazali, *op. cit*, p. 259.

⁵⁹² Dr. Saud Aldreb, *op. cit*, p. 578.

⁵⁹³ Jaber Nader, *op. cit*, pp. 15-16. Also; Hameed M. Allhbi, *The Arbitrator in the International Commercial Arbitration*, 1st Ed, Dar Alnahza Alarabia, 2002, p. 48.

⁵⁹⁴ Interview on the 15 Feb 2004 with Dr. Fahad Alhugbani, Senior Judge in The Board of Grievances also Member of the Saudi Arbitration Team.

⁵⁹⁵ Interview on the 15th of Feb 2004 with Dr. Fahad Alhugbani, Senior Judge at the Board of Grievances and Member of the Saudi Arbitration Team.

provision for interest on the top of the sum of the contract. The competent authority set aside this section of the arbitral award, because interest is forbidden in *Sharia* law.⁵⁹⁶ The recognition of the foreign arbitral award was executed with no attention to the formality of the composition of the arbitral tribunal.⁵⁹⁷ This can be a good basis for arguing that women should have an equal opportunity to participate in deciding domestic arbitral awards since the authority recognises foreign arbitral awards decided by women. Therefore, the Saudi legislature should apply this approach to the Regulation such that the authority should look at the arbitral award with less attention to the formalities of constitution of the tribunal, since the possibility of women in Saudi deciding the dispute in accordance with the *Sharia* is greater than the possibility of foreign women so deciding, in settling disputes.

On the composition of the tribunal, it could be argued that in some circumstances, where the subject-matter of the dispute particularly concerns women, for instance in a dispute regarding cosmetic surgery or breast surgery, the arbitral tribunal would benefit from the appointment of women as arbitrators to hear the dispute, since women are not less qualified than men in the relevant issues.⁵⁹⁸ In the opinion of the present writer, in such disputes the arbitrator's knowledge of the subject matter may be more important than being expert in the *Sharia*, given that arbitration now has expanded to resolve many disputes regardless of the nature of the subject matter.⁵⁹⁹

The *Sharia* is designed to be compatible and flexible to embrace all developments and changes that might occur at any time anywhere. Therefore, the burden is on the scholars

⁵⁹⁶ Case No. 1869/1/Q on 1411 A.H (1991 A.D)

⁵⁹⁷ No rules set forth this provision but it has become customary in Saudi Arabia. Interview with Dr. Abdullaziz Altwelay, Senior Judge at the Commercial Committee at the Board of Grievances, Madinah Branch, conducted by Phone on the 12th of December of 2003

⁵⁹⁸ This point was discussed in the interview with Dr. Fahad Alhugbani and it received support from him, on the basis that in the Kingdom of Saudi Arabia, such kinds of surgery are most likely to be done by a female Doctor.

⁵⁹⁹ I.e. arbitration in medical disputes or arbitration in engineering disputes. In the Kingdom of Saudi Arabia arbitration is taking a very effective role in the field of the engineering disputes

of *Sharia* jurisprudence to employ the Islamic text in the right way with special concern to the situation of the current days.⁶⁰⁰

To summarise, it is possible to say that women can be chosen as arbitrators on matters where they feel capable of settling disputes in the same way as men, as the Saudi Arbitration Regulation drafters do not preclude women from being arbitrators.⁶⁰¹

5.5 [A] Dismissal of arbitrators

After the parties to the dispute have given their consent to the appointment of the arbitrator, can they at any stage dismiss him or remove him?

It may be said that the arbitrator cannot be dismissed without mutual agreement of the parties to the dispute. Further, the arbitrator after the appointment cannot be dismissed by the determination of one of the parties alone, even if the appointment of the arbitrator was decided by the party who wishes to dismiss him. However, an arbitrator may be dismissed on the request of one of the parties or the competent authority if the arbitrator is proven to have neglected the execution of his duties relating to the arbitral process.

The parties to the dispute may dismiss the arbitrator at any stage of the arbitral proceedings before the arbitral award is rendered. The dismissal decision can be delivered to the dismissed arbitrator orally or by written notification. However, the dismissed arbitrator may be entitled to seek compensation from the parties if his dismissal occurred after the arbitral process has started, if he thinks that the dismissal decision was based on unreasonable grounds and caused damage to him either morally

⁶⁰⁰ An example to show that Islamic rules are changed and replaced from time to time to be suitable for each period is the case of the second Khalif Abu Baker, when he stopped giving those whose hearts are reconciled (*Almualfah Kulubhm*) the *Zakat* (the Islamic tax which is given to people in need), which is in contrary to the text of the *Quran*. The reason why the Islamic Khalif issued the rule of cutting the *Zakat* on the *Almualfah Kulubhm* is that the Islamic state was very strong at that time and did not need the support of this group. See Shaikh Yusef Al-qaradawi, *The Islamic Politics in the light of the Sharia Texts and its purpose*, Al-Resalah Est., 2001, p. 175. (in Arabic)

⁶⁰¹ In this respect, the decision of the Egyptian Minister of Justice, No. 3771 in 1995 includes a list of arbitrators who could be chosen in case parties do not agree on an arbitrator. The decision does not impose a condition of the male gender, but includes the names of ten women. See Nerman, *op. cit*, P.9.

or financially, or if the parties to the dispute may not have fulfilled their obligations arising out of the contract between them and the arbitrator.

In some arbitration laws, the effect of the dismissal of an arbitrator is that the arbitration agreement lapses, unless otherwise agreed by the parties, and the arbitration proceedings will be ended.⁶⁰² It could be argued that such a practice could encourage an unwilling party to frustrate the arbitral process by creating grounds for dismissal, since the consequence will be the termination of the arbitral process. In contrast, according to other arbitration laws, such as those of the United States⁶⁰³, a replacement arbitrator shall be appointed by the same method as the dismissed arbitrator. Perhaps, however, the replacement appointment ought to be made by the competent authority, if necessary.⁶⁰⁴

After the appointment of the new arbitrator, the arbitral tribunal should give the new arbitrator enough time to study the subject-matter of the dispute, which may cause a delay in making the arbitral award, depending on how far the previous arbitral tribunal had gone with arbitration proceedings.

5.5 [B] Dismissal under SAR

It is indicated in Article 11 of the regulation that the dismissal of an arbitrator must be determined by mutual agreement of the parties to the dispute. Therefore, any dismissal determined by one party alone is, under Saudi regulation, unacceptable, even if that arbitrator was selected by the party who wishes to dismiss him. This is because, when the arbitrators are appointed, the arbitral tribunal comes into existence and assumes an independent entity in which the disputing parties are not permitted to have any influence. Therefore the arbitrator cannot be dismissed unless both parties to the dispute agree.

⁶⁰² This provision still remains in the French Law, Art. 1464

⁶⁰³ Arbitration Act 1950, Art. 10; also this provision is found in other countries such as England

⁶⁰⁴ David, René, *op. cit.*, p. 266

Nevertheless, the party who wishes to dismiss the arbitrator can submit a request for dismissal of an arbitrator to the competent authority, explaining the grounds for the request. On the other hand, where the parties agree to dismiss the arbitrator, they are not obliged to reveal the reasons and the grounds for dismissal.⁶⁰⁵

The dismissal can be made when the arbitrator is appointed, and the arbitrator can be dismissed explicitly or implicitly, for instance, by the parties to the dispute appointing another arbitrator instead of him, and the dismissal can take place at any stage of the arbitral process before the arbitral award is made. However, if the arbitrator has made the arbitral award, the parties can agree to reject it, but if the parties fail to agree, then the arbitral award remains enforceable and is not subject to appeal.⁶⁰⁶

However, if the arbitrator is dismissed, he has the right, according to Article 11 of the regulation, to seek compensation if he has already started the task on the dispute before his dismissal or his dismissal was not caused by him. The dismissed arbitrator seeks compensation by submitting a demand to the competent authority including the amount of compensation. However, the article does not grant any right to a dismissed arbitrator who has not embarked on his task to demand compensation for the damage caused to his reputation and status, even if there was no proper reason for his dismissal. Such a provision might require reconsideration from the legislature, as a wrong would appear to be done to a dismissed arbitrator.⁶⁰⁷ Moreover, as we have mentioned, the arbitrator can be dismissed with no reason if the parties agree. Also the arbitrator can be dismissed under different circumstances, when the arbitral award bears the impact of the personal interest of the arbitrator, which therefore affects the justice of the arbitration. However, the Saudi arbitration regulation does not explicitly specify the grounds for dismissal nor refer to the grounds for dismissal of the judges as will be explained in the section on challenge of an arbitrator. Despite the silence of the regulation regarding

⁶⁰⁵ Dr. Mohammed N. Al-Bejad, *op. cit.*, pp. 150-151

⁶⁰⁶ *Ibid.*, p. 162

⁶⁰⁷ The Arbitration Regulation of 1983, Art. 11

dismissal, it appears that the arbitrator must be dismissed under the same grounds as a judge, since arbitrator and judge are equal in their mission to settle the dispute, and because the regulation equates arbitrators and judges regarding the reasons for challenge, which are less important than the reasons for dismissal. From the above, therefore, it appears that the arbitrator must be dismissed for the same grounds as apply to the dismissal of the judge, if he does not resign by himself.⁶⁰⁸

5.6 [A] Challenge of arbitrators

After the appointment of the arbitrators, the parties are entitled to challenge them if the reason for challenge appeared to one or both parties prior to the creation of the arbitral tribunal as a whole.

Most institutional arbitration rules and national rules provide for challenge to an arbitrator. Provisions for challenge are also found under most statutory regimes governing arbitration procedure. Such provisions stipulate that the challenge may be brought by a party or parties to the arbitration, including the arbitrator's appointing party. However, they are not limiting, and expressly refer to a request of the remaining arbitrators.⁶⁰⁹ This provision is explicitly found in international arbitration rules such as UNCITRAL Arbitration Rules⁶¹⁰, and the LCIA Arbitration Rules⁶¹¹, as well as in the national arbitration rules. For instance, the Swiss Private International Law provides:

A party may only challenge an arbitrator whom it has appointed or in whose appointment it has participated on grounds of which it became aware after such appointment. The grounds for challenge must be notified to the arbitral tribunal and the other party without delay.⁶¹²

⁶⁰⁸ Dr. Mohammed N. Al-Bejad, *op. cit.*, p. 153

⁶⁰⁹ A. A. de FINA, "The Party appointed arbitrator in International Arbitrations - Role and Selection," *Arbitration International*, Vol. 15, No. 4, Kluwer Publication, 1999, pp. 381-392

⁶¹⁰ UNCITRAL Arbitration Rules, Art. 10 (2)

⁶¹¹ LCIA Arbitration Rules, Art. 3 (7)

⁶¹² The Swiss Private International Law Act of 1987, Art. 180(2)

A challenge to an arbitrator by any party may be rejected if the party fails to prove to the competent authority that the reason for the challenge was not known at the time of the appointment of the challenged arbitrator. Moreover, the party may waive his right to challenge the arbitrator by participating in the arbitral proceedings, regardless of his knowledge of the reasons for challenge of an arbitrator, for the reason that participation of the party in the arbitral proceedings is considered as recognition of the fact there is no serious reason for challenging the arbitrator.⁶¹³

5.6 [B] Challenge of the Arbitrator in SAR

The Arbitration Regulation of 1983 gives the right to the parties to challenge the arbitrator if the reason for challenge occurred after the approval of the authority having jurisdiction over the dispute of the appointment.⁶¹⁴ However, if the reason for challenging the arbitrator occurred before the appointment and the party knew of it at the time of its occurrence, the authority having jurisdiction over the dispute will not accept the request for the challenge.

5.6.1 [A] Grounds of Challenge

The parties to arbitration may challenge arbitrators in the same way as judges. The underlying basis of challenging the arbitrators is doubt over the impartiality of the arbitral proceedings. Justifiable doubts as to the impartiality or independence of an arbitrator may result in a challenge by the party who feels that questionable behaviour may jeopardize neutrality.⁶¹⁵

⁶¹³ David, Reně, *op. cit*, p. 263

⁶¹⁴ Arbitration Regulation of 1983, Art. 12.

⁶¹⁵ José Luis Siqueiros, "The Challenge of Arbitrators in the Inter- American Commercial Arbitration Commission Proceedings", *Journal of International Arbitration*, Kluwer, Vol. 12, No. 4, 1995, pp. 91-98, also see Redfern and Hunter, *op. cit*, p. 218

In addition, most institutional Arbitration Rules provide provisions which state that the parties to the dispute may challenge the arbitrator where they have reasonable doubts of his impartiality and independence. Such a provision is found in the UNCITRAL Model Law.⁶¹⁶ Also the LCIA Arbitration Rules read:

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts to his impartiality or independence⁶¹⁷

Most national laws contain similar provisions to those adopted in the international arbitral institutions, where the lack of the impartiality and independence of the arbitrator may result in removal of that arbitrator. For instance, the provision of the Act of 1986 in the Netherlands stipulates that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality and independence.⁶¹⁸ This provision differs from the provision adopted in the Swiss Act of 1989, which allows the parties to challenge the arbitrator if they have reasonable doubts as to his independence only, not his impartiality.⁶¹⁹

In other countries, the courts have the power to revoke the appointment of the arbitrator in some cases. The United States is one such, although the majority of the courts in the United States have refused to decide on whether or not an arbitrator is suitable to arbitrate the dispute, except when this arbitrator has been appointed by the court itself.⁶²⁰

The English Act of 1996 contains a similar provision to the one adopted in the international arbitration institutions, but more comprehensive:

“ A party to arbitral proceeding may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:

⁶¹⁶ UNCITRAL Model Law of 1985, Art. 12(2)

⁶¹⁷ The LCIA Arbitration Rules, Art.3(7)

⁶¹⁸ The Netherlands Arbitration Act of 1986, Art. 1033

⁶¹⁹ Redfern and Hunter, *op. cit*, p. 219

⁶²⁰ David Renč, *op. cit*, p. 224

- a- that circumstances that give rise to justifiable doubts as to his impartiality;
- b- that he does not possess the qualifications required by the arbitration agreement;
- c- that he is physically or mentally incapable of conducting the proceeding or there are justifiable doubts as to his capacity to do so;
- d- that he refused or failed:
 - (i) properly to conduct the proceeding, or
 - (ii) to use all reasonable dispatch in conducting the proceeding or making an award,
 and that substantial injustice has been or will be caused to the applicant”⁶²¹

Moreover, the Netherlands Arbitration Act of 1986 set forth the most important reasons which may result in challenging the arbitrator:

- if the arbitrator (or his spouse) has a personal or financial interest in the dispute, such as where he is creditor, debtor, presumptive heir or a donee of one of the parties to the dispute.
- if the arbitrator (or his spouse) has a subordinate or employment relationship with one of the parties to the disputes or their representatives. For example, in the case of *Centrozap v. Orbis*, the Swiss Federal Tribunal found that it was sufficient reason to warrant the disqualification of the arbitrator that his wife was the assistant of the lawyer of one of the parties to the dispute.
- if the arbitrator (or his spouse) is a relative of one of the parties to the dispute.
- if there is or has been a lawsuit between the arbitrator (or his spouse) and one of the parties
- if there is a friendship or hostility between the arbitrator and one of the parties to the dispute.
- if the arbitrator has previously given his advice or opinion on the subject-matter of the dispute to one of the parties to the dispute before his appointment as an arbitrator.

⁶²¹ Arbitration Act of 1996, Art. 24(1)

When such circumstances exist, challenge is legitimate. The challenge procedure is available under virtually all arbitration laws and arbitration rules as a legitimate means for obtaining impartiality. There may also be grounds for challenging the arbitrators which are not based on justifiable doubts as to his impartiality or independence, when an arbitrator does not possess the qualifications agreed and required by the parties in the arbitral agreement.⁶²² If an arbitration clause requires all arbitrators to be engineers and a party nominates another arbitrator with different qualifications, such as a lawyer, without any engineering background, this might be a ground for the other party to challenge the appointment. Consequently, violation of the contractual requirement of the appointment of the arbitrator may not only result in the disqualification of the arbitrator but could also result in setting aside the arbitral award or to its non-enforcement.⁶²³ This is because the parties are obliged to follow the requirement outlined in the arbitration agreement or in the arbitration clause. In addition, in international commercial arbitration, there are also other reasons which may cause the challenge of an arbitrator. For example, the sole or presiding arbitrator may be challenged, if it is found that he is not from a country other than those of which the parties to the dispute are nationals.

If the challenge is successful, it may lead to the swift replacement of the challenged arbitrator. This is the case when an arbitrator has been challenged by one party and the other party, the one who appointed the challenged arbitrator, agrees to the challenge; likewise, if the challenged arbitrator simply withdraws from his office.

However, when the other party does not agree to the challenge or when the challenged arbitrator does not voluntarily withdraw, a decision on the challenge has to be made.

This decision, depend on the rules to be followed, may delay or even disrupt the

⁶²² Christopher Koch, "Standards and Procedures for Disqualifying Arbitrators", *Journal of International Arbitration*, Vol. 20, No. 4, Kluwer Publication, 2003, pp. 325-353, also as adopted in the UNCITRAL Model Law

⁶²³ *Ibid*

proceedings; in other words, the challenging procedure may give a party an opportunity to foster unnecessary retardation. The rules governing this issue play a significant role in the prevention and avoidance of delaying tactics.⁶²⁴

Like many other arbitration rules mentioned earlier, Article 12 (2) of the Model Law restricts the grounds for challenge to specified circumstances – normally, an arbitrator's lack of independence or impartiality. In this regard it differs from some arbitration Rules which do not contain any such constraints, and instead allow the Court unlimited discretion, in the case of a challenge, to remove an arbitrator for any reason that it may regard as appropriate. Moreover, the Model Law does not explicitly set forth a requirement of impartiality; arbitrators may therefore nevertheless be challenged for partiality and for not possessing the qualification agreed upon by the parties only. Failing to perform their functions properly or other reasons which may cause a defect to the arbitral process are not covered by the Model Law as grounds for challenging the arbitrator. In making a challenge, the parties are required to have regard only to the requirements of the Model Law. However, in other Arbitration Rules, the parties may have regard to any mandatory provisions of law that may be applicable.⁶²⁵

Moreover, the UNCITRAL Model Law has explicitly confirmed that challenges to arbitrators have been made for a variety of different reasons, although they have most frequently concerned the independence or impartiality of the arbitrator concerned, including, in particular, the arbitrator's failure to disclose fully in the statement of independence possible relationships with the parties or their counsel.⁶²⁶

Indeed, challenges relating to an arbitrator's failure to disclose a relationship have tended to succeed more often than other challenges received by the Court and, in

⁶²⁴ David Renč, *op. cit.*, p. 224

⁶²⁵ For example the ICC Arbitration Rules in Art. 11 (1) indicates that the challenge of the arbitrator is on the ground of the lack of the independence or otherwise.

⁶²⁶ UNCITRAL Model Law, Art. 12 (1)

particular, where not only the undisclosed relationship, but the fact of non-disclosure itself, might reasonably be said to call into question the arbitrator's independence in the eyes of the parties. Challenges founded on an arbitrator's alleged misconduct of the arbitral proceedings have generally fared less well. This is primarily because the drafters of the Model Law has been reluctant to concern themselves with procedural decisions of arbitrators made on the basis of their much more intimate appreciation of all the relevant circumstances of a particular case, except where the arbitrator's conduct is manifestly improper. Thus, for example, an arbitrator who failed to advance an arbitration with reasonable dispatch, in accordance with the Model Law requirements, could be challenged successfully on this basis.

5.6.1 [B] The ground of challenge under SAR

The new act of the Saudi arbitration regulation provides that the grounds for challenging an arbitrator are the same as for challenging a judge. It provides that:

The arbitrator shall be stopped for the same reasons of estoppel of the Magistrate.⁶²⁷

Moreover, the Implementation Rules of 1985 add some other motives to the ground of challenge the arbitrator in the Arbitration regulation of 1983:

Any persons having an interest in the dispute or having being sentenced to a (HUD)(3) or penalty in a crime of dishonor, or being from a public position following a disciplinary order, being adjudicated as bankrupt, unless being relived, shall not act as arbitrator.⁶²⁸

Because of the lack of the provisions in the judicial regulation to specify the grounds for challenging a judge in the kingdom of Saudi Arabia, it is necessary to refer the challenge of the judge and the arbitrator to the general rules of the *Sharia*. These are stated in Article 91 of the new Regulation of the *Al-Murafat Al-Shareeah*, which can be a

⁶²⁷ Arbitration Regulation of 1983, Art. 12

⁶²⁸ The Implementation Rules of 1985, Art. 4

guide for specifying the circumstances considered as grounds on which to challenge the judge and stop him from proceeding with the dispute settlement. Thus, the arbitrator is challenged, under the arbitration regulation, for the same grounds as specified for challenging the judge in the previous provision.⁶²⁹ One company presented a request to the Commercial Circuits of the Board of Grievances to challenge the arbitrator who was appointed by the other party, stating that the defendant and the umpire arbitrator were members of the management commission of one of the companies and that this would undermine the impartiality of the arbitrator. The Commercial Circuits responded by referring to the general principle of the *Sharia* which stipulates that the circumstances for challenging the judge arise when the judge hears a case of a party from whom he cannot accept evidence, such as member of his family, and that this rule could be applicable to the arbitrator from the reading of Article 12 of the regulation. Therefore, the Circuits, according to this argument, issued a decision rejecting the request for the challenge, since the testimony of the two members of the management commission was valid⁶³⁰. Because of the lack of explicit provisions regarding the grounds of challenge specifically for the arbitrators, it seems that parties to disputes, in practice, base the challenge of the arbitrators on the same grounds which are set out in the national arbitration rules of various countries, as well as the international and institutional rules of arbitration. Additionally, it is worth mentioning that Dr. Al-Bejad argues that, under the Regulation, challenge is applicable to a sole arbitrator who has been appointed by the parties or by the competent authority on condition that the party who is requesting the challenge must not have known of the circumstances which appear to be ground for challenge prior to the appointment. However, if the competent authority finds out that the party requesting the challenge was aware of the circumstances which could be ground for the challenge prior to the appointment, the competent authority shall reject

⁶²⁹ Mohammed N. Al-Bejad, *op. cit.*, pp. 158-159

⁶³⁰ Arbitral Award No. 131/28 on 1419 A.H (1999 A.D)

the request for the challenge. On the other hand, in the case of an arbitral tribunal consisting of three arbitrators, the request for a challenge can only be applied to the third arbitrator on the grounds provided in the Regulation and the Implementation Rules, because the two arbitrators appointed by the parties individually seem to be considered as lawyers for the parties who nominate them, rather than arbitrators deciding the dispute with the other arbitrators. Accordingly, the procedure of challenge in such a case is applicable only to the neutral or umpire arbitrator.⁶³¹

Furthermore, the Commercial Court Regulation of 1931 contains a provision which sets forth the grounds for challenging judges. It provides that:

If the lawsuit has been brought against the President of the member of the Court, if one of them has a financial interest in the case, if he is a partner of one of the parties, if has given witness statements in his favour, if there is any hostility between a judge and any party or if he is a parent of any party, up to the degree to which a witness statement would be inadmissible. It is sufficient that any of these reasons be established for a judge not to be admitted in the case.⁶³²

It is important to note that neither the Arbitration Regulation of 1983 nor the Implementation Rules of 1985 include any provision relating to the issue of the liability of the arbitrator which, it could be argued, would be a good reason for the parties to request a challenge if the arbitrator proved negligent in carrying out the task of the arbitration professionally. However, Yahya Al-Samaan points out that “according to the general principle of the *Sharia* an arbitrator can be held liable for negligence in failing to take note of important documents or losing or demanding them, or in failing to take note of a vital statement by one of opponents”⁶³³

⁶³¹ *Ibid*

⁶³² The Commercial Court Regulation of 1931, Art. 438

⁶³³ Yahya Al-Samaan, *op. cit.*, pp. 228-229

5.6.2 [A] Procedure of Making the Challenge

Generally, the procedure for challenging an arbitrator is to be found in the law applicable to the arbitral process. The party may make the request to challenge, in the case of *ad hoc* arbitration, directly to the arbitral tribunal and then to the competent authority, which will deal with the challenge according with the applicable law imposed in the arbitration agreement. Otherwise the parties can make the challenge directly to the competent authority, with no need for it to be made to the arbitral tribunal. In institutional arbitration, the request of the challenge will be made to the arbitral tribunal or alternatively to the court of the institution whose procedure is being applied. It is not expected that the competent authority will proceed with the challenge without parties initiating it officially to the authority. A decision was issued by the Cairo Court of Appeal that the court refused the challenge because the allegation that one of the arbitrators was biased was not established.⁶³⁴

El-Ahdab points out that a distinction should be made between a challenge on the ground of the lack of the impartiality and independence presented to the arbitral tribunal and a request presented to the competent authority. A decision made by the arbitral tribunal has less power than a decision made by the competent authority. The jurisdiction of the competent authority upon the issue of the impartiality and independence of the arbitrator is very comprehensive. However, if the challenge is about an issue other than the impartiality and independence of the arbitrator, such as that the arbitrator does not possess the requisite qualification or does not speak the language specified in the arbitration agreement, the competent authority will grant the authority to the arbitral tribunal to decide upon the request.⁶³⁵

⁶³⁴ Decision issued by The Cairo Court of Appeal, Case No. 45/1995- Judgement of Circuit 50 (Commercial) dated 31/12/1997

⁶³⁵ Abdul Hamid El-Ahdab, *op. cit.*, p. 227

Most national laws empower the national judge to decide upon an arbitrator's challenge. Therefore, the first question that arises is that of the authority's competence to decide on the challenge. However, the particular nature of the relationship between arbitration institutions and the parties may well excuse the intervention of national courts to assess the contractual liability of the protagonists on the stage of administered arbitration. Submission of the challenge of an arbitrator to a national judge by a party that has agreed to an institutional procedure may, however, be regrettable. Naturally, this kind of practice rewards the bad faith of parties seeking to sabotage the arbitral procedure. Nevertheless, even where there is an established procedure for challenging arbitrators in institutional arbitration, exceptional circumstances may lead local courts to intervene.⁶³⁶ Similarly, some national rules follow the approach of the UNCITRAL Model Law by which the challenge should at the start be submitted to the arbitral tribunal. However, the parties, under this rule, may request a decision from the courts at the place of the arbitration if the parties are not satisfied with the arbitral tribunal's decision. It could be argued that this approach may be problematical, because the tribunal 'becomes a judge in its own cause'. In the case of a three-member tribunal, all three arbitrators will take part in the decision; if it is a sole arbitrator, that person decides alone. This is hardly compatible with the notions that justice must be seen to be done, and that a judge should not sit in his or her own cause.⁶³⁷

The request for challenge must be in writing and must contain the facts and circumstances on which the challenge is based. In addition, if the arbitration is performed under institutional rules, the duty of the institution is normally to inform all participants of the challenge and to give the opportunity for the participants to comment on the challenge. According to the rules of different institutions, the challenged

⁶³⁶ Guillermo Aguilar Alvarez, "The Challenge of the Arbitrator", *Arbitration International*, Kluwer Publication, Vol. 6, No. 3, 1990, pp. 203-225

⁶³⁷ Christopher Koch, *op. cit.*, pp. 325-353

arbitrator must resign, if all the parties agree on the challenge. However, the resignation of the challenged party will not be considered as acceptance of the grounds of the challenge.⁶³⁸

In order for the institution to decide upon the challenge, it is essential that it is informed of the comments of the participants and how they feel about it. Some institutional rules, such as the ICC Rules, stipulate that the comments of the participants are to be made available to the others by the ICC so that there may even be another round of arbitrator and party comments.⁶³⁹

Under the UNCITRAL Model Law, the parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, the Model Law contemplates a second procedure, as described in paragraph 2 of Article 13 (Challenge Procedure). In accordance with this alternative, a party who intends to challenge an arbitrator, within fifteen days after becoming aware of the constitution of the arbitral tribunal, or after becoming aware of any circumstance which gives rise to justifiable doubts as to the impartiality, independence or qualifications of the arbitrator, shall send a written statement of the reasons for the challenge to the arbitral tribunal. If the other party does not agree to the challenge or the challenged arbitrator does not withdraw from his office, then the arbitral tribunal shall decide on the challenge. The “arbitral tribunal” should consist of the two other appointed arbitrators.⁶⁴⁰

If the challenge under any procedure agreed upon by the parties or when carried under the second procedure, is not successful, i.e. the challenged arbitrator continues in office, the challenging party, after having received notice of the decision rejecting the challenge, may request the court to decide on the challenge, which decision shall be

⁶³⁸ *Ibid*

⁶³⁹ *Ibid*

⁶⁴⁰ José Luis Siqueiros, *op. cit*, pp. 91-98

unappeasable⁶⁴¹ This latter course has the advantage of settling the issue in a binding manner. This provision avoids undue delay, allowing the arbitrators to continue performing their duties while the challenge is pending.⁶⁴²

If a request for the challenge of the arbitrator is brought to the competent authority, the arbitral tribunal should suspend the arbitration proceedings until the decision on the request of challenge of the arbitrator is heard. However, there are exceptional circumstances, which require the continuation of the proceedings.⁶⁴³ Nevertheless, the practice in other countries, for example these of the Romano-Germanic family is for the arbitral tribunal to continue the arbitral proceeding and the request of the challenge to be postponed until the arbitral award is rendered. This may result in the party requesting the challenge not cooperating in the arbitral proceedings, because his request to challenge the arbitrator is redundant.⁶⁴⁴

Furthermore, it could be argued that the arbitral tribunal should suspend the arbitral proceeding until the decision over the challenge to the arbitrator is made. This is because, if the challenge of an arbitrator is accepted, the parties to the dispute will avoid losing time and money if the request of the challenge of the arbitrator should be conducted after the arbitral award is rendered.

On the other hand, if the request of the challenge is rejected, the arbitration will proceed, while if the request is accepted, the arbitral tribunal will proceed with filling the vacancy left by the challenged arbitrator with a new arbitrator before the arbitral process recommences, if the arbitral tribunal consists of a sole arbitrator, while if the arbitral tribunal consists of three arbitrators, the arbitral award may be rendered by the

⁶⁴¹ *Ibid*

⁶⁴² *Ibid*

⁶⁴³ such as the fear of the death of a very important witness who is dying of a serious illness

⁶⁴⁴ David Reně, *op. cit*, pp. 263-264

remaining arbitrators, especially if the proceeding is at the stage of deliberations.⁶⁴⁵

However, the remaining arbitrators may not reach the majority vote of the deliberation, and then the replacement is significant for carrying out the proceedings.

The vacancy of the challenged arbitrator is filled with the new arbitrator in the same manner as the challenged arbitrator's appointment.⁶⁴⁶ Therefore, the appointment of the new third arbitrator or the sole arbitrator is by the mutual consent of the parties to the dispute, unless the parties fail to reach an agreement, when they should call for the intervention of the competent authority to appoint the new arbitrator.

Furthermore, the arbitral tribunal should give the replacement arbitrator enough time to study the dispute, for instance documents such as the written statements of the pleadings and the evidence, and procedure admitted by the previous arbitral tribunal, in order for the replacement arbitrator to participate at any stage of the arbitral proceedings. For example, if the oral hearings have not yet been held, it is crucial for the arbitral tribunal to go over the arbitral proceedings with the new arbitrator, whereas if the oral hearings have been started before the appointment of the new arbitrator, the arbitral tribunal should give him the time to study the process of the arbitration and enable him to start the process with the arbitral tribunal from the stage where the former arbitrator has stopped, to try to avoid repetition of the hearings, which would require extra time and money.

5.6.2 [B] The procedure for challenging the arbitrator under SAR

This has been set forth in Article 12 of the arbitration Regulation of 1983. According to this article, the request of the challenge should be brought to the competent authority

⁶⁴⁵ *Ibid*, p. 265

⁶⁴⁶ UNCITRAL Model Law of 1985, Art. 15.

originally having the jurisdiction over the dispute, the Commercial Circuits of the Board of Grievances or to the supervision committee if the original Committee does not comply with the request for the challenge. Such was the case between *A. H. S v. Q Constructor Company* when the Supervision Committee noticed that the Commercial Circuits had approved the arbitrator of the plaintiff, whereas the defendant objected to the appointment because the appointed arbitrator was the umpire arbitrator of a previous tribunal in the same dispute, whose award had been dismissed. The Supervision Committee stated that this rejection amounted to challenging the arbitrator.⁶⁴⁷ Moreover, the request should be made within five days of the day when the parties were informed of the appointment or the day the reason for challenge appeared.

The party to the dispute must submit his request to challenge an arbitrator directly to the competent authority, because the arbitral tribunal does not have the power to decide upon a challenge of one of its arbitrators. As stated in Article 12 of the regulation, the request for challenge of the arbitrator must be submitted to the authority having the original jurisdiction over the dispute within five days of the day of the appointment or from the day on which the reason for challenge appeared to any one of the parties at any stage of the proceedings, unless the arbitral award has been rendered. In addition, the time limit of the challenge should be measured as laid down in Article 12, taking into consideration the 'period of the distance', which is the period until the notification of such appointment arrives at the opposing party, particularly when the party is not resident in the same place as the competent authority.⁶⁴⁸ Moreover, the notification of the appointment should be by the method agreed on by the parties in the arbitration agreement. But, if the arbitration agreement does not specify the method of informing the other party of the appointment of the arbitrator, the general rules should be applied in this regard. This means notification should be through the competent authority, and in

⁶⁴⁷ Award No. 96/T/3 on. 1417 A.H (1997 A.D)

⁶⁴⁸ Mohammed N. Al- Bejad, *op. cit*, p. 160

this case, notification by telephone call, telegraph or registered letter by the opposing party is not acceptable.⁶⁴⁹ Therefore, it is crucial that the Saudi legislature should consider increasing the period specified in the article within which the request of the challenge must be submitted, in order to give the party requesting to challenge sufficient time to be sure of the ground of the challenge, and to prepare and bring its request for challenge. Sufficient time should also be given for the notification of the appointment of the arbitrator to arrive to the opposing party, if such a period is not specified in the arbitration agreement.

According to Article 12 of the regulation, the parties have the right to bring such a request to the competent authority. However, Dr. Al-Bejad argues that this provision does not withdraw the right of the parties to request the arbitrator directly to resign from deciding the dispute after the occurrence of the ground of the challenge. This is because the general rules stipulate that the arbitrator should resign on his own from deciding the dispute from the day the ground of challenge appeared. Therefore, if the arbitrator does not resign on his own, the opposing party will then be granted the right to challenge the arbitrator before the competent authority.⁶⁵⁰ It is worth mentioning that if the party requests the arbitrator to resign within the period specified in the regulation, this party cannot be granted the right to request the challenge before the competent authority during the same period unless the arbitrator rejected the request of resignation. In other words, the period specified in the article designated is for requesting the challenge before the competent authority and requesting the arbitrator to resign. Therefore, the party should get the agreement of the arbitrator to resign within the five days. If the party fails to get the agreement of the arbitrator to resign within the period specified in

⁶⁴⁹ *Ibid*

⁶⁵⁰ *Ibid*, p. 161

the article, he could then bring the request to challenge the arbitrator to the competent authority on the last day; otherwise, the request is unacceptable.⁶⁵¹

When the request to challenge an arbitrator is submitted to a competent authority such as the Board of Grievances, this authority will call the parties to the dispute and the challenged arbitrator to a special session to hear their pleading and defence. After that it will render a final decision in respect of the challenge.⁶⁵²

Neither the Regulation nor the Implementation Rules have stipulated that after submission of the request for challenge, the arbitral proceedings will be postponed until a decision is made and therefore the agreed time of the arbitral award will also be postponed while the competent authority is considering the request for challenge, since the challenged arbitrator cannot conduct the arbitral proceedings.

Accordingly, the competent authority having the original jurisdiction over the dispute will call the parties and the challenged arbitrator to decide upon the request of the challenge. If the competent authority finds the ground of the challenge is enough to disqualify the arbitrator, it will then be accepted. After the decision of the challenge is successfully made, the challenged arbitrator is not allowed to appeal against the decision. As Dr. Al-Bejad stated, it would be contrary to ethics for an arbitrator to insist on resuming the settlement proceedings, even if the ground of the challenge is incorrect.⁶⁵³ However, if the challenged arbitrator believes that the ground of the challenge was incorrect, he is entitled to seek compensation from the parties according to the general principle of responsibility in the *Sharia*.⁶⁵⁴

The consequence of the challenge is to disallow the arbitrator from commencing the arbitral proceedings and, therefore, the parties to the dispute must appoint a replacement

⁶⁵¹ *Ibid*, pp. 161-162

⁶⁵² The Arbitration Regulation of 1983, Art. 12

⁶⁵³ *Ibid*

⁶⁵⁴ Ahmed Abu-Alwafa, *Arbitration as a Means of International Dispute Settlement in Sharia Law*, 6th Ed , The Institute of the Diplomatic Studies, Riyadh, 1999, p. 167 (in Arabic)

arbitrator instead of the challenged arbitrator. On the other hand, if the parties fail to reach an agreement upon the appointment of the replacement arbitrator, the competent authority having the original jurisdiction over the dispute will intervene to carry out the task of filling the vacancy.⁶⁵⁵ Besides, according to Article 14 of the Regulation, the time limit of the arbitral award will be extended to thirty days.⁶⁵⁶ However, normally, in practice, the parties to the dispute determine the extension of the arbitral award in the arbitration agreement in the case of the challenge, but if the parties did not include the time of the arbitral award in the agreement, then the arbitral award must be rendered within ninety days of the date of approval of the arbitration agreement by the competent authority.⁶⁵⁷ According to Article 14, the time of the arbitral award will be extended to thirty days. However, allowance should be made for the period from the date of the submission of the request of the challenge until the date of the appointment of the replacement arbitrator, which the drafters failed to specify. To say otherwise is to conflict with the wording of Article 9 of the regulation, where the arbitral award must be rendered within ninety days of the date of approval of the arbitration agreement, while sometimes the period between the requests for the challenge and filling the vacancy is lengthy which may make it impossible to fulfil that condition. Therefore, the period between the request of the challenge and filling the vacancy should not be counted within the thirty days specified in Article 14 of the regulation. Otherwise, the party who is not in favour of the challenge could stretch the period between the request of the challenge and the appointment of the replacement arbitrator by not cooperating in the challenge hearing, as justification, according to Article 9 of the regulation, to resort to the competent authority either to decide upon the dispute or to extend the period for the arbitral award. Therefore, it could be argued that the situation resulting from these provisions is contrary to the intended feature of arbitration, which is the speed of

⁶⁵⁵ Dr. Mohammed N. Al- Bejad, *op. cit*, p. 163; also see Dr. Edward Eed, *op. cit*, p. 413

⁶⁵⁶ Arbitration Regulation of 1983, Art. 14

⁶⁵⁷ Arbitration Regulation of 1983, Art. 9

resolving the dispute, because it occupies the competent court, the authority having the original jurisdiction over the dispute, with a dispute which could have been decided earlier.

5.7 [A] Fees and expenses of arbitrators

The cost of a claim before an arbitral tribunal is often higher than the cost of the same claim before a judicial court, because judges and court rooms are paid for by the state, whereas it is necessary for the parties to the dispute to pay the fees and expenses of the arbitral tribunal and the cost of hiring a suitable room or rooms for the conduct of the arbitral process. In fact, the concept that an arbitrator should be entitled to a fee was not known before the end of the nineteenth century. At that time, the parties to the dispute usually chose a person who was a friend of theirs to resolve their disputes. This person would have felt offended if he had been offered a fee.⁶⁵⁸ In the twentieth century, the concept changed to one where an arbitrator has in general the right to claim the dispute a fee for his work and time spent on the case. However, an arbitrator may lose this right if he does not fulfil his mission to the arbitration proceedings and does not issue an arbitral award, or if the arbitral award rendered by him is null and void as result of his negligence or fault.

National arbitration laws of various countries differ in respect of the right of an arbitrator to receive a fee. Many countries, such as England, Italy, Spain and the Netherlands, recognise and give an arbitrator this right on the basis that he spends a lot of time and effort to resolve the dispute arising between the parties, so he is entitled to receive a fee. In other countries, such as Belgium, France and many civil law countries,

⁶⁵⁸ David Reně, *op. cit.*, p. 270.

an arbitrator is not entitled to a fee, but the parties to the dispute recognise the right of an arbitrator to claim a fee. This may be done explicitly or on the basis of usage.⁶⁵⁹

(i) Amount of the fees and expenses

The determination of the fees and expenses of the arbitral tribunal differs depending on whether the kind of the arbitration is institutional or *ad hoc*. In institutional arbitration, the amount of the fees and expenses of arbitration will be fixed by the institution itself, or decided after consultation with the sole or presiding arbitrator according to the arbitration rules of such institution, whereas in *ad hoc* arbitration, the parties to the dispute fix the amount after consultation with the arbitrators themselves or if they are unable to agree upon a specific amount, the competent authority, such as the court, will fix it.

Moreover, it is possible that the arbitrators themselves fix the amount of the fees and expenses. However, if they abuse their power and fix a large amount, the competent authority has the power to reduce the fees to a reasonable amount on the basis of the request of one or more of the parties to the dispute.

(ii) Fees of arbitrators

There are at least three methods of assessing the fees payable to arbitrators. First, the *ad valorem* method where fees are calculated as a percentage of the total amount of the dispute. Some arbitral institutions in practice fix the fees of arbitrators within a given range, taking into account the time spent, the rapidity of the proceeding and the complexities of the dispute.

⁶⁵⁹ *Ibid.*, p. 271.

Secondly, the *per diem* method which establishes a daily rate for work done by an arbitrator on the case. This method depends on the arbitrators keeping a record of the time which they have actually spent and it also depends on the parties to the dispute being prepared to trust this record.

Thirdly, the *fixed fee* method where an agreed sum is payable to the arbitrators by way of remuneration, irrespective of the scale and the complexity of the dispute or the time spent by the arbitrators. The disadvantage of this method is that it is difficult to know how the case will develop, whether or not it will be resolved in a reasonable time or it will take much time before the arbitral tribunal reaches an award. On the other hand, when the parties refer their dispute to a specific institutional rule of arbitration, such as the ICC Arbitration Rules or the LCIA Arbitration Rules, they will be bound by the schedule of fees adopted by the rules of this institution.

(iii) Expenses of the arbitral tribunal

There are two methods of dealing with the expenses of arbitrators. The first is the *reimbursement method*, where the arbitrators must keep a detailed note of their expenditure including air fares, hotel expenses and so on. Then, they submit these details to the secretary of the arbitral tribunal or directly to the parties to the dispute for reimbursement. Sometimes, a limit may be imposed on the amount for which an arbitrator will be reimbursed. When the arbitrator exceeds this limit he must pay it on his own account.

The alternative method is the *per diem* method, where the parties to the dispute will pay the arbitrators' travelling expenses and an amount fixed as a daily rate to cover hotels and incidental expenses such as meals, telephone calls and so forth. The arbitrator will pay any excess over this fixed allowance.

It is highly desirable for the arbitral tribunal to arrange with the parties to collect payment while the arbitration is in progress rather than when the proceedings are over. This also helps the parties to the dispute to keep a check on expenses as the case proceeds.

4.7 [B] Fees and Expenses under SAR

The Arbitration Regulation of 1983 and its Implementation Rules of 1985 contain provisions which govern the fees and expenses of the arbitral tribunal. These provisions recognise the right of arbitrators to claim a fee for the effort and time spent by them during the course of the arbitration proceedings.⁶⁶⁰ It does not assume that the arbitrator will carry out the task of arbitration without reward, by analogy with the judicial system in Saudi, where it is free. Therefore, the parties to the dispute can not challenge the decision to pay the fees of the arbitrator on the ground that judicial fees are free, which Saudi Arabia is known.⁶⁶¹

In principle, the parties to the dispute have the right to fix the amount of the arbitrators' fees after consultation with them. However, if they are unable to agree upon a specific amount, the authority originally having jurisdiction over the dispute will fix the fees.

The Arbitration Regulation of 1983 explicitly provides that:

If there is no agreement on the fees of arbitrators, and a dispute ensues, the matter shall be settled by the Authority originally competent to hear the dispute.⁶⁶²

The current writer would argue that the Saudi legislature must integrate a provision into the regulation to establish, with the collaboration of the Board of Grievances and the Ministries of Commerce and Justice, a list of fee criteria containing minimum and maximum range of fees according to the sum of the contract. This should be similar to

⁶⁶⁰ Arbitration Regulation of 1983, Art. 22.

⁶⁶¹ Decision of the Supervision Committee of the Board of Grievances, No. 90/10/1422

⁶⁶² The Arbitration Regulation of 1983, Art. 23.

the provision of establishing the list of arbitrators by the authority originally competent to hear the dispute to fix the fees,⁶⁶³ to prevent the prejudice that might occur to the arbitrators and the parties from unjust estimation carried out by the competent authority. The unpaid portion of the fees of arbitrators must be deposited with the authority originally having jurisdiction over the dispute within five days of the approval of the arbitration instrument. This sum shall be paid within a week of the date on which the enforcement order of the arbitral award has been issued.

In practice, the parties to the dispute usually fix the fees of arbitrators in the arbitration agreement after consultation with the arbitrators themselves. Sometimes, if the parties to the dispute do not fix a specific amount, they insert a provision in the arbitration agreement which states that the fees of arbitrators will be paid by the losing party. However, if each party to the dispute fails in some demands the fees of arbitrators will be divided between the parties to the dispute equally where each one will pay the fees of the arbitrator appointed by him and they will share in the fees of the sole or presiding arbitrator.

There are many cases which confirm this practice, like the case of *Mr. S. A. S. (Sudanese natural person) v. A. Co. Ltd (Insurance company) & H. Co. for H. C. (Hire Cars company)* where the losing party paid all the fees of the arbitral tribunal⁶⁶⁴ and also the case of *S. Co. for Comm. & Cont. (Commercial & contracting company) v. Comm. S. Co. (Insurance company)* where the parties to the dispute shared the fees of arbitrators equally.⁶⁶⁵ The Arbitration Regulation of 1983 states in Article 23 that the decision of the competent authority concerning the fees of arbitrators is final. However, Article 46 of the Implementation Rules of 1985 contain a provision conflicts with former article. This provision gives either of the parties to the dispute the right to object to the decision of the competent authority regarding the fees of arbitrators within eight

⁶⁶³ Implementation Rules of 1985, Art. 5

⁶⁶⁴ The Arbitral Award issued on 16/09/1406 A.H. (1986 A.D.).

⁶⁶⁵ The Arbitral Award No. 2/1406, dated 26/05/1406 A.H. (1986 A.D.).

days of being notified of the decision. Such an objection will be brought to the competent authority itself.

In fact, it is necessary that the Saudi legislature reviews these provisions and sets forth its position in respect of the finality of the decision of the competent authority concerning the fees of arbitrators.

In addition, a question might arise where an arbitrator has failed to attend a hearing, and the fault was entirely his own, perhaps because two different matters had been scheduled for the same week. The parties, their representatives, witnesses and the other arbitrators may have attended. The hearing room may have been reserved and stenographers hired to transcribe the proceedings. The costs may be substantial. Will the absent arbitrator be liable for the wasted costs? May the other arbitrators charge the parties their usual fees for the period reserved?⁶⁶⁶ Will the disputant parties charge the absent arbitrator to pay the attendees? The regulations are silent on these matters, and also fail to define the relationship between the parties and the arbitrator in order to define their responsibilities and liabilities.

5.8 Summary

From the foregoing, it seems sensible to adjust the legislation in Saudi Arabia in order to close some of the loopholes that have become apparent, and to help the Regulation become more in line with the normal international practice. This latter will help businesses to join in the arbitration proceedings with more confidence, and thus benefit the whole business of international commercial transactions.

For example, as shown above, the requirement of an uneven number of arbitrators by the arbitration regulation helps to remove deadlock. According to the Arbitration Regulation, the parties have full freedom to appoint arbitrators themselves, or they may

⁶⁶⁶ Murray L. Smith, *op. cit.*, pp. 17-40

opt for selection by a third party chosen by them, or by co-operation between themselves and a third party. The competent authority will appoint arbitrators if the parties are unable to agree, or if either party does not nominate his arbitrator. And so it is recommended that the Saudi legislature determine a specific period within which the members of the arbitral tribunal should be appointed by both parties, after which the competent authority will assume this task. This period will assist to eliminate any attempt by the defaulting party to delay the commencement of the arbitration proceedings.

There are some major qualifications which are required by most arbitration laws for a person who attempts to take the role as an arbitrator, such as full legal capacity, sufficient experience, impartiality and independence. The Saudi Arbitration Regulation requires only that an arbitrator should have full legal capacity, and neglects the other major qualifications that the arbitrator should possess. Therefore, it is crucial that the Saudi legislature requires sufficient experience, impartiality and independence in persons who wish to act as arbitrators. These stipulations raise some questions which need clear answers from the Saudi legislature. For instance, the requirement of full legal capacity raises the question of the ability of women to act as arbitrators in Saudi Arabia. *Sharia* law does not recognise women's full competence to give evidence, as the testimony of two women is equivalent to that of one man. *Sunni* scholars vary in their view whether women can act as judges or arbitrators, and they debate whether an arbitrator is a judge or not. Those scholars who say women have the right to act as arbitrators, differ in the grounds on which they do so. Further, the Board of Grievances refuses to ratify an arbitration agreement containing a woman arbitrator, or to enforce an arbitral award made by a woman arbitrator, whereas the Board of Grievances may recognise some foreign arbitral awards, even if the arbitral tribunal contains a woman. Therefore, it is important that the Saudi legislature gives a clear answer on such double

standards. Notwithstanding, it is suggested that the Saudi legislature should make the most of the opinion of the scholars of the *Sunni* schools who allow women to take the role of arbitrator, since this opinion will harmonise with the current trend of the most well known arbitral rules; especially as *Sharia* law is always meant to be suitable to any time or place. It should be taken into consideration that modern society as well as Islamic jurisprudence grant that women are completely independent. They are able to conduct their own commercial transactions and be responsible for their own money.

A similar problem arises regarding the ability of non-Muslims to act as arbitrators. Non-Muslims are unable to act as arbitrators in domestic arbitration, because the applicable law of the dispute in the Kingdom of Saudi Arabia is normally the *Sharia*. Nevertheless, in the case of international commercial arbitration held in the Kingdom, it is not necessary that the members of arbitral tribunal are Muslim, particularly when foreign law is applicable. Also the Board of Grievances recognises foreign arbitral awards, which are usually made by tribunals containing non-Muslim arbitrators. Consequently, the Saudi legislature should reconsider the ability of non-Muslims to act as arbitrators, since the main point is to have the arbitral award in accordance with *Sharia*, which can be approached in a technical dispute by a non-Muslim arbitrator. More importantly, applying the *Sharia* law does not necessarily require that the arbitrator should be Muslim. The competent authority should leave the burden on the arbitrator to issue the award within the context of *Sharia* instead of having the burden on the disputant parties to limit themselves to appointing Muslim arbitrator whether the arbitration takes place domestically or internationally. Therefore, it is crucial to maintain a safeguard for foreign investors to choose their arbitrators freely whether Muslim or not, since Saudi has invited the international community to enter the Saudi market by joining the WTO. According to the Arbitration Regulation, an arbitrator may be dismissed by the mutual consent of the parties to the dispute. Also, either party has the right to challenge the

arbitrator within five days of the day on which the reason for challenge appeared and at any stage of the arbitration proceedings, unless the arbitral award has already been made. It might be better if the Saudi legislator increased this period to give the parties sufficient time to submit the challenge to the competent authority, especially when, as sometimes is the case, the place of the arbitration is different from the place of the competent authority.

Arbitrators have the right to claim from the parties to the dispute the fees for their work and for time spent on the case. The fees and expenses are fixed by the parties after consultation with the arbitrators themselves. If they are unable to agree upon a specific amount the competent authority should be able to fix it.

The recommendations that are here presented are supported by the evidence and analysis that has been shown in this chapter. If they are adopted, they will allow foreign persons to feel more confidence in the laws of the kingdom relating to the selection of arbitrator. This will in its own small way improve the smoothness and amicability of international trade relationships between the Kingdom and the international community. Therefore, producing rules of procedure that maintain a healthy arbitral tribunal will surely reflect positively on the quality of the arbitrators' awards. No less complicated in its rules and application than the composition of the arbitral tribunal and its constitution is the arbitral award. Thus, the requirement and formalities of the awards, deliberations, back up provisions for the case of either material errors or ambiguity of the awards, the procedure of the annulment and the recognition and the enforcement of the arbitral awards, will be discussed critically in depth in the next chapter.

CHAPTER SIX

THE ARBITRAL AWARD

6.1 Introduction

The issue of the constitution of the arbitral tribunal was discussed comprehensively in the last chapter. Members of the arbitral tribunal will be capable of producing the award which will effectively end the dispute. By doing so, disputant parties will reach final settlement. In this chapter, the focus will be on the issues that relate to the arbitral award. At the beginning we will highlight the nature of the arbitral award. Also we will shed light on the types of the arbitral awards, such as the final award, partial and interim award.

The form and content of the arbitral award are covered in this chapter, which discusses the most important formalities and requirements in the arbitral awards, such as the award in writing, signature, place and reason that the award is based on. Arbitrators are required to issue the award within a certain period. Therefore, the time limit for issuing the award is discussed.

The next section of this chapter is devoted to setting forth issues necessary for making the award, such as deliberation, using the vote and the back up provisions in case of material error being found in the award, and or any part of the award being unclear.

The last section of this chapter is devoted to the issues that follow the depositing the award to the authority, such as the annulment, recognition and enforcement of the arbitral awards. It first treats the provisions granting the annulment, the grounds on which annulment is based and the time limit within which the parties are allowed to challenge the award.

Recognition and execution of the arbitral award, whether national or foreign, are discussed in a section of this chapter which concentrates on the international mechanism

and the role of the international conventions and the rules of arbitration concerning the recognition and execution of foreign arbitral awards, such as the New York Convention of 1958 and the UNCITRAL Model Law of 1985.

6.2 [A] The Nature of the Arbitral Award

In order to characterise the nature of the arbitral award it is essential to illustrate the boundary of the arbitral award, beyond which the arbitrator is not authorised to go. The NY Convention stated in Article 2 that ‘the term “arbitral award” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which parties have submitted’. The French Court of Appeal in the *Sardisud* case described the arbitral award in terms of “the duty of the arbitrators to settle dispute finally of the whole or part of the dispute submitted to them, whether in the core of the dispute or in any procedural aspects, in order to end the case”⁶⁶⁷.

A majority of arbitration rules provide that the award is final and binding from the moment it is rendered. The parties are bound by such an award, since they must mutually agree to waive all means of recourse that may be waived and since they must voluntarily execute the award without delay. Most international arbitration rules recognize this characteristic of the arbitration award by providing that, as soon as the award is rendered, it "becomes *res judicata (chose jugée)*." Two principles must be reconciled: the efficacy of the award and the security of knowing that what has already been adjudicated will not be modified. The interpretation, rectification, and completion of the award must not undermine the meaning and purpose of the award as initially rendered.

⁶⁶⁷ French Court of Appeal Decision issued on 25/03/1994

6.2 [B] The legal nature of the arbitral award under SAR

The determination of the nature of the arbitral award has been a matter of debate among Islamic jurists, based on the controversy about the nature of arbitration itself. Some claim that arbitration has a contractual nature, and therefore, the arbitral award will have the same nature, as the parties have agreed to resort to arbitration. If it is, indeed, the case that the arbitral award is contractual in nature, its enforcement will be subject to the willingness of one of the parties and the other party will have recourse to the court to force the other party to enforce the arbitral award.

Another group among the Islamic jurists argue that the arbitration has a special nature and rules to preserve its characteristics, and hence, the arbitral award has a special nature too. It is an award that can be enforced, after issuing the enforcement order, in the same way that judicial awards are enforced. Therefore, it is not possible to say it is a contract by giving a contractual nature to the award, nor a judicial award, as it is not rendered by a judge. Then, it can be said that an arbitral award is a judicial award with a special nature.⁶⁶⁸ The Regulation and the Implementation Rules imply that the arbitral award has a distinctive judicial nature, as they contain provisions related to how to issue the award, as well as provision governing challenge, which are not dissimilar from the provisions related to the judicial awards.

Further, the arbitral award is issued by the arbitrator who is subject to the rules that apply to judges in many places in the Regulation and the Implementation Rules. Therefore, the arbitral award has the same power as a judicial award, being binding on the parties, and enforceable through the designated official authority. However, it has a special nature since it is issued by selected trusted professionals within a reasonable time.

⁶⁶⁸ Ahmed Abu-Alwafa, *op, cit*, p. 261.

6.3 Types of Arbitral Awards

There are different types of arbitral awards which may be made during the arbitral process. These types may dispose of one or more of the issues concerning the subject matter of the dispute, such as the determination of the applicable law of the arbitration. It would be better to determine all issues and decide all claims in a single award. However, certain issues of the dispute, such as the scope of the arbitral tribunal's jurisdiction, may need to be decided prior to making the final award at the end of the arbitral process.

This section will deal with the major types of the arbitral awards which may be rendered either during or at the end of the arbitral process.

6.3.1 Final Awards

The main characteristic of the term "final award" is that it finally settles the issues which were submitted to the arbitral tribunal, and puts an end to the dispute between the parties.⁶⁶⁹ Therefore, the final award should be accurate in its reasoning not only for the reason that the arbitral award should be correct, but also to be enforceable. The usual term, "final", used in the various arbitration rules, refers to an award which determines the dispute submitted to the arbitral tribunal.⁶⁷⁰ When the award is rendered, the arbitral tribunal becomes *functus officio*, for the reason that its mission is completed, and it is discharged from its duties.⁶⁷¹ More importantly, final awards are deemed to cease the relationship between the arbitrators and the parties to the dispute, since they put an end to the jurisdiction of the arbitral tribunal over the dispute.⁶⁷² This will lead to very significant consequences, as it will have the same effect as a binding decision by an

⁶⁶⁹ Christophe Imhoos, *Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes*, International Trade Centre, Geneva, UN, 2001, p. 105

⁶⁷⁰ Alan Redfern & Martin Hunter, *op. cit.*, p. 362

⁶⁷¹ Christophe Imhoos, *op. cit.*, p. 105

⁶⁷² Alan Redfern & Martin Hunter, *op. cit.*, p. 379.

ordinary court, and cannot be appealed, although there are limited rights to have an award reviewed by the courts under some national laws, such as the German arbitration law.⁶⁷³

It has been noticed that most arbitral rules and conventions, for instance the Model Law, have failed to provide a specific interpretation of the term, “final award”.⁶⁷⁴ This is because doing so would close the door to wide interpretation of the concept of a final award. This is important since it places on the parties some procedural obligations that are unlikely to be found in other types of awards. For example, the time limit for challenging the final award differs from that for other types. Another view is that the absence of a definite interpretation of the term “final award” in the Model Law is “for the sake of simplicity”.⁶⁷⁵ This is not true, for the reason that the *travaux preparatoires* referred to the draft provision of the US delegate⁶⁷⁶ and construed the term “final award” as meaning settlement of the dispute in full or “the final award constitutes or completes the disposition of all claims submitted to arbitration”.⁶⁷⁷

All awards are final, whether they are partial or conclude the whole dispute, ‘in a sense that they dispose finally the issue they decide and are binding on the parties’. Therefore, the final award may either be partial or interim. Whether it rules on a single aspect of the dispute, or on the entire dispute submitted to the tribunal, what is important from the enforcement prospective is that in order to qualify for enforcement under the convention, the award has to be final. The description offered above seems to be consistent with the relevant legislation in various jurisdictions where the types of award, which can be

⁶⁷³ Section 1059 of the ZPO

⁶⁷⁴ This work focus practically on the Rules of the Model Law

⁶⁷⁵ A/CN.9/246, Para. 115.

⁶⁷⁶ Mr Holtzmann describes how he would differentiate between awards: “A distinction might have to be made between interlocutory awards, whereby the tribunal ruled on such preliminary matters as jurisdiction or the finding of liability, and partial awards, whereby damages were awarded on one part of a claim but other issues to be decided. The term “interim award” referred to an award on such matters as interim measures of relief”. see Peter Binder, *op. cit.*, pp. 194-195.

⁶⁷⁷ A/CN.9/WG.II/WP.40. Art. XXII. Alternative A.

effectively rendered by an arbitral tribunal, are: 'final awards, partial awards and interim awards'.⁶⁷⁸

6.3.2 [A] Partial and interim Awards

The terms interim and partial award are sometimes used interchangeably, since it is very difficult to draw a line between them. In fact, the majority of interim awards are by nature partial awards, in the sense that they both determine finally issues regarding jurisdiction, damages and sometimes questions of applicable law.⁶⁷⁹ Thus, such an award is any final decision by the arbitral tribunal on a question that can be dealt with independently of other issues in the dispute, either because of its nature or because it concerns an identifiable and quantifiable part of the claim that can be separated from the rest of the dispute.⁶⁸⁰ Further, partial and interim awards are considered very efficient in determining matters that were omitted during the determination of the subject-matter which will save time and money for the parties and arbitrators involved.⁶⁸¹ A 'genuine partial award' is a final decision on an aspect of the dispute that can be dealt with on its own or as part of a decision as to the legal basis for a claim. For example, in the case of *BrasPetroOil Services Co. v. Great Man River Project*, after the court had decided the award, the respondent claimed that the document was unlawfully withheld and the decision must be reviewed. The arbitral tribunal decided at an oral hearing that the respondent should prove that the documents were withheld unlawfully. The respondent failed to submit the evidence regarding this issue on date. In response, the arbitral tribunal issued a procedural order, holding that the respondent had failed to cooperate with the tribunal to prove or to provide evidence for the unlawful failure to disclose the

⁶⁷⁸ *Ibid*

⁶⁷⁹ Julian D. M. Lew QC, Loukas A. Mistelis, Stefan M. Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, London, 2003, pp. 634-635.

⁶⁸⁰ Rolf Trittman, *op. cit*, p. 258

⁶⁸¹ Alan Redfern & Martin Hunter, *op. cit*, p. 380

document. The Paris *Cour d'appel* commented that the procedural order was in fact an award which was submitted to the ICC for authorisation.⁶⁸²

However, normally partial award is used to set out substantive issues of the dispute, for instance to determine the sum of money that is due and payable by one party to the other.⁶⁸³

The power of the arbitral tribunal to issue partial award may derive from the arbitration agreement or from the law governing the arbitral process. As it is expressed in various national arbitration rules, such as the English and Dutch law which grant the arbitral tribunal with the power to initiate partial awards during the arbitral proceedings.⁶⁸⁴

Whereas, in other national arbitration rules, such as the Japanese law grants such power to the arbitral tribunal, only if the arbitration agreement, whether submission agreement or arbitration clause, provides for it.⁶⁸⁵

At the international level, many international and institutional arbitration rules, such as the UNCITRAL Arbitration Rules provides the arbitral tribunal with the power to issue partial awards.⁶⁸⁶ As well as the LCIA Arbitration Rules provides that “The Tribunal may make separate final awards on different issues at different times”.⁶⁸⁷

A partial award is binding on the parties and it only sets out the issues which it decides. However, the partial award can be challenged by the resisting parties only after the issuance of the final award which decides the whole dispute. As stated in the Netherlands Arbitration Act of 1986:

“Unless the parties have agreed otherwise, an appeal to a second arbitral tribunal from a partial final award can be lodged only in conjunction with an appeal from the last final award”⁶⁸⁸

⁶⁸² 14 *Mealey's International Arbitration Report*. 24, 25 (1999)

⁶⁸³ Alan Redfern & Martin Hunter, *op. cit.*, p. 356.

⁶⁸⁴ The Netherlands Arbitration Act of 1986, Art. 1049; The new English Arbitration Act of 1996, Sec. 47 (2) b.

⁶⁸⁵ Mauro Rubino-Sammartano, *op. cit.*, p. 408.

⁶⁸⁶ UNCITRAL Arbitration Rules, Art. 32 (1).

⁶⁸⁷ The LCIA Arbitration Rules, Art. 16 (6).

⁶⁸⁸ The Netherlands Arbitration Act of 1986, Art. 1050(2).

Similarly, the Italian court will not challenge the partial award before issuing the final award which determines the whole dispute. Thus, the Court of Cassation has held that a partial award can not be challenged separately from the final award. The court justifies that for the reason that if the court rejected the challenge before the final award was issued, the final award would only deal with the left part of the dispute and this conflict with arbitration agreement.⁶⁸⁹

On the other hand, interim awards are set out to deal with issues of the dispute which may require to be determined in the preliminary stages of the arbitral process. For instance, the arbitral tribunal may issue interim award to determine how the case would proceed when the parties are unable to agree upon the procedural law of the arbitration, and the law of the place of the arbitration permits the arbitral tribunal to decide such matter.

The power of the arbitral tribunal to issue interim award is usually conferred in the arbitration agreement, whether an arbitration clause or a submission agreement, or by the law governing the arbitral process.

Some national arbitration rules explicitly give the arbitral tribunal the power to make interim awards.⁶⁹⁰ The Netherlands Arbitration Act of 1986 provides that “the arbitral tribunal may render a final award, a partial final award, or an interim award”⁶⁹¹

Whereas, some other national arbitration rules do not grant the arbitral tribunal such power to issue interim award, such as the United States laws.⁶⁹²

Internationally, the UNCITRAL Arbitration Rules provides a provision to grant the arbitral tribunal the power to make the interim award during the course of arbitration. It

⁶⁸⁹ *Spa Terme di santa Cesarea v. Spa Saverio Staicchi case*, Court of Cassation (Italy), 12/071979, Giustizia Civil (Italy) Massachusetts, p. 1767, this was mentioned in Mauro Rubino-Sammartano, *op. cit.*, p.409.

⁶⁹⁰ The new English Arbitration Act of 1996, Sec.39

⁶⁹¹ The Netherlands Arbitration Act of 1986, Art. 1049.

⁶⁹² Howard Holtzmann, *International Handbook on Commercial Arbitration, The United States*, Deventer, The Netherlands, Kluwer Law & Taxation, 1984, p. 20.

reads "...the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards".⁶⁹³

Interim awards are like partial awards considered binding decision between the parties on the issues with which they deal.⁶⁹⁴ However, it may be possible to challenge the interim awards. Some arbitration rules give the parties the right to challenge interim awards after the determination of the final award which disposes the whole dispute, unless the parties have agreed otherwise.⁶⁹⁵ On the other hand, some other arbitration rules give the parties to the dispute the right challenge the interim arbitral awards before making the final award of the dispute. For instance, the Model Law provides that the parties may challenge the interim award concerning the jurisdiction of the arbitral tribunal before the competent authority within thirty days from the date of notification of the interim award.⁶⁹⁶

Therefore, interim award may not always save time and money of the parties to the dispute. Since the it may lead to the intervention by the competent authority, such as the courts for judicial review, at the request of one of the parties to set a side such interim award or to affirm it. Such intervention may delay the determination of the case and lengthen the arbitration. Whereas, the main point of regulating the interim award is to prevent the paralysis of the arbitration and to speed and smoothen the arbitral process.

6.3.2 [B] Partial and interim award under SAR

Prior to the issue of the Saudi Arbitration Regulation, arbitrators were uncertain of issuing an awards during the arbitral process as necessary for the arbitral process to carry on, for instance, decision as to which of the parties is liable for damages, whilst

⁶⁹³ The UNCITRAL Arbitration Rules, Art. 32(1)

⁶⁹⁴ Alan Redfern & Martin Hunter, *op. cit.*, p. 360.

⁶⁹⁵ The Netherlands Arbitration Act of 1986, Art. 1050(3).

⁶⁹⁶ UNCITRAL Model Law of 1985, Art. 16(3).

the assessment of the damages is left to the final award. Even arbitrators were unclear whether to make an interim measures for protection in the form of an interim award. But the Regulation drafters emphasise that “All awards issued by arbitrators” can be enforced as arbitral awards.⁶⁹⁷ The term “All” in the last provision seems to resolve the aforesaid lack of clarity.⁶⁹⁸ It might be said that the use of such approach is for the sake of simplicity.⁶⁹⁹

Accordingly, the arbitral tribunal may render partial or interim awards concerning a part of the dispute which may be subject of a partial award. Practically speaking, there are certain cases in which the arbitral tribunal made interim awards, such as the case of *M. Ind* (an industrial company) v. *E. Co.* (a French industrial company), where the arbitral tribunal issued an interim award which decided the issue raised by one of the parties, as to whether the arbitral tribunal had jurisdiction to determine the subject-matter of the dispute. It decided that it had jurisdiction according to the arbitration agreement.⁷⁰⁰ Further, the rules directed that these kinds of arbitral award, final or interim, must be filed within five days with the authority initially competent to hear the disputes.⁷⁰¹ Consequently, the tribunal will issue a final award which disposes of all issues of the dispute at the end of the arbitral process. However, it is important that the Saudi legislature resolved the deficiency that appears in the provision by giving the arbitral tribunal the freedom to issue interim or partial awards during the arbitral process. This is on the basis that the final award will be rendered fundamentally in accordance with any partial and interim awards decided for the same dispute during the arbitral process.

⁶⁹⁷ Saudi Arbitration Regulations of 1983, Art. 18.

⁶⁹⁸ Nancy B. Turck, “Saudi Arabia”, *International Handbook on Commercial Arbitration*, J. Paulsson(ed), suppl. 17 January, 1994

⁶⁹⁹ This was a comment of one of the Model Law commentators who thought there was uncertainty in dealing with the different types of arbitral awards.

⁷⁰⁰ The Arbitral Award No. 4/1411, issued on 29/12/1412 A.H

⁷⁰¹ Saudi Arbitration Regulations of 1983, Art. 18.

It seems from the text of the Saudi Regulation that partial and interim awards are binding on the parties and have the same power as the final award, since the article gives both parties the power to object to any type of arbitral awards made by the arbitral tribunal within fifteen days from the date on which such party has been notified of the award after it was filed by the competent authority.⁷⁰² Thus, the regulation concerning the types of arbitral awards is unclear as to whether partial and interim awards must follow the same procedure as that for the final award. If not, should the arbitral tribunal have the power to consider the grounds and evidence on which the order for a partial or interim award was made? It is suggested that the Saudi legislature should take into account that there should be a difference between procedures for granting final awards and those for other types of arbitral awards, because partial and interim awards exist to make the task of issuing the final awards easier, and imposing such a complicated procedure would negate this advantage.

In addition, this provision shows that the regulation stipulates that more awards can be procedural, or as the text puts it, 'issued from investigation procedures', rather than final awards.⁷⁰³ The same stance was adopted by the Commercial Arbitration Rules of the GCC, of which Saudi Arabia is a member, that the arbitral tribunal should grant the power to take the necessary initiative at the request of one of the parties, regarding provisional procedures relating to the subject matter.⁷⁰⁴ Therefore, it is clear from what has been written that Islamic Rules do not contradict the rule referring to interim and procedural awards, since they simplify the task of the parties and the arbitral tribunal in reaching a final and just award.

⁷⁰² *Ibid*

⁷⁰³ By contrast, other laws name other types of arbitral award in the context of the regulation, such as the UNCITRAL Arbitration Rules which specified that the arbitral tribunal may issue additional, provisional or partial arbitral awards in addition to the final award.

⁷⁰⁴ The GCC Commercial Arbitration Rules of 1993, Art. 27

In fact, when the Islamic jurisprudence rules are scrutinized, it will be found that the parties in conflict have freedom to agree by what means the existing dispute should be settled. They may, if they so wish, authorize the tribunal to adopt these measures. On the other hand, arbitration is considered to be of a lesser degree than the judicial authority, and it seems apparent, therefore, that it is a matter of judicial authority. Consequently, procedures may be conducted through co-operation between the arbitrator or arbitral tribunal and the judicial authority. This, therefore, appears to be a common factor between Islamic jurisprudence and modern arbitration laws.

6.4 [A] Content and form of the Arbitral Award

Just as it is important for the parties to have the arbitral award issued, it is very important that the arbitral tribunal respects the requirements regarding the content of the arbitral award imposed, whether by the arbitration agreement or the applicable law of the arbitration. These requirements are imposed to speed up the arbitral process and try to avoid leaving scope for either of the parties to handicap the arbitral process. Most arbitration rules impose a provision that the arbitral award should contain certain elements. However, the various rules differ as to the elements to be contained in the arbitral award. Nevertheless, they share the same requirement that the arbitral award must be unambiguous and dispositive.⁷⁰⁵ Some rules have gone further to include more requirements regarding the content of the award, the main reason being to prevent any delay in the arbitral process. On the other hand, other rules neglect to specify the elements of the award.⁷⁰⁶ Such being the case, it may be possible to assume that it has been left for the arbitrators to include in the award whatever elements they deem necessary, which will of course be different from one arbitrator to another and from one case to another. This introduces a degree of possible unevenness to the arbitral award

⁷⁰⁵ Redfern & Hunter, *op. cit.*, p. 389

⁷⁰⁶ For example the Rules of the ICC before the current Rules of Arbitration of the International Chamber of Commerce came into effect on 1 January 1998.

and could induce a lack of confidence on those who use arbitration. Furthermore, if the award does not include certain basic elements, this omission may prove an obstacle to its enforcement in a country that requires such elements to be included in the award in order to enforce it.

Article 31 of the Model Law sets out the provision governing the content of the arbitral award. The first paragraph of the article requires that the award should be in writing and be signed by the arbitrator(s). It can be noted from the wording of the article that the award must be signed by the arbitrator or arbitrators rather than arbitral tribunal, in order to make it clear that it is the arbitrator or the arbitrators who must sign the award, not the presiding or the secretary of the tribunal.⁷⁰⁷ While the provision of signature is to prove the arbitrators' agreement upon the award, the provision also confirms that the award can only be issued in writing, as the provision of signature could not be imposed if the award were issued orally. Further, this paragraph tries to resolve the problem of omission of the signature of one of the arbitrators, since the decision, as stated earlier, can be issued by a majority vote according to some arbitration rules,⁷⁰⁸ providing justification for a dissenting arbitrator to sign the award. On the other hand, other commentators hold the opinion that the matter of a dissenting arbitrator should be determined either by the parties in the arbitration agreement⁷⁰⁹ or by the arbitral tribunal⁷¹⁰, and that the determination of a dissenting arbitrator is a matter of the determination of rules of procedure.⁷¹¹ From the wording of this article, the first paragraph seems to have a mandatory character in that both requirements, written form and signature by the arbitrators, are considered as "obvious requirements". Having the

⁷⁰⁷ Peter Binder, *op. cit.*, P. 187

⁷⁰⁸ UNCITRAL Model Law of 1985, Art. 29.

⁷⁰⁹ *Ibid.*, Art. 19(1), reads "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings"

⁷¹⁰ *Ibid.*, Art. 19(2), reads "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence".

⁷¹¹ Peter Binder, *op. cit.*, P. 188.

written form and the signature of the arbitrators maintained will surely play an effective role at the stage of enforcing the award as it will be much easier than to enforce an oral award.⁷¹² Since Article 31(1) has a mandatory character and Article 19 of the same provision grants freedom for some rules of procedures to be determined either by the parties or by the arbitrators, this raises the question whether the parties inherit this freedom to decide on different requirements or different rules in respect of the signature of the arbitrators.

The second element is the reasoning upon which the award is based, unless the parties agreed otherwise.⁷¹³ Undoubtedly, giving the reasoning of the award will surely assist the competent authority to get a complete picture of the arbitral award which they will need in order to be able to consider any challenge of the award. Moreover, having the arbitral award reasoned will give the disputing parties confidence in the arbitral tribunal and in arbitration generally. Not only that, having the award reasoned will assist the parties to settle similar disputes in the future without reference to arbitration. The requirement that the reasoning be stated may reflect the civil law view that such a requirement has a “beneficial influence”, as it makes the award much easier to understand. In contrast, the common law approach is that not requiring the reason will assist the arbitral tribunal to render the award quickly.⁷¹⁴ The Model Law has taken a compromise stance in this regard, as it grants the parties to the dispute the right to dispense the arbitral tribunal from stating the reason for the award, if they wish. The place and date of the arbitral award are less important than the other components.⁷¹⁵ However, identifying the place of the award will identify the competent authority that has the original jurisdiction to hear any challenge against the award. Also, stating the

⁷¹² *Ibid*, p. 6-054

⁷¹³ UNCITRAL Model Law of 1985, Art. 31(2)

⁷¹⁴ For example, in the United States the arbitration law does not require the arbitral tribunal to state the reasons for the award. However, other common law countries, such as England and Pakistan, hold that the arbitral tribunal should give reasons for the award unless the parties agreed otherwise.

⁷¹⁵ As stated in Art. 31(3) of the UNCITRAL Model Law of 1985

place in the award could be important in relation to the recognition and enforcement of the award, as it will identify whether the place stated in the award is a contracting country of the NY Convention of 1958, on the recognition and enforcement of foreign arbitral awards.⁷¹⁶ Similarly, the date of the award has the same importance as the place, since it identifies whether the arbitral award was rendered within the time limit of the arbitration. Moreover, the date of the arbitral award will help the parties to calculate the time limit for the competent authority for enforcing the award, as well as to accept the submission of a challenge against the award.

Even though the rules of The Model Law have succeeded in some points in connection with the content of the arbitral award, they have failed to indicate the validity of an arbitral award that does not contain one of the required components.

Further, Article 31(3) provides that an award should state the place and the date of the arbitration as determined by Article 20(1), which allows the parties freely to agree on the place of the arbitration. Failing such agreement, the arbitral tribunal shall determine that place “having regard the circumstances of the case, including the convenience of the parties”⁷¹⁷. Also, the article requires that the award shall be deemed to have been made at the place stated in the award.⁷¹⁸

The significance of the place and date of arbitration under the Model Law is of primary importance in the recognition and enforcement stages of an arbitration, especially in the context of enforcement proceedings under the NY Convention Art.V(1)(e). The date of the arbitral award is *inter alia* relevant in connection with the termination procedure in Article 33(1) and the correction of errors procedure in Article 33(2).

⁷¹⁶ Peter Binder, *op. cit.*, P. 190.

⁷¹⁷ UNCITRAL Model Law, Art. 20(1)

⁷¹⁸ Peter Binder, *op. cit.*, p. 190

6.4 [B] Content of Arbitral Award under SAR

In fact, the readers of the Saudi Arbitration Regulation find that there is not much difference between the Regulation and other arbitral rules in the requirements that arbitral awards should contain certain components. The regulation emphasises that “The award shall, in particular; include the Arbitration document, a summary of the examination of the parties, the evidence submitted by each of them, reasons for the award, the date on which the award is passed, the signatures of arbitrators and the dissent of any one or more of the arbitrators”.⁷¹⁹ Further, Article 41 of the Implementation Rules contains further requirements in respect of the content of the arbitral award “The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defences, substantial defences, and the reasons and text of the award”.⁷²⁰ The latter article seems to show the necessity of the award being signed by all the arbitrators, but does not set any regulation at the event of the absence of some signatures, as does the Model Law. As Alsubaihi argues, the provision should emphasise to what extent any one of the parties has the right to challenge the arbitral award for the reason of the absence of some signatures.⁷²¹ Further, it seems from the requirements of the content of the award that the award cannot be orally concluded and has to be written on paper. In addition, Al-Bejad argued that the award must be written and in Arabic, even if the parties are foreigners and even if the award will be enforced in a foreign state.⁷²²

⁷¹⁹ Saudi Regulation of 1983, Art. 17

⁷²⁰ Implementation Rules of 1985, Art. 41.

⁷²¹ Dr. A. Al-Subaihi, *International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law*, PhD Thesis submitted to the University of Birmingham, 2004, p. 233.

⁷²² Mohammed N. Al-Bejad, *op. cit.*, p. 220; also Article 36 of the Saudi Judicial Procedure Code stipulates that Arabic is the official language The Arabic language is the official language of the courts, and it is permissible for non-Arabic witnesses or disputants to stand before the court with a translator.

It seems that all the components listed in the Saudi Regulation and its Implementation apply to either settlement by arbitration or settlement by conciliation, since the arbitration rules do not differentiate between the two methods in the regulation, except with regard to making the decision.⁷²³

From the above, it seems that these two articles are more comprehensive than Article 31 of the Model Law, where only the signature of the arbitrator, the reason, date and place of arbitration are required to be contained in the award. According to the Regulation, in order for the competent authority to recognise the award, as it is not the body that arbitrated the dispute, it needs to obtain a full picture of the arbitral process until the award is rendered, to check whether the arbitral tribunal has followed the arbitral rules. However, while imposing such comprehensive requirements regarding the components of the arbitral award is intended to facilitate monitoring of the arbitral process, it is arguable that these rules may result in serious delay of the process, as the examination of so many documents would surely need considerable time, where lesser formalities would obtain the same result, such as the rules that imposed by the Model Law.

Undoubtedly, Article 17 of the Regulation and Article 41 of the Implementation Rules will not succeed without the cooperation of the arbitrators to include in the arbitral award all the relevant elements, since these elements listed in the provision will not always match the parties' interest to protect their rights. In some disputes, more components may be needed than those listed in these articles. In practice, in most of the cases of arbitral award that are considered in the Chamber of Commerce and Industry in

Article 25 of the Implementation Rules makes the same stipulation, it reads: "The Arabic language shall be the official language to be used before the arbitration panel, whether in the discussion or in writing. The arbitration panel and the parties may not speak other than the Arabic Language and any party who does not speak Arabic shall be accompanied by an accredited translator who shall sign with him the minutes of the hearing, approving the statements made".

⁷²³ In relation to the decision, it is stated in Article 16 of the regulation that "The decision of the arbitrators shall be taken by a majority vote and where they are authorised to make conciliation, the award shall be issued by unanimity". It seems from a reading of the Saudi regulation that the only difference between arbitration and conciliation from a procedural point of view is as indicated in this article.

Jeddah, it has been noticed that the arbitrators usually limited themselves to the requirements of Article 17 of the Saudi Arbitration Regulation of 1983 and Article 41 of the Implementation Rules of 1985.

In the case of *A.A. Co. v. E.T. Co.*⁷²⁴ both companies disputed the right to use artistic styles and trade marks in the Middle East in return for expenses stipulated by the contract. The defendant company refrained from paying the plaintiff's company its due fees and of the insurance started to deal with other companies, which breached the terms of agreement. In another case, *T.T. Co. v. T.Z. Co.* when the disagreement arose between an insurance company T.T. Co. and the agricultural company T.Z. Co., the plaintiff company claimed that it had the right to receive 2.108.610 SR from the defendant company, since they had agreed on this sum. However, a dispute arose between the two companies when the insurance company T.T. Co. asked the agricultural company T.Z. Co. to pay the due instalments, but the agricultural company did not pay on the basis that the insurance contract was not concluded originally and that the matter was a response to a proposal by the insurance company which was not accepted by the agricultural company. The insurance company explained that the insurance contract arose through negotiations between the two parties. After review of the case by the arbitral tribunal, they found that there was some overlap between the conclusion of the contract and its cancellation, and that the conclusion of the contract, in view of Article 8 of the insurance policy, included the cancellation of the protection if payment was not effected. In the light of these facts, the arbitral award was issued that each party should bear half the said amount and subsequently both parties accepted the arbitral award.⁷²⁵

⁷²⁴ Arbitral award of the Arbitration Centre in the Chamber of Commerce and Industry in Jeddah was issued on 27/7/1417 A.H (8/12/1996 A.D)

⁷²⁵ The arbitral award from the Arbitration Centre in the Chamber of Commerce and Industry in Riyadh, No. 17.907 dated 05/05/1414 A.H (1993A.D)

From these two cases, it can be seen that the arbitral tribunal takes into consideration the required components of the award in a legal sense. It is undoubtedly helpful to have a clear and complete understanding of all the components of an award for its efficient execution, as proclaimed by Saudi Arbitration Law and other local and international arbitration laws. The rationale behind this matter is the achievement of a just and quick dispute settlement.

The Saudi Arbitration Regulation and its Implementations Rules have not gone further than the Model Law in respect of the matter of the validity of the arbitral award in the case that one of the elements is missing. Practically, the arbitrators should make sure that the award contains all the elements required by the Regulation or the Implementation Rules. If the competent authority found that one of the elements had been omitted, then the competent authority could choose either to set aside the award or to remit the award to the arbitral tribunal for inclusion of the missing element. The choice between the two alternatives will depend upon the importance of the missing element. If the missing element is very important, such as the reason or the date or place, setting aside the award would be appropriate, but if the missing element were less important, such as a copy of arbitral instrument, the competent authority would find it more appropriate to remit the award to the arbitral tribunal for its inclusion.

6.5 [A] Time limits

There are many reasons why international commercial disputes are submitted to arbitration, the main reason being the speed of the settlement process. Partners in the business arena use arbitration to avoid the expected delay of extended court proceedings.

However, in reality, some other factors can lead to considerable delay in the arbitration process, lasting for months or even years.⁷²⁶

To prevent this from happening, arbitration agreements impose time limits on arbitrators to complete their mission. Today, most arbitration agreements contain such stipulations. There are also rules of institutional arbitration that provide for such time limits. Consider, for example, the provisions of the 1998 ICC Rules and the statutes of England and Thailand.⁷²⁷

The date where the time limits starts differ from one set of arbitral rules to another, just as they vary in respect of the duration of the time limit. However, normally the time limit effectively starts to run either from the date of closing the hearings or the date of the approval of the arbitration agreement.⁷²⁸ As Redfern and Hunter noted, the time limit should not give any party the opportunity to frustrate the arbitral process, especially if the arbitral rules stipulate that the time limit is counted from the date of the appointment of the arbitrators, not from the date of closing the hearings.⁷²⁹ In this case, the authority should be competent to intervene if it is noticed that the unwilling party is frustrating the arbitral process until the time limits lapses.

On the other hand, some other arbitral rules, such as the Model Law, are silent in determining the time within which an arbitral award must be rendered. This is left for the parties to the dispute, or the arbitral tribunal to decide in the arbitration agreement.

The benefit of this approach is that it enables the time limit of the arbitration to be set

⁷²⁶ Markus R Frick, "When Foreign Arbitral Award are Late.. Should U.S. Courts Enforce Them?", *Dispute Resolution Journal*, Vol. 57, No. 1, 2002. found in http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:pqd&rft_val_fmt=info:ofi/fmt:kev:mtx:journal&genre=article&rft_dat=xri:pqd:did=00000112295890&svc_dat=xri:pqil:fmt=html&req_dat=xri:pqil:pq_clntid=25727 accessed on the 14 of April 2004

⁷²⁷ The time limit set by the ICC Rules to render the final award is six months, see Article 24 of ICC Rules

⁷²⁸ In the ICC Rule it starts to run from the day of the last signature of the so-called Terms of Reference.

⁷²⁹ Redfern & Hunter, *op. cit*, p. 392

according to the real facts of the case, for instance the complexity of the subject matter, the distance of the parties to the dispute far from each other or from the place of arbitration, or the need to search for witnesses. Therefore, the mandatory time limit provision should be to obligate the parties to the dispute to set an appropriate time limit for the arbitration in the arbitration agreement, after studying the recitals of the case. It might, however, be argued that obliging the parties to set a time limit in the arbitration agreement is not sufficient to safeguard the quality of the arbitration process, and there should be a back up provision in case the parties do not fulfil this requirement. A reasonable time limit should be stated, which would apply if the parties failed to indicate the appropriate time limit.⁷³⁰ This back up provision should be such as not to hurry the arbitral process, but also not to make it unduly lengthy.

Most arbitral rules contain a provision that if necessary, the time limit can be extended. However, they differ in regard to the grounds for extension. In institutional arbitration, the time limit can be extended on the initiative of the arbitration court, such as the ICC court, or pursuant to a reasoned request from the arbitral tribunal. In contrast, the Model Law is silent regarding time limit extension, leaving it to the parties or the arbitral tribunal to decide whether the time limit needs to be extended and if so, for how long. A difficulty might arise here, that one of the parties may be unwilling to extend the time limit and frustrate the arbitral proceeding until it is terminated. Therefore, the competent authority should have the competence to intervene to take effective measures if the parties or the arbitral tribunal has good reason to extend the time limit, even if there is resistance by an unwilling party. However, this approach should not lead to any grievances where the willing party is only attempting to widen the period of the arbitration to find more evidence in the case. Therefore, the competent authority should

⁷³⁰ This model is followed by various arbitral rules, for instance the French Code of Civil Procedure of 1981, Art. 1456. as reads: "If no time limit is fixed in the arbitration agreement for the arbitrators' mission it shall be six months from the day on which the last arbitrator accepts his mission"

study the request for an extension very carefully and base its decision on reasonable grounds.

The ICC rules embed the respective rules into the arbitration agreement of the parties. Hence, any violation of the procedural of the arbitration rules is a violation of “the agreement of the parties” as provided by Article V (1) (d) of the NY Convention. The arbitrator's violation of time limits set by arbitration rules has, therefore, the same effect as time limits contained in the arbitration agreement itself.⁷³¹ The appropriate standard under the NY Convention should be that only material defects in an award could be grounds to refuse its enforcement. In other words, when delays in rendering the award show no prejudice, the award should be enforced.⁷³²

6.5 [B] Time limit under SAR

The Saudi Arbitration Regulation has taken very sensible measures regarding the issue of time limits, similar to some of the international arbitral rules.⁷³³ The first sentence of Article 9 of the Regulation reads “The Ruling on the dispute shall be issued on the date specified in the arbitration instrument...”. Thus, the Saudi Regulation has given the parties to the dispute full entitlement to determine the time limit within which the arbitral award must be rendered, as they have the best knowledge of the appropriate period to settle the dispute. It also sets a mandatory time limit in the case the parties have not agreed upon a time limit for issue of the award. In such cases, the arbitrator(s) must render the arbitral award within ninety days from the date of approving the arbitration document. This part of the article seems to be drafted to maintain the speed of arbitration, and the period of ninety days is considered reasonable in comparison with

⁷³¹ Markus R Frick, *op. cit.*

⁷³² *Ibid*

⁷³³ Saudi Arbitration Regulation of 1983, Art. 9

the period of judicial settlement. If the arbitrator(s) do not issue the award within this mandatory time limit, any party can refer the matter to the authority having jurisdiction over the dispute, which is the *Diwan Al-Mazalim*. The competent authority will then have two alternatives, either to make the decision upon the dispute, or if necessary, to allow an extension to the time limit, which is, as specified in the regulation thirty days. There are various circumstances in which the issue of extension arises. These are specified in the regulation as follows:

6.5 [B] (i) Extension of time limit by agreement of the parties

As mentioned earlier, Article 9 of the Regulation grants the right for the parties to the dispute to determine the time limit of the arbitration. This is in the line with the view of the arbitration agreement as a consensual contract, where the parties' will is the effective instrument to determine the most fundamental issues in the arbitral process. Since the parties can agree to resort to arbitration and make the appointment of the arbitrators and bestow the arbitrators with the power within the regulation, the parties also have the right to terminate the arbitration at any stage. Therefore, they are given the power to make an adjustment to what they have agreed on.

Consequently, parties are allowed to agree upon the extension of the time limit for any reason. In the event that one of the parties disagrees on extending the time limit, the request shall be declined, unless there is an agreement to allow the extension by a single party. Obviously, if the parties agree upon the extension, they should indicate the period and notify the arbitrators. Al-Bejad comments that the notification can be made orally, but it is preferable that it be written, to make it easy to prove.⁷³⁴ Article 24 of the Implementation Rules grants that "The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing".

⁷³⁴ M. N. Al-Bejad, *op. cit*, P. 217

Since the agreement of the extension can be oral or written, the agreement may therefore be implicitly between the parties, if one of the parties requests another session after the expiry of the time limit. This can be seen as a presumption of the will of the parties to extend the time limit.

Once the parties have agreed to extend the time limit, the arbitrator(s) may not reject or refuse the extension, because of the obligation to respect the parties' will. Since this will grants the power to the arbitrator(s) to solve the dispute, the same will can revoke this power at any stage.⁷³⁵

The only effect on the arbitrators of the extension of the time limit by the parties is that they may request extra fees for the extra time and work carried out. However, it should be made clear that an arbitrator is not eligible for such extra fees if the extension of the time limit was because of the arbitrator's negligence. Reasonably, arbitrators will also have the right to abdicate from carrying out the arbitration. However, as Dr. Al-Bejad argues, if an arbitrator resigns from carrying out the task of arbitration because of extension of the time limit, compelling reason must be given, such as that the parties refused to pay extra fees, or that the extension of the time limit is not justified or the extension is a ploy to prolong the arbitration.⁷³⁶

On the other hand, if the time limit ends before the extension has been agreed by the parties, it seems that the parties would have to agree on a new arbitration, because the parties cannot extend the time limit of an arbitration that is terminated.⁷³⁷ In agreeing on a new arbitration, the parties would take into consideration all the proceedings that took place in the dead arbitration, even choosing the same arbitrator. In other words, technically, it is a new arbitration but in fact, it is just an extension to the old one. The

⁷³⁵ Art. 24 of the Implementation Rules obligates the arbitral tribunal to issue a resolution on what have been agreed upon between the parties. The same article does not give any right to the arbitral tribunal to reject or even negotiate the parties' agreement.

⁷³⁶ M. N. Al-Bejad, *op. cit.*, P. 218.

⁷³⁷ Abdul Hamid El-Ahdab, *Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985 (part two)*, *op. cit.*, pp. 23-60

other alternative is for one of the parties to request the competent authority to extend the limit even after the expiry of the time limit given. In such a case, the arbitration would not be considered terminated or dead between the expiry date and the decision of the extension.⁷³⁸ However, the parties cannot take any steps within the time between the request for extending the time limit and the decision by the competent authority. They cannot continue the arbitration, nor refer the dispute to the competent authority, which has yet to decide whether to make the arbitral tribunal competent by extending the time limit or make itself competent by refusing the extension.⁷³⁹ Therefore, the Saudi legislature should bear in mind that failure to determine the period between the request of extension and the authority's decision would leave the parties in an uncertain situation.

6.5 [B](ii) Extension of time limit at the death of one of the parties

The Saudi regulation takes a similar stance to the commercial arbitration rules in several Arab countries, which provide that the death of one of the parties does not have a negative effect on the arbitration or cause its termination. Thus, Article 13 of the Regulation stipulates that the arbitration is still effective if the death of one of the parties occurs, and that the arbitration shall be extended by thirty days. Careful consideration of the wording of the article suggests that the thirty days extension is a minimum, because the same article gives the arbitrator(s) discretionary authority to decide upon the extension of the time limit if necessary.⁷⁴⁰ The rationale for granting this authority to the arbitrator, rather than to the heirs of the dead party, is that he or she

⁷³⁸ *Ibid*

⁷³⁹ *Ibid*

⁷⁴⁰ As specified in the text of Art. 13 of the regulation, which reads "The Arbitration shall not be terminated by death of one of the parties but the period fixed of the award shall be extended by 30 days unless the arbitrators decide to extend this period further"

is more capable than anybody else to decide how much time is needed for the heirs of the deceased party to be briefed on the case and updated.⁷⁴¹

It is essential to note that Article 13 of the Regulation does not explain the manner of calculation of the period specified in the article, it only states that the time “shall be extended”. Will the period between the estoppel and the recommencement of the proceedings be uncounted? Will the proceedings be temporarily terminated from the day of notification of the death of the party? Bearing in mind that the heirs of the dead party would need time to appoint representatives for them, it is important for Article 13 of the Regulation to make it clear that the period of extension does not count as part of the time limit agreed in the arbitration agreement. The period between making the replacement and the thirty days should be added to the original time limit.⁷⁴²

6.5 [B](iii) Extension of time limit at the request of the arbitrator

Arbitrators also have the right to extend the time limit as it is granted in Article 15 of the Regulation that “the arbitrators may by a resolution adopted by majority vote extended the date originally fixed for the award for circumstances relevant to the matter in dispute”. It must be noticed from this article that the arbitral tribunal is empowered to decide upon extending the time limit. However, this extension is subject to two conditions; the decision must be made by majority vote, and the arbitral tribunal must prove that the extension is for the benefit of resolving the dispute. Therefore, the arbitral tribunal must indicate in the resolution of the extension the reason for extending the time limit. However, the wording of the article could be made clearer, to specify the circumstances in which the arbitrator can extend the time limit, or an example given

⁷⁴¹ M. N Al-Bejad, *op. cit.*, p. 212.

⁷⁴² A. S. Al-Rodaiman, “The System and Procedures of the Arbitration in the Kingdom of Saudi Arabia”, Paper presented in workshop of *Islamic legal and Procedural Principles in Arbitration*, Organized by Imam Mohammed Bin Saud Islamic University with Collaboration of Alwathaeg Firm, Alkhubar City, Kingdom of Saudi Arabia, 11th -14th of December of 2003, p. 11

instead of stating “for circumstances relevant to the matter in dispute”. This is because not all circumstances relevant to the dispute justify an extension. For instance, as Al-Bejad argued, it is unacceptable for the arbitrator(s) to extend the time limit for the purpose of making an inspection, given the short time an inspection would normally take.⁷⁴³ This is not to present this case per se but just to illustrate that not all relevant circumstances justify an extension. Further, one commentator argued that extension based on unreasoned circumstances can be a fundamental reason for challenging the award, regardless the arbitrator’s competence in this regard, for the reason of contravention of the logicity of extending the time limit.⁷⁴⁴

6.5 [B](iv) Extension of time limit when arbitrator lacks of capacity

It is stipulated in the Regulation that if an arbitrator has been appointed to replace a dismissed arbitrator, whose capacity exists no longer, the time limit to issue the award shall be extended for thirty days.⁷⁴⁵

Thus, the extension of the time limit to issue the award shall be executed from the date of the appointment of the replacement arbitrator. The same procedure as in the case of the death of one of the parties will be applied in the case of the disappearance of the arbitrator’s capacity. Therefore, the time limit will be counted from the date of disappearance of the capacity until the replacement is successfully completed, and the time limit recounted with omission of the estopple period and adding thirty days, in the case where no agreement between the parties exists as specified in Article 14 of the regulation.

⁷⁴³ ⁷⁴³ M. N Al-Bejad, *op. cit*, p. 214.

⁷⁴⁴ *Ibid*, P. 215

⁷⁴⁵ Saudi Arbitration Regulation of 1983, Art. 14

Neither the article nor the Regulation determine the time period between the estoppel of the arbitration and appointing the replacement. Leaving this period undetermined would result in difficulty in completing the arbitration speedily.

6.6 [A] Deliberations to reach to the award

Arbitral tribunal members normally hold the deliberation privately from the parties. The arbitrators' deliberation should not be exposed to any party, for as some arbitral rules state, "deliberation must be secret".⁷⁴⁶

In order for the deliberation to function appropriately secrecy should carry on during the process of deliberation until the issue of the arbitral award is completed. No member of the arbitral tribunal should disclose any information that was discussed during the deliberation to any one of the parties or any other person who has an interest on the dispute, because disclosing such information may result in challenge of the arbitral award based on the disclosed information discussed during the deliberation. Furthermore, members of the arbitral tribunal may feel unable to express freely their point of view about the dispute during the deliberation, if they cannot be assured of secrecy.

Whilst secrecy is important in the process of deliberation, also the decision must determine all the issues that related to the dispute. Therefore, to accomplish this task, the arbitral tribunal should determine a date for commencement of their deliberation, after which no documents or evidence can be submitted to the tribunal.⁷⁴⁷

⁷⁴⁶ French Code of Civil Procedure of 1980, Art. 1469.

⁷⁴⁷ For example the French Code of Civil Procedure states that: "the arbitrator shall fix the date upon which the matter shall reach the stage of deliberation. After this date, no claim may be made, nor any argument raised. No observation may be proffered, nor any document produced, except at the request of the arbitrator". See French Code of Civil Procedure of 1980, Art. 1468.

Even though the various arbitral rules vary in requiring that the arbitrators should issue the arbitral award at the place of arbitration, it is not necessary that deliberations take place at the place of arbitration.⁷⁴⁸

6.6 [B] Deliberation under SAR

The Saudi Regulation takes the same attitude that the deliberation must be held in secret as it states that “shall *only* be attended collectively by the arbitration panel who attended the hearings”⁷⁴⁹. The Saudi legislature requires that the deliberation must be held “*in camera*”, as the wording of the article which means that the session must be held privately.

A question might arise as to the validity of the award if one of the arbitrators refuses to take a role in the deliberations. In this regard, the drafters of the Arbitration Regulation and its Implementation failed to prescribe a provision for such an eventuality. In practice, every arbitrator is obliged to participate in the deliberations even if there is one arbitrator disagreeing with the opinion of the other arbitrators. This arbitrator can attach his dissenting opinion to the arbitral awards, as in the case of *N. Co. for Adm. & Ltd Serv v. S. Co. Ltd*, where one arbitrator annexed his dissenting opinion in a document attached to the arbitral award.⁷⁵⁰

6.7 [A] Use of vote

Making the decision in arbitration differs from one set of rules to another on the basis of various circumstances, such as the number of arbitrators in the arbitral tribunal, and the matter that is to be decided.

⁷⁴⁸ As the case of the LCIA Arbitration Rules, Art. 7(2). Reads “ The Tribunal may hold hearings and meetings anywhere convenient, subject to the provision of Article 10.2, and provided that the award shall be made at the place of arbitration”

⁷⁴⁹ Implementation Rules of 1985, Art. 38.

⁷⁵⁰ Arbitral Award No. 1107/1/K 1408 on the 22-08-1410 A.H (1999 A.D)

An arbitral tribunal consisting of three members may decide the dispute unanimously or by majority vote. However, some arbitral rules follow the trend of giving the power to the president arbitrator to decide the dispute and make the award, or such power can be given by the parties' agreement.⁷⁵¹ The truth is that for an arbitral award to be made unanimously facilitates the process of recognition and enforcement of the arbitral award. However, unanimity of the decision may lead to frustration of the arbitral process if one arbitrator specifically uses the veto against the other arbitrators' award, which thus would prevent the parties from resolving their dispute via arbitration, since such action would involve more time and cost. Thus, most countries require expressly or implicitly that the arbitral award is given by majority vote.⁷⁵²

Similarly the Model Law provides:

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by majority of all members of the tribunal. However, question of procedure may be decided by the presiding arbitrator, if so authorised by the parties or all member of the arbitral tribunal inexistent.⁷⁵³

The above article implies that substantive and procedural decisions, or as provided by the provision "any decision", can be made by majority votes of the arbitrators. The case of an arbitral tribunal composed of a single arbitrator is left untouched in the provision, for the reason that the problem does not exist, since only one arbitrator is deciding the decisions. Although the article tries to make provision for a majority vote in the case of multi members, neither the same article nor other provisions succeed in solving the problem in some situations where a majority vote cannot be reached and there is a deadlock. Such situations can arise when the votes of the arbitrators are equal in a case where the parties agree to choose an arbitral tribunal with an even number, or when

⁷⁵¹ David Renč, *op. cit.*, p. 315.

⁷⁵² French Code of Civil Procedure of 1980, Art. 1470; The Netherlands Arbitration Act of 1986, Art. 1057(1).

⁷⁵³ UNCITRAL Model Law of 1985, Art. 29.

parties agree to choose an uneven number and each arbitrator has his own opinion, leading to a decision of 1:1:1.⁷⁵⁴ Such a deadlock is not justified, since the arbitral tribunal is bound to reach, at the end of the proceedings, an award which will resolve the dispute. The Model Law drafters realised the danger of the deadlock and proposed a prescription to avoid such a problem, as provided by some arbitral rules where, in the absence of a majority, the chairman of the arbitral tribunal has the decisive power to decide the dispute alone.⁷⁵⁵ The drafters of the Model Law realised that adopting such an approach may under certain circumstances prevent other members of the arbitral tribunal from having an appropriate influence on the decision making.⁷⁵⁶ It seems from Article 29 that if the members of the arbitral tribunal reach a deadlock, the parties to the dispute are left to seek determination from the competent authority of the state, otherwise the dispute will not be settled. In this respect, a distinction must be drawn between two cases. On the one hand is the case where the members of the arbitral tribunal failed to attend the deliberation or failed to participate in making the decision. In such a case, giving the presiding arbitrator the power to decide the dispute would be beneficial, because the prospect of the arbitral award being decided by the opinion of the presiding arbitrator alone would put pressure on the other members of the arbitral tribunal to influence the award, and in the worst case, of refusal by the other parties to cooperate, the arbitral award will be made by the presiding arbitrator. On the other hand, in the other case where the deliberation reaches deadlock between members of the arbitral tribunal including the presiding arbitrator, intervention of the competent authority either to look for a new arbitrator or to settle the dispute might seem to be

⁷⁵⁴ Peter Binder, *op. cit.*, pp. 178-179.

⁷⁵⁵ For example, the Swiss Private International Law Act of 1987, Art. 189(2) provides: "In the absence of the agreement, the arbitral award shall be rendered by a majority decision, or, in the absence of a majority, by the presiding arbitrator alone". Internationally, the ICC Arbitration Rules Art. 19 state: "When three arbitrators have been appointed, the award is given by a majority decision. If there is no majority, the award shall be made by the chairman of the arbitral tribunal alone"

⁷⁵⁶ A/40/17, Para. 224. In supporting the approach of not considering the inclusion of the drafters' proposal, the U.S delegate Mr. Holtzmann expressed that "the requirement of a majority decision made it more likely that all issues would be fully considered as a result of the need to reach agreement"

justifiable. However, such an approach would require more expense and more time, contrary to the main aim of arbitration. Alternatively, the competent authority could give the presiding arbitrator the decisive vote to make the award according to his opinion. It would seem to be undesirable to give the competent authority the power to confer the decisive vote on the presiding arbitrator.⁷⁵⁷ Consequently, designation of the decisive vote for the presiding arbitrator should be derived from the rules of the Model Law. Such designation should apply in case the failure of making the award unanimously or by the majority vote.⁷⁵⁸ An attempt was made by the Model Law drafter to give the presiding arbitrator the power to decide only the question of procedure, subject to the authority of the parties. This provision still does not provide the answer for the problem of the lack of a majority vote for an opinion, or the case of equal votes, since the Model Law lacks a precise meaning for “questions of procedure”. It was pointed out by Mr. Hermann, the Secretary of the working group, that “with regard to the distinction between procedural and substantive matters, it had been felt, when drafting the article, that since the arbitral tribunal had power to decide on matters of both procedure and substance, it should also have the power to decide on the distinction between them”.⁷⁵⁹

6.7 [B] Use of Vote under SAR

According to the Regulation, the issue of the arbitral award is by the majority vote if the dispute is settled via arbitration. If the dispute is settled by conciliation, the award shall be made unanimously.⁷⁶⁰ In practice, most arbitral awards are made by the arbitrators unanimously. However, there are certain cases which were resolved by a

⁷⁵⁷ Parties to arbitration are always reluctant to give the judicial authority the power to intervene in the arbitral process.

⁷⁵⁸ This modality is revealed in other arbitral rules. See above footnote no. 82.

⁷⁵⁹ A/CN.9/245, Para. 104.

⁷⁶⁰ Saudi Arbitration Regulation of 1983, Art. 16; The Implementation Rules of 1985, Art. 41.

majority vote, for instance, the case of *R. R. Co. v. A. C. Co.*,⁷⁶¹ and the case of *H. M. R. H. Co. v. A. Co.*⁷⁶² On the other hand, in the case of *A. Co. v. Mr. S. A. H.*, which contained several disputed issues, the arbitrators resolved some of them unanimously, whereas the other issues were decided by majority vote.⁷⁶³

However, neither the Regulation nor the Implementation Rules contains any back up provisions for the case when majority vote cannot be reached, as in the example given above, when each member of the arbitral tribunal furnishes his opinion and the presiding arbitrator's opinion does not influence either side of the scale. Giving any other alternative to create a way through the deadlock, as the rule stands at present, would be in total violation, since the award must be made by majority vote.

In this regard, the approach of giving the presiding arbitrator the decisive vote has been rejected by some legal writers in Saudi, on the ground that the principle of allowing the parties to form an arbitral tribunal with multi-members laid down in Article 4 of the Implementation Rules, is defeated. Therefore, the legislature could have limited the designation to a single arbitral tribunal. Moreover, the presiding arbitrator has no right to impose his opinion, ignoring the other members' opinions.⁷⁶⁴ Even though this argument might seem theoretically acceptable, in practice it is a handicap to the attempt to cure the problem of deadlock, and the Regulation fails to provide for such circumstances. Practically speaking, in this regard, for the problem of deadlock the parties are left to look elsewhere, in general rules of the adjudication. It has been seen several times that when the Regulation fails to provide the appropriate answer in some instance, the parties or the arbitrator refer to the appropriate provision laid down in the general rules of Adjudication.

⁷⁶¹ The Arbitral Award No. 4/1408, issued on 13/08/1408 A.H

⁷⁶² The Arbitral Award, issued on 19/05/1411 A.H

⁷⁶³ The Arbitral Award, issued on 27/05/1414 A.H

⁷⁶⁴ M. N. Al-Bejad, *op. cit.*, pp. 207-208.

The rules of the Commercial Court specify that at the end of the hearing the presiding judge orders the parties to vacate the court and asks each member to present his opinion, in order to make the award either by majority vote or unanimously.⁷⁶⁵ This provision, also, does not provide a basis for solving the problem of difference of opinions among the arbitrators. However, the New Procedure Code provides that if the case is to be heard by multiple judges, the award shall be made unanimously or by majority vote, and in the worst case, when there exist more than two opinions, the Ministry of Justice appoints a new judge to influence one of the opinions.⁷⁶⁶ Practically speaking, this approach is unacceptable, because nominating a new arbitrator involves reopening the case, including the final stages of the hearings. Otherwise, the award would be invalid for violating Article 38 of the Implementation Rules, which states that the deliberation must be secret and attended by all members of the arbitral tribunal.

After considering the rules which govern the situation where the decision is made by multiple members, it seems the approach of giving the presiding arbitrator the decisive vote to make the decision is the lesser of two evils, since granting such a privilege to the presiding arbitrator would speed the issue of the award, as well as make it cheaper. However, such designation should be regulated, as analysed in the section concerning the Model Law. Thus, the Regulation and the Implementation Rules make the decisive vote of the presiding arbitrator conditional on the failure to reach a decision either unanimously or by majority vote.

6.8 [A] Material errors of the award: Back up provisions

As stated above, even though the jurisdiction of the arbitral tribunal terminates with the arbitral award, the arbitral tribunal may correct any clerical or typographical errors in

⁷⁶⁵ Saudi Rules of the Commercial Court of 1350 A.H, Art. 509. Also article 9 of the judicial rules provides that decisions of the Judicial Supreme Council must be made either unanimously or by majority vote. There is no provision in the rules for the case where the opinions of the members are equal. However, Article 19 of the same rules stated that if the opinions are equal, the opinion of the presiding member will prevail.

⁷⁶⁶ The New Saudi Procedural Code, Art. 161.

the award if it is granted this power, either by the arbitration agreement or by applicable law. The correction of these errors can be made either at the request of one or both parties, or on the arbitral tribunals' own motion.

At the international level, most arbitral rules have regulated the provision of correction of clerical or typographical errors,⁷⁶⁷ except that the ICC Rules are silent with regard to referring to the arbitral tribunal the power to correct the errors. This silence may be because the ICC International Court of Arbitration is given the jurisdiction to examine the award before it is signed and issued to the parties and errors are presumably corrected at such examination.⁷⁶⁸

Whilst the parties are empowered to request a correction of any errors from the arbitral tribunal, the arbitral tribunal also have the right to refuse such a request, but such a refusal must be justified with reasons, otherwise the party that submits the correction request might challenge the decision to refuse correction to the competent authority having original jurisdiction are the dispute.

The drafters of the Model Law went further than include a provision giving the parties the right to request the arbitral tribunal to correct any clerical or typographical errors. They also set a mandatory time limit of 30 days from the date of issue the award, for such a request to be submitted.⁷⁶⁹ Further, the same article gives the power to the arbitral tribunal to extend the time limit if it is considered to be necessary. Surely, this position was a result of a moderate thought, since according to one view it is inappropriate to fix a time limit as there might be a situation where the arbitral tribunal is unable to comply with such mandatory time period, whereas the other opinion is that the arbitral tribunal should act promptly. However, in the case where the parties submit the request after the expiry of this time limit, it seems that the admission of the request

⁷⁶⁷ UNCITRAL Model Law, Art. 33; also The UNCITRAL Arbitration Rules, Art. 36; also The LCIA Arbitration Rules, Art. 17

⁷⁶⁸ Redfern & Hunter, *op. cit.*, p. 374.

⁷⁶⁹ UNCITRAL Model Law, Art. 33(1); also this model is founded in other arbitral rules such as The New Egyptian Arbitration Act of 1994, Art. 50(1); also Netherlands Arbitration Act of 1986, Art. 1060(2)

depends on the circumstances. First, the reason for the delay must be justifiable, otherwise the arbitral tribunal will refuse the request for correction. Secondly, admission will depend on how important the correction is that needs to be done. For instance, if leaving the award without correction may lead to dangerous consequences, the arbitral tribunal will accept the request for correction, even if the time limit has expired. Furthermore, Article 33 of the Model Law indicates that the correction has to be formatted as specified in Article 31. This means it must be written and signed by the arbitrators, and the reasons given.⁷⁷⁰ The drafter of the Model Law intended, by requiring the correction to follow the same formalities as the award, to treat the correction as part of the original award, leaving no opportunity for any of the parties to deny any aspect of the award that has been modified. One question might arise as to whether the drafter of the Model Law took into consideration any mandatory time limit for informing the other party “opponent” about the request. However, the drafter’s approach while drafting the provision was that it is unnecessary to indicate any procedure for interpreting the award, other than informing the other party.

5.8 [B] Back up provision under SAR

Article 42 of the Implementation regulates the issue of correcting material or arithmetical errors in the award without prejudice to the provision of Articles 18 and 19 of the Regulation, whereby parties to the dispute may submit their objection to the refusal to the competent authority within 15 days from the day of noticing the award.⁷⁷¹ Further, the competent authority may decide to accept a request objection or may reject such a request and take any action he considers appropriate.⁷⁷² It might be argued that material or arithmetical errors in the award in Article 42 of the Implementation Rules

⁷⁷⁰ UNCITRAL Model Law, Art. 33(4)

⁷⁷¹ Implementation Rules of 1985, Art. 18

⁷⁷² Implementation Rules of 1985, Art. 19

should remove the decision of the correction from the time bar stated in Article 18 of the Regulation, because mere material errors, whether clerical or typographical, do not result in any rights or obligations, and it is suggested that the parties to the dispute should be able to claim correction at any time.⁷⁷³ The arbitral tribunal may, on its own initiative or at the request of a disputing party, correct purely material or arithmetical errors in the award. The decision for the correction of the award is to be made on the original copy of the award and shall be signed by the parties.⁷⁷⁴ For example, in the case of *Civ. W. Co (Construction company) v. I. G. Ins. Co. (Insurance company)*, the arbitral tribunal corrected, on its motion, some mathematical errors in the arbitral award on the original copy of such award, according to the wording of Article 42 of the Implementation Rules.⁷⁷⁵

However, according to practice it should be expressed that the request for correction should be submitted to the arbitral tribunal before the time limit of the arbitration expires or before the deposit of the award, as the arbitral tribunal usually loses its jurisdiction after that date or after the deposit of the award to the competent authority. If such a case occurs, the requesting party should refer its request to the competent authority which will take the task of correcting the material errors in the award. Giving the competent authority the power to correct errors in the previous circumstances may be seen as appropriate, otherwise, either the errors would be left uncorrected or the parties would be left to enlarge the jurisdiction of the arbitrators to correct any errors at any time, which may block the way to enforcing the award, especially in the case of bad faith of the arbitrator(s). On the other hand, this argument might be countered by a claim that giving the competent authority the power to correct the errors would result in interference from the authority to hear the whole dispute from the beginning in order to agree upon such corrections, which would undermine the essential nature of the

⁷⁷³ Nancy B. Turck, Saudi Arabia, *op. cit*

⁷⁷⁴ The Implementation Rules of 1985, Art. 42.

⁷⁷⁵ The Arbitral award No. 9/1407, dated on 06/031408 A.H. (1988)

arbitration. It may be argued that the party can request the competent authority to correct the award, as long as the request for correction is submitted within the period in which the parties can challenge the award.⁷⁷⁶

However, the decision of the arbitral tribunal regarding a request for correction of the award can be objected to on various grounds, such as if the correction of the award would result in a major modification in the award or, as stated in Article 42 of the Implementation Rules, if the arbitrators exceed their right regarding the correction of the award. The article states, “decisions issued against request for rectification may not be objected to independently”. This provision seems to be unclear in the first instance. However, the legislature seems to intend that if the arbitral tribunal refuses a request for correction, the parties to the dispute may only object to the competent authority on the basis of such a decision, but they cannot object to the decision of the refusal to correct the award separately.

6.9 [A] Ambiguity of the Arbitral Award: back up provisions.

The most important condition regarding the form of the arbitral award is that the award must be unambiguous so the parties can implement it correctly, avoiding any result that might lead the parties to resort to a new arbitration or may lead them to resort to another trusted dispute settlement method. However, in case any kind of ambiguity occurred or some parts of the award were unclear to the parties, some remedy should be available to facilitate implementation. Normally, there is a provision for interpretation of the ambiguous part of the award. Most arbitral rules take such an approach.⁷⁷⁷ However, they vary in respect of the source of power to interpret the arbitral award. The arbitral

⁷⁷⁶ Saleh Salim, *Legal Study for the Arbitration Regulation in the Kingdom of Saudi Arabia*, Riyadh Chamber of Commerce and Industry, Riyadh, Saudi Arabia, undated, p. 57

⁷⁷⁷ Internationally: UNCITRAL Model Law of 1985, Art. 33; UNCITRAL Arbitration Rules, Art. 35; LCIA Arbitration Rules, Art. 17. Nationally: The French Code of Civil Procedure of 1980, Art. 1475; The New Egyptian Arbitration Act of 1994, Art. 49; The New English Arbitration Act of 1996, Art. 57(3)a

tribunal could be empowered to interpret the arbitral award based on the agreement of the parties, applicable law or the procedural rules of the place of the arbitration.⁷⁷⁸

Alternatively, a request may be submitted to the competent authority to take action to remit the award to the arbitral tribunal for clarification.

The Model Law expressly allows either party to request the arbitral tribunal to interpret the award.⁷⁷⁹ The drafters of the Model Law intended to take the line that the source of the power to interpret the award originates from the parties' agreement, as they stated, "if so agreed by the parties". Giving the power to the parties to agree upon the interpretation could serve the party who wishes to interpret the award if the rules of the place of arbitration do not contain any provision for interpretation. For example, the Netherlands Act of 1986 does not provide for interpretation of an award, and the parties by agreement adopted the UNCITRAL Rules as procedural rules which provides in Article 35 for interpretation of the award, and as stated by the parties, "There is no provision in the Netherlands Arbitration Act of 1986, expressly excluding the parties from agreeing to an interpretation and their agreement under UNCITRAL Article 35 is, in the Tribunal's opinion, controlling".⁷⁸⁰ It is to be noticed that the sense underlying the provision, "if so agreed by the parties", in the Model Law, is that interpretation is requested when it is really needed from both parties' point of view, in order to avoid any consequences from the interpretation, such as the delay of the enforcement, arising purely due to the wish of the losing party alone to prolong the arbitration.

Further, the Model Law provides that interpretation is allowable "if the arbitral tribunal considers the request to be justified"⁷⁸¹. In other words, the arbitral tribunal is empowered to decide whether the request is justifiable, otherwise it will be entitled to refuse the request. For example, it will refuse requests to argue some parts that were

⁷⁷⁸ Robert D. A. Knutson, "The Interpretation of Arbitral Award- When is a Final Award not Final?", *Journal of International Arbitration*, Vol. 11, No. 2, 1994, pp. 99-110

⁷⁷⁹ UNCITRAL Model Law of 1985, Art. 33(1)b

⁷⁸⁰ Robert D. A. Knutson, *op. cit.*

⁷⁸¹ UNCITRAL Model Law of 1985, Art. 33(1)b

badly argued in the first instance or requests for interpretation where the award is unambiguous. Also, it is noteworthy that the drafters of the Model law referred to the provision of “interpretation of a specific point or part of the award”.⁷⁸² This means that parties are not allowed to request the arbitral tribunal to interpret the whole award, as this would in effect mean going again through the whole case, just like referring the dispute to a new arbitration.

Within what period must any ambiguous part of the award be clarified? The Model Law makes the time limit for interpretation the same as that for the correction of material errors.⁷⁸³ In the view of the author of this research, if an award contains any ambiguous part, this would prevent the parties from executing the award until this part is clarified. Therefore, any time limit set for such interpretation should be short in order to maintain the speed of arbitration. However, a question might arise as to what happens if the parties to the dispute submitted the request for interpretation after the time limit expired. According to Article 33(4) of the Model Law, it is allowed for the arbitral tribunal to extend the time limit for another period, if necessary. From the wording of this provision, it seems that the drafters had in mind the importance of the interpretation of the award, when giving the arbitral tribunal power to extend the time limit for interpretation, while at the same time giving the arbitral tribunal scope to decide whether such an extension is warranted, so as not to give opportunity to any party to circumvent the right of extending the time limit.

6.9 [B] Back up provisions under SAR

According to Article 43 of the Implementation Rules, any of the disputing parties may request the arbitral tribunal to clarify any ambiguity in the original award. It is stated, “The parties may request the arbitration panel which has issued the award to interpret

⁷⁸² *Ibid*

⁷⁸³ The time limit for the interpretation is thirty days from the day of receiving the award.

any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well as the rules relating to means of objection”.⁷⁸⁴ Giving only the parties the right to request the arbitral tribunal to interpret the ambiguous part in the award raises a question whether the arbitral tribunal could clarify any ambiguity in the award on its own initiative. According to the wording of the concerned article, it seems not. However, from another point of view, the arbitral tribunal can clarify on its own initiative any ambiguity if it appears to its knowledge that some parts of the award are ambiguous, because the arbitral tribunal has a responsibility to issue an unambiguous and clear award. On the other hand, the arbitral tribunal should be granted the right to interpret the award subject to the right of correcting any material errors in the award according to Article 42 of the Implementation Rules.

By reviewing the text of Article 43 of the Implementation Rules, it is noticed that the article has left some aspects untouched. For instance, it widens the right for the parties to request the arbitral tribunal to interpret any ambiguity in the text of the award, whereas the right should be limited to specific parts of the award, as stated in the Model Law; “interpretation of a specific point or part of the award”.⁷⁸⁵ Further, the text of the article makes no provision for the arbitral tribunal to decide whether the parties’ request is justified. This could result in unjustified requests being submitted by the parties or requests for interpretation of aspects where there is no proof of ambiguity. This might be a mechanism for the losing party to frustrate the arbitration. However, as mentioned earlier, the arbitral tribunal has the right to interpret the award on its own initiative, even though the article does not indicate such right. Therefore, the arbitral tribunal has the right to decide upon a request of the interpretation, whether to accept it if it is justifiable or reject it if it is not justifiable. Another matter of importance is that the article does not

⁷⁸⁴ Implementation Rules of 1985, Art. 43

⁷⁸⁵ UNCITRAL Model Law of 1985, Art. 33(1)b

determine the time limit within which the parties should submit the request or the period the arbitral tribunal may spend in interpreting the award. Since there is no indication of the time limit, the interpretation of the award should be within the time limit for issuing the award or before the submission of the award to the competent authority, otherwise the competent authority will have the responsibility to interpret the award.⁷⁸⁶

Article 43 of the Implementation Rules indicates that interpretation is deemed complementary to the original award. That has the advantage of making clear that interpretation is not to modify or add any aspect to the original award, but only clarify the ambiguities.

6.10 [A] Annulment of the arbitral awards⁷⁸⁷

Since arbitration is deemed to be one level judiciary,⁷⁸⁸ a party not satisfied with the arbitral award is left either to challenge the award to the court of the place where the award was issued or wait until the initiation of the enforcement proceedings to refuse enforcement.⁷⁸⁹ However, prior to annulment, parties should prove that they have exhausted the possibilities for reviewing the award with the arbitral tribunal that issued the award.⁷⁹⁰ The action of annulment in opposition to the arbitral tribunal is the only means of recourse adopted by the UNCITRAL Model Law.⁷⁹¹ This provision reflects the drafters' attention to the importance of balance between the autonomy of arbitration and judicial control. This would affect the progress of achieving independence from the

⁷⁸⁶ Ahmed Abu Alwafa, *Arbitration as a Peaceful Method of International Dispute Settlement in the Sharia Law*, 6th Ed, The Institute of Diplomatic Studies, Riyadh, 1412 A.H, pp. 284-287 (in Arabic).

⁷⁸⁷ The term for this action is varies from one rule to another: "challenge", "set aside", "recourse", "review". These terms are used interchangeably. For example see Model Law Art. 34 "set aside", Saudi Arbitration Regulation Art. 18 "objection", US, FAA section 10 "vacation"

⁷⁸⁸ However, some other rules provide that parties may appeal from the arbitral award. For instance the GAFTA Commodity Arbitration gives the right to the parties to appeal from the award within 30 days to the Board of Appeal; also Netherlands Arbitration Act of 1968, Art. 1050(1).

⁷⁸⁹ Julian D. M. Lew QC, Loukas A. Mistelis, Stefan M. Kroll, *op. cit*, p. 663.

⁷⁹⁰ This is including the request for interpretation of any ambiguity or correction of any material errors in the arbitral award. See Julian D. M. Lew QC, Loukas A. Mistelis, Stefan M. Kroll, *Op. cit*, p. 667

⁷⁹¹ UNCITRAL Model Law of 1985, Art. 34.

court for the sake of carrying out the arbitration with speed and efficiency.⁷⁹² However, this provision that the “Recourse to a court against an arbitral award may be made only by an application for setting aside”, indicates that other means of recourse, such as an appeal *stricto sensu* against an award or a third party action are not allowed.⁷⁹³

The Model Law took the position that recourse of application is submitted “to the court” of the country where the arbitration took place, as indicated by Article 34(2). The exclusive jurisdiction would be as specified in Article 6 of the Model Law.⁷⁹⁴ This statement raises a question whether recourse of application can be submitted to another arbitral tribunal, since the article specifies only “to court”. Some legal writers have commented that although the Model Law grants the exclusive jurisdiction to the court of the seat of arbitration, as the provision does not mention any other body, recourse to another arbitral tribunal is available, if the parties agree. However, it seems that this possibility is not an alternative for the states.⁷⁹⁵ The rationale for such adoption of exclusive jurisdiction is to avoid any doubt as to conflict of jurisdiction, since the court of the state where the arbitration takes place has the jurisdiction to set aside the award. This avoids the alternative of having to “search for other connecting factors such as the law governing the arbitral procedure, which in practice is difficult to determine in the absence of a contractual choice of law provision to this effect” as Gharavi argued. However, the principle of jurisdiction rule based on the seat of arbitration corresponds strongly to the will of the parties, as they could choose the arbitral seat with a view to challenging the award, rather than for the convenience and neutrality of the seat.⁷⁹⁶ Arguably, the principle may influence the main international convention on the recognition and enforcement of arbitral award, where the country of the arbitral seat has

⁷⁹² Peter Binder, *op. cit.*, pp.206-207.

⁷⁹³ Hamid G. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award*, Kluwer Law International, London, 2002, p. 30.

⁷⁹⁴ UNCITRAL Model Law of 1985, Art. 34(2); Art. 6.

⁷⁹⁵ Peter Binder, *Op. cit.*, p. 208; also Fawzi M. Sami, *International Commercial Arbitration*, Vol. 5, Dar Althaqafah for Publication and Distribution, Amman, 1997, p. 406. (in Arabic).

⁷⁹⁶ Hamid G. Gharavi, *op. cit.*, pp. 15-16.

the exclusive jurisdiction to hear action for the arbitral award's annulment. Nevertheless, this argument proves defective, as the main international conventions do not determine the issue of the jurisdiction of the arbitral award annulment, as they do the recognition and enforcement of the award, but they are familiar with the effect of the annulment of the award issued either by the court of the seat of arbitration or the country under the law of which the award was made.⁷⁹⁷

The exclusive nature of Article 34 of the Model Law, as Binder indicated, does not affect the parties' entitlement to practise the other rights granted in other Model Law's provisions. For example, the parties retain the right to refuse the recognition and enforcement of the arbitral award according to Articles 35, and 36 of the Model law. Further, the parties retain the right to request the arbitral tribunal to correct and interpret the arbitral award according to Article 33 of the Model Law.⁷⁹⁸ On the other hand, if the party became aware of circumstances during the arbitral process that may be ground for annulment but chooses not to bring it to the arbitral tribunal until the award is issued, then arguably the party waives his right to annul the award on that ground.⁷⁹⁹ Consequently, it seems that the parties must fulfil certain requirements prior to application for annulment, since as mentioned previously, in order for the court to admit the application of the challenge, the parties must exhaust the possibilities of bringing it before the arbitral tribunal first.⁸⁰⁰

However, a question might arise in respect of the situation where the court accepts the application for annulment. Would such action be followed by the decision of the court to invalidate the arbitration agreement, so that the parties are no longer bound by the

⁷⁹⁷ *Ibid*, pp. 16-17; The New York Convention of 1958, Art. V (1) e.

⁷⁹⁸ Peter Binder, *op. cit.*, p. 208.

⁷⁹⁹ UNCITRAL Model Law of 1983, Art. 4. also this doctrine is found in other arbitral rules such as Netherlands Arbitration Act, Art. 1065 (4); also English Arbitration Act, Section 73 (1). For more regarding the allegation of waiver read R. Garnett, H. Gabriel, J. Waincymer, J. Epstein, *A Practical Guide to International Commercial Arbitration*, Oceana Publications Inc, Dobbs Ferry, New York, 2000, pp. 115-116

⁸⁰⁰ This trend was followed in the decision of the French Court of Appeal Cass. 2e civ., Janv 1994. *Rev de l'arb.*

agreement? Since the Model Law fails to make effective provision in regard to this dilemma, several arbitral provisions suggest different prescriptions. Thus, according to the French NCPC the court dealing with the request of annulment might decide issues only within the limit of the arbitration.⁸⁰¹ On the other hand, a suggestion was made by the Swiss Concordat that arbitrators must resume the case, unless the parties hold reservations on the arbitrators who participated in the former arbitration.⁸⁰² Since the Model Law takes the approach, in line with the universal trend, of limiting the possibility of judicial intervention,⁸⁰³ it is suggested that the Model Law leave it to the parties to decide whether to have the issue reheard by the same tribunal or start a new arbitration, if reasons are brought not to involve the previous arbitrators. Careful attention should be paid to the delay that might be caused by the agreement to start a new arbitration or rehear the issue. However, such delay might not be comparable to the considerable time needed for a judicial authority to decide the issue.

6.10 [B] Annulment of arbitral awards under SAR

The Arbitration Regulation and its Implementation Rules govern all arbitral procedures to produce one dispute settlement method with speed and fairness. Similarly, the Regulation gives parties the right to object⁸⁰⁴ to an arbitral award within fifteen days of the notification of the award. It is provided that

“...adversaries may submit their objections against what is issued by arbitrators to the authority with which the award was filed, within fifteen days from

⁸⁰¹ French NCPC, Art. 1485; for more read Julian D. M. Lew QC, Loukas A. Mistelis, Stefan M. Kroll, *op. cit.*, pp. 680-681

⁸⁰² Swiss Concordat, Art. 40(4).

⁸⁰³ As to the decision of the Court of Appeal of New British Columbia in the case of *Nippon Steel Corp. et al v. Quintette Coal Limited*, Canada Supreme Court Reports, 1990, Vol. 2, where the Court of Appeal rejected the application of appeal and stated that the appropriate criterion in reviewing the arbitral award is maintain the independence to the arbitral tribunal that parties chose them and to cut down the judicial intervention.

⁸⁰⁴ Saudi Legislature used the term “object” for the action of annulment or challenge. Many other arbitral rules differ in the use of terminology of the action of challenge.

the date they are notified of the arbitrator's awards, otherwise such award shall be final"⁸⁰⁵.

It seems from the above text, as El-Ahdab indicates, that the Regulation excludes any third party from making application for annulment of the award, as this can be done only by parties to the dispute.⁸⁰⁶ However, the effect of the arbitral award might reach a third party who is not a party to the arbitration agreement, yet no other arbitral rules, such as the Model Law, have tackled this problem. Al-Bejad argues that the silence in the Regulation regarding the right of a third party does not mean he is excluded, as the arbitral award is equal to a judicial award and may therefore be challenged by any party who has an interest. Therefore, Article 18 of the Regulation applies to any party who has an interest in the award.⁸⁰⁷

The key to keeping arbitration attractive is to ensure the speed needed in commercial disputes. In order to achieve this goal, judicial intervention should be limited to the review of the procedural matters, not review of the award on the merits. According to Article 19 of the Regulation, the competent authority, *Diwan Al-Mazalim*, shall then hear the objection and decide either to accept such objection and decide the matter or reject such objection and issue an enforcement order. Problematically, it cannot be understood from the article that the *Diwan Al-Mazalim* has the exclusive jurisdiction to review the award on the merits, or otherwise, since the Regulation does not make this explicit. Dr. Aljarba has raised the view that the competent authority, *Diwan Al-Mazalim*, is the appellate body to hear any challenge, whether the challenge is on the procedures or on the merits, since the Regulation does not define the grounds of challenge, on the assumption that arbitration is one kind of adjudication.⁸⁰⁸ However,

⁸⁰⁵ Arbitration Regulations of 1983, Art. 18.

⁸⁰⁶ Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, op. cit, p. 607.

⁸⁰⁷ M. N. Al-Bejad, *Op. cit*, p. 237

⁸⁰⁸ Mohammed A. Aljarba, "Thoughts on the Concept of Challenging the Arbitral Awards in Saudi Arbitration Regulation", *Tejarat Al-Riyadh*, No. 482, Nov. 2000, pp. 46-47(in Arabic). This point of view has been supported by other legal writer. They take the view that sine Article 19 does not specify grounds for objection, this means that the arbitral award can be challenged for any reason. Among these legal writers are Dr. Omar Ba Kashab, "Legal Concept of Saudi Law of Arbitration for Settling Commercial

other legal writers take the position that, even though the Regulation contains ambiguity with regard to the jurisdiction of the competent authority, it does not have the exclusive jurisdiction to examine the merit of the dispute before the decision of the objection is made.⁸⁰⁹ By looking at Article 20 of the Regulation, which states that the arbitral award is enforced when it becomes final by order of the authority originally competent to hear the dispute issued on the request of any of the parties *after* ensuring its accordancy with *Sharia*, it is obvious that the competent authority has no jurisdiction to refuse the enforcement of arbitral award, if it does not contradict *Sharia*, without consideration of other reasons. Therefore, it seems that the judicial review over the arbitral award should be carried out in this manner. This leads us to the conclusion that under the Saudi Regulation, the hearing of the challenge of the arbitral award by the competent authority, *Diwan Al-Mazalim*, means reviewing the whole case more closely, similar to the role of a Court of Appeal. That is to say, a challenge to an arbitral award in Saudi Regulation is a second degree of adjudication.⁸¹⁰ However, another legal writer argues, that the Regulation adopts the legal principle adopted in most arbitral rules, which is the prohibition of appealing arbitral awards before the body that the award of competent authority is appealed. The writer justifies his argument by saying that appealing the arbitral award will create an additional degree of adjudication to the official judicial degrees in the Kingdom, and the Constitution of the Kingdom is the only mechanism that can create such a judicial degree within certain procedures. Hence, treating the competent authority in the case of challenge as an appellate body will cause a constitutional breach. Further, he argues that appealing the arbitral award will adversely affect the efficiency of the arbitration, as the case will be heard by three different

Disputes Within National & International Sphere”, *Journal of King Abdul-Aziz University: Economics and Administration*, Vol. 14, No. 1, 2000, pp. 151-217, p. 171. (in Arabic)

⁸⁰⁹ Yahya Al-Samman, *op. cit*, p. 234; Dr. M. N. Al-Bejad, *Op. cit*, p. 238. also went on to say that the competent authority has no jurisdiction to review the award on the dispute merits, as arbitration would lose its features if the competent authority were to rehear the dispute.

⁸¹⁰ Mohammed A. Aljarba, *op. cit*, p. 47.

judicial bodies, namely, the arbitral tribunal, the competent authority which has the jurisdiction to hear the dispute and the court of appeal. This will prolong the settlement process and make adjudication preferable.⁸¹¹

In the case *A. B. Bagodo v. M. A. Algebaishi*⁸¹² after the arbitral tribunal issued the award, the plaintiff submitted an application of objection to the Commercial Circuits on the ground of the illegality of the purchase contract. The application of objection was accepted, and the Commercial Circuits reheard the case in the presence of both parties and issued the decision that the arbitral award was annulled on the ground that the main contract was illegal. The defendant objected to the decision of the Commercial Circuits on the ground that the challenge of the plaintiff on the arbitral award was submitted to the Commercial Circuits before the award was issued, and also on other procedural grounds. In response, the Commercial Circuits refused the defendant's challenge and the issue of the time limit of the arbitral award and the challenge was overlooked. The defendant raised the appeal to the Appellate Review Committee. In response, the Appellate Review Committee reviewed the decision of the Commercial Circuits, as well as other documents of the case, and the decision of the arbitral tribunal. At the conclusion of the case, the Appellate Review Committee issued its decision to confirm the decision of the Commercial Circuits with reservation on the matter of neglect of the mandatory time limit.⁸¹³

As a result, it seems from the case of *A. B. Bagodo v. M. A. Algebaishi* that the Saudi Arbitration Law does not provide sufficient safeguard to parties involved in commercial disputes in various matters. In particular, the ambiguity of the provision regarding the jurisdiction of the Commercial Circuits and the Competent Authority, whether to review the challenge of the award on procedural matters only or on the merits, leaves it open

⁸¹¹ *Ibid*, pp. 236-237

⁸¹² Case No. 539/2/G on 1413 A. H (1993 A. D), Unpublished case.

⁸¹³ Decision of the Appellate Review Committee of the *Diwan Al-Mazalim* No. 169/T/3 on 1417 A. H (1997 A.D) Unpublished.

for the competent authority, as illustrated in the previous case, to hear the dispute on the merits,⁸¹⁴ This will negatively affect the efficiency of settlement by arbitration. Further, the practice of arbitration in Saudi demonstrates that the arbitration process has the nature of adjudication in three degrees: the first is the arbitral tribunal that issues the arbitral award, the second is the Commercial Circuits in the *Diwan Al-Mazalim* which hears the challenge of the arbitral award, and the third is the Appellate Review Committee in the *Diwan Al-Mazalim*, which hears appeals addressed against the decision of the Commercial Circuits. This removes the advantage of finality that arbitration is supposed to possess. It also encourages parties to refer their dispute to the competent authority, since at the worst the case will go through two degrees. More importantly, such an approach causes a considerable delay until the award is final.⁸¹⁵

6.10.1 [A] Grounds for Annulment

Ideally, provisions governing the issue of the award's annulment provide grounds on which a party can seek such annulment. Unequivocally, the Model law offered a comprehensive list of circumstances in which the court of the seat of arbitration may set aside the award.⁸¹⁶ These are when:

- (a)** the party making the application furnishes proof that:
 - (i)** a party to the arbitration agreement referred to in article 7 was 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 this State; or
 - (ii)** the party making the application was not given proper notice of the appointment of an arbitrator or of the

⁸¹⁴ As the Commercial Circuits found that the main contract was illegal. which indicates that the examination of the Commercial Circuits was on the merit of the dispute rather than on the procedural issues.

⁸¹⁵ The Kuwaiti Arbitration Code in Article 186 took different approach by disallowing appeal unless the parties so agreed in the arbitration agreement. Dr. Aljarba states that the Kuwaiti approach seems to be preferable, since if the parties decided not to refer the dispute to the judicial authority the parties will retain the right to agree upon challenging the arbitral award before the judicial authority. see Dr. M. A. Aljarba, *op. cit*, p. 47

⁸¹⁶ UNCITRAL Model Law of 1983, Art. 34 (2).

- arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.

As seen, the grounds listed in the article are divided into two groups, which reflect responsibilities of both the parties and the court. Article 34(2)(a) contains grounds to be proven by the parties, that is to say, it is for the party requesting the challenge to prove the existence of such grounds, Arguably, failing to prove sufficiently the existence would result in confirmation of the award. Article 34(2)(b) consist of grounds that must be examined by the court on its own motion, with the burden of proof on the parties. Binder claims the reason behind allowing such a simplified initiative by the court is that these grounds are of great importance to the institution of arbitration as a whole.⁸¹⁷

Noticeably, Article 34 (2) makes it clear that natural justice and matters of procedure are the basis for the judicial review in the context of an application to annul the arbitral award. The rationale is to set a limitation, where the judicial review of the award on the merits is unacceptable, as well as to reduce the possibility of judicial intervention in the

⁸¹⁷ Peter Binder, *op. cit.*, p. 212.

arbitration proceedings.⁸¹⁸ However, the wording of Article 34(2) that “an arbitral award *may* be set aside....”, would arguably indicate the intention of the drafter of the Model Law to give the discretionary power of the court to refuse annulment of the award based on one of the annulment grounds.⁸¹⁹ Such discretionary power indicates that the validity of the annulment application would depend on the mercy of the court, since according to such power it may not accept in a particular case one of the grounds listed in the article. On the other hand, other arbitral rules contain provisions offering grounds for annulment less rigorous than those in the Model Law, such as Article 1502 and 1502 of the French New Code of Civil Procedure.⁸²⁰ One study shows that fifteen out of eighty eight arbitral awards reviewed by the court of appeal during ten years were set aside or their enforcement was refused.⁸²¹ Statistically, the number of awards annulled would indicate that these grounds are less rigorous than those of the Model Law, strictly approached by the court.⁸²²

It seems from the above provision that these grounds are similar to those stated in Article V of the NY Convention, as well as the grounds found in Articles 35 and 36 of the Model Law. In fact the similarity of the provisions is not just a coincidence, but it indicates the policy of the Model Law to reduce the impact of the place of arbitration. Also, it shows that the Model Law does not operate in isolation.⁸²³ It has been argued that the grounds listed in Article V of the NY Convention might be considered too restrictive to cover all procedural injustice, in the case when annulment of an award is justified. The suggestion was made to replace the list of grounds in Article 34(2) by a general blueprint such as “in case of procedural injustice”, which would place the

⁸¹⁸ This outcome was incorporated in the decision of the case of *Petroships Ptr Ltd v. Petec Trading and Investment Co. and others*, Lloyds Rep, 2001, pp. 348,351.

⁸¹⁹ Hamid G. Gharavi, *op. cit.*, p. 42.

⁸²⁰ Also other national rules follow the same model such as the New Swedish Arbitration Act of 1999, Art. 34; the Belgian Judicial Code, Art. 1704(2); Uruguayan General Code of Procedure, Art. 449.

⁸²¹ Hamid G. Gharavi, *op. cit.*, pp. 40-41.

⁸²² As the decision of the *Cour de cassation* held in a 1987 that “the role of the Court of Appeals, seized by virtue of articles 1502 and 1504 of the New Code of Civil Procedure, is limited to the examination of the grounds listed in these provisions” cited from *Ibid*, footnote no. 180

⁸²³ Peter Binder, *Op. cit.*, pp. 208-209.

burden of decision on the common sense of the judge.⁸²⁴ Although this suggestion received some support, it would result in exclusive intervention by the court in annulment determination, and the court would have supervisory jurisdiction over the annulment of the award on its merit.

Various Model Law-adopting states have raised doubt over some issues that seem not to be covered by Article 34 (2). For example, the UK delegation in the drafting session proposed further grounds, arguing that their insertion would cure the deficiency of the article.⁸²⁵ The chairman commented on the proposal that the proposed grounds would fall within the concept of the public order. Further support was raised by various writers who argue that the *travaux preparatoires* of the Model Law emphasise that the public policy provision covers various possible causes for annulling the award in various cases, such as if the arbitral tribunal has been corrupted in some way or it has been proved that corrupted evidence misled the arbitration.⁸²⁶ Beyond the tendency to universal acceptance of the ground of delinquency, identifying the content of public policy seems to be difficult and it is likely to vary from country to another. According to some legal writers, the national court hearing the challenge would follow the model of courts enforcing awards on the basis of the NY Convention in the manner of treating public policy.⁸²⁷

⁸²⁴ *Ibid*, Para. 7-012-7-013

⁸²⁵ The UK delegation proposed to add ;

- (a) the award is founded on evidence which is proven or admitted to have been perjured;
- (b) the award was obtained by corruption of the arbitrator or of the witness of the losing party;
- (c) the award is subject to a mistake, admitted by the arbitrator, of a type which does not fall within article 33(1)(a)
- (d) fresh evidence has been discovered which could not have been discovered by the exercise of due diligence during the reference. The evidence demonstrates that though no fault on the part of the arbitrator the award is fundamentally wrong.

Also, Article 34(2)(a)(v) of the Scottish Law Reform Act(Arbitration) states: “the award was procured by fraud, bribery or corruption,.....”

⁸²⁶ Redfern & Hunter, *op. cit*, p.424; also see, R. Garnett, H. Gabriel, J. Waincymer, J. Epstein, *op. cit*, p. 117.

⁸²⁷ R. Garnett, H. Gabriel, J. Waincymer, J. Epstein, *op. cit*, p. 117.

Obviously, any amendment granted by various Model Law adopting states in the list of the Grounds would reflect the society's need and stage of development. International commerce, trade and all the related rules, including arbitration, are fields that develop more rapidly than others. Thus, it should be expected that what is planned to be included will need to be amended and modified as development progress.⁸²⁸

6.10.1 [B] Ground of annulment under SAR

Imperfectly, neither the Arbitration Regulation nor the Implementation rules provide grounds for objection. However, the award is enforced when it becomes final after ascertaining that there is nothing in the *Sharia* that prevents its enforcement,⁸²⁹ as contradiction with the *Sharia* is the only ground for refusal of enforcement. It seems, as the judicial review over the challenge should be conducted in the same manner as the judicial review over enforcement, that contradiction with the *Sharia* is the only ground for annulment provided by the Regulation.⁸³⁰ However, the competent authority may decide upon a challenge as it considers appropriate. As Dr. Alhugbani points out, the Saudi Regulation gives the competent authority the full entitlement to apply the general rules of annulment, and he argues that, by this approach, the Saudi legislature refrains from limiting the competent authority on the issue of annulment.⁸³¹ However, in the researcher's view, failure to define the grounds for annulment in the Regulation and its Implementation has caused the competent authority, such as the Commercial Circuits, to go beyond the task of the competent authority, to hear the challenge on the merits of the

⁸²⁸ Such amendments as to integrate grounds more rigorous than those of Model Law by various Model Law adopting arbitral rules, mainly by insertion of additional grounds. Such as Article 33(1)(h) and (g) of the Islamic Republic of Iran's Law on International Commercial Arbitration; also Article 53 of the Sultanate of Oman.

⁸²⁹ According to Article 20 of the Saudi Regulation of 1983.

⁸³⁰ As in the case of *A. B. Bagodo v. M. A. Algebaishi* the Commercial Circuits challenged the award on the ground that the contract was illegal according to *Sharia*

⁸³¹ Dr. Fahad Alhugbani, "The Supervision Role of the Saudi Court on the Arbitral Awards", *Speech given on the Arabic Judicial Forum*, Cairo, 23 November 2000, p. 6

award rather than on procedural matters.⁸³² The Arbitration Regulation or Implementation rules would be improved by setting out minimum grounds for challenging the arbitral award. It is therefore suggested that the Saudi legislature should consider reviewing the modalities of the grounds of annulment provided in Article 34 (2) of the Model Law, which might fit as standard modalities, subject to insertion of the requirement for compliance with the *Sharia*.⁸³³ An attempt has been made by one legal writer to clarify the position by suggesting that the arbitral tribunal is likely to accept any of the following grounds, which are adopted by most arbitration laws, for challenging the awards⁸³⁴:

- (1) lack of a valid arbitration clause or agreement;
- (2) violation of public policy (mandatory rules of the Islamic *Sharia*) by the arbitral award;
- (3) lack of impartiality of the arbitrator, abuse of his authority or exceeding his authority;
- (4) procedural defect, as in the case of the arbitral procedures not being conducted in accordance with the mandatory provisions of the arbitration code and the implementation rules;
- (5) lack of a fair hearing;
- (6) composition of the arbitral tribunal not with compliance with the arbitration agreement or the mandatory provisions of the arbitration codes;
- (7) form and content of the arbitral award not in accordance with the requirements of the arbitration codes.

⁸³² With the exception of public policy.

⁸³³ As the Egyptian Arbitration Code of 1994 applied in article 53 the grounds listed in the UNCITRAL Model Law although it contains more annulment grounds which are not included in the Model Law.

⁸³⁴ Yahya Al-Samman, *op. cit.*, pp. 234-235.

6.10.2 [A] Time limit for making Annulment application

In order to maintain the features of arbitration with respect to the speed and, more importantly, finality, a provision for limitation of the period within which a party may challenge the award must be incorporated in the rules regulating annulment. The Model Law includes such a provision, which specifies three months as the time limit for making an application for annulment, starting from the date of receiving the award by the party making the application.⁸³⁵ The provision goes on to include the circumstances where party makes an application for correction or interpretation. The time limit in such a case will start following the date of executing such application. The main criticism of this provision would be in regard to the long period of the time limit. A concern arises that such a time limit might attract the losing party to rely on this provision for the sake of delaying and frustrating the arbitration. Article 34 (3) of the Model Law gives some assurance in respect of the validity of the application made after the expiry of the time limit for annulment. Nevertheless, giving such a long time period would strengthen the position of the court to take a solid stance that any application submitted after the expiry of the three months is not accepted.⁸³⁶ Acceptance would invalidate the main features of the arbitration as a means of dispute settlement, namely, speed and low cost. However, the time limit provision is worded, “An application for setting aside *may* not be made.” This may be taken to mean that this approach must not obstruct the court hearing the annulment request from considering the reasons and the unforeseen circumstances which may have prevented the party requesting annulment, from doing so within the time limit. Moreover, some grounds may take time to be discovered. For example, in the case of fraud, evidence might not appear within the time limit imposed by the rules. In the Belgian Judicial Code, the time limit is categorised according to the nature of the

⁸³⁵ UNCITRAL Model Law of 1985, Art. 34 (3).

⁸³⁶ As the position taken by the French Code of Civil Procedure of 1981 Article 1505 which provides: “such action (an action to set aside) may be heard as soon as the award has been rendered; it is barred if it has not been brought within the month following notification of the award and its *exequatur*”

ground of annulment.⁸³⁷ The speed of arbitration cannot be maintained at the expense of neglecting the most important element, justice.

6.10.2 [B] Time limit for making Annulment application under SAR

Article 18 of the Regulation indicates that the request for challenge of the arbitral award should be submitted to the competent authority within fifteen days from the day of notification of such arbitral award to the disputing parties. However, it is unclear whether the request for challenging the arbitral award is valid after the expiry of the time limit. However, the competent authority, such as the Board of Grievances, has the competence either to refuse such request or to accept it. The decision of the competent authority will surely depend on the reason that causes such delay, to enable the competent authority to distinguish justifiable from unjustifiable reasons.

6.11 Recognition and enforcement of Arbitral Award

Most of the arbitration rules and conventions use the terms “recognition” and “enforcement” of arbitral award.⁸³⁸ However, recognition on its own is the process of accepting or respecting the legal force and effect of the arbitral award, whereas, enforcement is the process of applying or carrying out what has been decided by the arbitrators. It can thus be said that enforcement goes one step further than recognition. Nevertheless, the distinction mentioned above is not entirely appropriate. It is based on the fact that an award may be recognised without being enforced; however, once it is enforced it means that the award has been recognised by the court ordering the enforcement. According to one analytical commentator, the distinction between

⁸³⁷ Belgian Judicial Code, Art. 1707. This article provides that a party can challenge the award within three months from the date fraud is discovered provided, that a period of five years from the date the award was notified has not expired.

⁸³⁸ For example the title of New York Convention and Art. I(1), also UNCITRAL Model Law, Art. 35.

recognition and enforcement is importance for the so-called *res judicata*, which determines that the dispute has been resolved and no further arbitration proceedings may start the dispute again.⁸³⁹ The more precise distinction, therefore, should be between “recognition” and “recognition and enforcement”.⁸⁴⁰ However, the important distinction would be between the formality of recognising and executing the arbitral award nationally and internationally, as they are treated differently depending on whether they are considered domestic or foreign.⁸⁴¹

Undoubtedly, the efficiency of arbitration as a method for the settlement of commercial or investment disputes is due to a large extent to the fact that it is generally easier to implement arbitral awards than State court decisions. The expectation of the parties to arbitration is that the arbitral award will be implemented without any delay.⁸⁴² The expectation of the arbitral tribunal and the competent authority that has the jurisdiction to hear the dispute is that the parties will implement the arbitral award voluntarily, without the need for enforcement proceedings in the national court.⁸⁴³ However, this might not be the case. The enforcement order is an important step to implement the arbitral award when a party refuses voluntarily to carry it out, through applying legal sanctions.⁸⁴⁴ However, it still places a huge burden on the winning party, due to the difficulty of investigating the locations of the losing party’s assets.⁸⁴⁵ The problem of tracking the assets of the losing party is exacerbated when the frameworks concerning the enforcement of arbitral award do not set provisions to impose penalties on the uncooperative party.

⁸³⁹ Peter Binder, *op. cit.*, p. 217.

⁸⁴⁰ Redfern & Hunter, *op. cit.*, p.448

⁸⁴¹ Generally considering an arbitral award is domestic if it is rendered in an arbitration conducted under its laws or within its territory.

⁸⁴² Redfern & Hunter, *op. cit.*, p. 443.

⁸⁴³ *Ibid*

⁸⁴⁴ *Ibid*, p. 449

⁸⁴⁵ The sanctions might include the seizure of property and other assets including bank accounts, stock in trade, bonds, equity.

6.11.1 The International Mechanism for enforcement

The international efforts towards finding a universal enforcement mechanism are reflected in various conventions and bilateral and multilateral treaties.⁸⁴⁶ However, the NY Convention and the Model Law mechanisms seem to have superseded most of these conventions and treaties. The superiority of these frameworks does not arise by coincidence, as all the statistics illustrate the considerable number of states that have adopted such frameworks. The Model Law enforcement mechanism appears almost identical to that of the NY Convention.⁸⁴⁷ However, a close look at such regimes would illustrate the disparity in efforts of unification of the laws governing the enforcement of international commercial arbitration, despite the similarity of the language. The elimination of the distinction between foreign and domestic arbitral awards is the main distinguishing feature of the Model Law compared to the NY Convention framework. The ambition of the Model Law was to have uniform treatment of arbitral awards irrespective of their country of origin, as the drafters of the Model Law started to draw the provision concerning the recognition and enforcement, “irrespective of the country in which it was made”.⁸⁴⁸ The Model Law approach of reducing the relevance of the place of arbitration shows great consistency with the ideology of international commercial arbitration, as the place of arbitration normally would be chosen as a neutral point. Elimination of the relevance of the place of arbitration plays a very effective role in having the arbitral award enforced in the country where the defaulting party’s assets are found, regardless where the arbitration was conducted. As Redfern and Hunter

⁸⁴⁶ New York Convention, Geneva Protocol on Arbitration Clauses of 1923, Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, The World Bank’s 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, The European Convention on Commercial Arbitration of 1961 and etc...

⁸⁴⁷ Kenneth T. Ungar, “The Enforcement of Arbitral Awards Under UNCITRAL’s Model Law on International Commercial Arbitration”, *Columbia Journal of Transnational Law*, Vol. 25, No. 3, 1987, p. 719

⁸⁴⁸ UNCITRAL Model Law of 1985, Art. 35 (1). By adding the statement of “irrespective of the country in which it was made” the drafter managed to make an adjustment to article III of New York Convention. Also the same consequence would originate from Article 1(2) as reads : “The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State”

stated, “international awards should be recognised and enforced *internationally*, and not merely in the country in which they are made”⁸⁴⁹

The significance of Article 35 (1) is that not only does it equate all kinds of arbitral award, domestic and foreign, but it goes further to equate the award with an ordinary court decision, by obliging the competent court to recognise and enforce such awards. As Binder stated, “This demonstrates great trust in the system of arbitration”.⁸⁵⁰ This unlimited support by the state court to enforce awards locally and universally would not reflect the partiality of the provision, where the term “*shall*” within the context of the article would not give any opportunity for judicial intervention unless such action is based on the grounds listed in Article 36 of the Model Law.⁸⁵¹

The second paragraph of Article 35 set forth the technical procedures to be followed for applying for the award’s enforcement. The obligatory authentication is the formality of proving that the signature of the arbitrator making the award is genuine.⁸⁵² The certification requirement is the formality by which the copy of the award is to be proven the true copy of the original. It is not clear whether certification is required in the case where the documents presented to the competent court contain the original award in the same language as to the competent court.⁸⁵³

It has been argued that the provisions of the Model Law and NY Convention failed to determine the law governing authentication and certification. The insertion of such details, whether the law of the enforcing state or the law of the awarding state, applies, would avoid the possibility of disagreement between the two states.⁸⁵⁴ However, the practice of New York Convention states is to request authentication and certification by the diplomatic or consular agent of the enforcing state in the place where the award was

⁸⁴⁹ Redfern & Hunter, *op. cit*, p. 451.

⁸⁵⁰ Peter Binder, *op. cit*, p. 217.

⁸⁵¹ Kenneth T. Ungar, *op. cit*, p. 741.

⁸⁵² *Ibid*, p. 742

⁸⁵³ In the case where the original award is presented but in a different language from that of the competent court the Certification would still be required on the copy of translation.

⁸⁵⁴ This issue can arise if the awarding state is different from the enforcing state.

issued, on the basis of their knowledge of the particularities of the arbitration law of the awarding state. As Ungar argues, there may be a presumption that the Model Law-adopting states will follow the latter practice, since the provisions of the Model Law concerning the technical requirements are almost identical to those of Article IV of NY Convention.⁸⁵⁵

The second paragraph of Article 35 (2) sets forth a further requirement, for the submission of the “original arbitration agreement referred to in article 7 or a duly certified copy thereof”.⁸⁵⁶ This requirement seems to contain more flexibility as to the options found in Article 7 of the Model Law. As Binder stated, “It is submitted that a defect in form can be cured by waiver or submission in cases where the proceedings were on the basis of an oral agreement initiated and not objected by any party”.⁸⁵⁷

Unquestionably, disparity of the languages between the enforcing state and awarding state would require certified translation.⁸⁵⁸ The question which might arise, is whether it would be necessary for Model Law-adopting states to narrow the provision on the translation with requirement with more details, as can be found in the comparison with Article IV(2) of the NY Convention.⁸⁵⁹ However, one legal writer has defended the position of the Model Law, arguing that “the exact details of the procedure of translation had been deliberately left open in the Model Law because of the many differences in national practice”.⁸⁶⁰

The attitude of the Model Law shows a difference from the restrictive approach of the NY Convention with regard to the reservations imposed in the Convention.⁸⁶¹ The commercial reservation in the NY Convention is found to be problematic as to the

⁸⁵⁵ Kenneth T. Ungar, *op. cit.*, p. 743

⁸⁵⁶ UNCITRAL Model Law of 1985, Art. 35 (2).

⁸⁵⁷ Peter Binder, *op. cit.*, p. 219.

⁸⁵⁸ UNCITRAL Model Law of 1985, Art. 35 (2) as provides: “If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language”

⁸⁵⁹ Article IV(2) of New York Convention provides that “the translation shall be certified by an official or sworn translator or by diplomatic or consular agent”

⁸⁶⁰ Peter Binder, *op. cit.*, p. 219.

⁸⁶¹ New York Convention of 1958, Art. I (3).

various possible definitions of the term “commercial”. This is illustrated by *India Organic Chemical Ltd v. Chemtex Fibres Inc.* where the dispute arose between Indian and American parties to a contract. The Indian party sued the American in an Indian court, in a dispute involving transfer of technology. In response, the defendant challenged to terminate the court proceedings by initiating arbitration, as the parties had included an arbitration clause in the main contract. The court rejected the defendant’s action on the basis that the contract must be commercial “by virtue of a provision of law or an operative legal principle in force in India”. Although the court admitted that the contract and dispute were commercial in nature, in terms of the NY Convention, the court declared that the defendant had failed to “call in aid any statutory provision or operative legal principle in India”, and refused to terminate the court proceedings.⁸⁶² Arguably, some national courts may find a given contract and related dispute “commercial” as their legal system defines the term “commercial”, while others would exclude the same dispute from their commercial dispute criteria.

One could argue that the effect of the commercial reservation in the NY Convention could influence the Model Law, as it is stated, “This Law applies to international commercial arbitration”.⁸⁶³ To counter this argument, it is necessary to point out that the provision on the commercial nature of the dispute, in the Model Law, does not give any room for the competent court to interpret the term “commercial”, as the drafters of the Model Law provide in the footnote of the provision a definition of the term, to reduce any possibility of misinterpretation from one court to another.⁸⁶⁴ However, a problem could arise with regard to the effect on Article 1(1) of the Model Law, as paragraph 5 of

⁸⁶² 1978 A.I.R. (Bom) 108

⁸⁶³ UNCITRAL Model Law of 1985, Art. 1 (1).

⁸⁶⁴ Footnote of Art. 1(1) of the UNCITRAL Model Law provides “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”

the latter article might eliminate the provision determining the interpretation of the term ‘commercial,’ as well as other rules in the Model Law, if the provision concerned conflicted with any legislation that existed in the state prior to the adoption of the Model Law. Article 1 (5) provides, “This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law”. Assuming that the state is reluctant to enforce a foreign arbitral award for the reason that the award involves a sensitive area of law, Ungar argues that it is to the credit of the Model Law that Article 1(5) gives states room to exempt any sensitive area, such as security or antitrust law from the commercial category.⁸⁶⁵

More importantly, the Model Law is silent with regard to the time bar for enforcement. That is to say, the Model Law is intended to follow the method of prescription as the right to enforce the award is barred by prescription, since there is no definite time limit given by the provision.⁸⁶⁶

6.11.2 Grounds for refusal

On the one hand, the winning party is granted the right to resort to the court of the place where the assets of the losing party are found, to enforce the award. On the other hand, the losing party has the right to frustrate the execution of the award if certain grounds are found. Under Article 36(1)(a) of the Model Law, recourse against an arbitral award is made on five exhaustive grounds.⁸⁶⁷ The concerned grounds relate to defective

⁸⁶⁵ Kenneth T. Ungar, *op. cit.*, p. 740.

⁸⁶⁶ In the US the time bar is three years after the award is made, section 207, Federal Arbitration Act; in Russia the time bar is also three years from the day the award acquires legal force; the time bar in England is six years from the day the losing party refuses to comply with the request to pay.

⁸⁶⁷ The exclusive nature of the five grounds demonstrates that the court must not accept any application of non-enforcement based on grounds other than those listed in the Article. Similarly, Article V(1) of the NY Convention took the same approach. In this respect, the delegate of Belgium, Sweden and the former Soviet Union raised an objection to a proposal submitted by an Indian delegate to include additional ground for non-enforcement “because it deemed superfluous and might be used as a pretext for refusing the recognition and enforcement of an arbitral award”. See Naif Al-Shareef, *Enforcement of Foreign*

procedure in the country where the arbitration took place. The grounds are limited to the following:⁸⁶⁸

- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was 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; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute 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 recognized and enforced; or
 - (iv) the composition of the arbitral tribunal 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; or
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.⁸⁶⁹

There are two sets of grounds under Article 36 (1) of the Model Law, divided into those dependent upon the request of the party (Article 36 (1)(a)), and those the court can raise on its initiative *ex officio* (Article 36(1)(b)).⁸⁷⁰ The reason for this is that the party seeking enforcement would find it extremely difficult to furnish a negative proof not to enforce the award. Therefore, the party contesting the recognition and enforcement of

Arbitral Awards in Saudi Arabia: Grounds of Refusal Under Article (V) of NY Convention of 1958, University of Dundee, 2000, p. 33.

⁸⁶⁸ UNCITRAL Model Law of 1985, Art. 36. These grounds found in the latter article are seen as the mirror of the grounds in Article V(1) of the New York Convention.

⁸⁶⁹ UNCITRAL Model Law of 1985, Art. 36 (1). The wording of the later provision is very similar to article V and VI of NY Convention. The similarity to NY Convention is considered valuable in the context of recognition and enforcement.

⁸⁷⁰ The drafter of the Model Law adopted the same manner of dividing the grounds as in Article 34 of the same Rules.

the award needs to present the facts or circumstances that make one or more of the elements of article 36 (1)(a) applicable. As stated by one legal writer, “The enforcement of the award has not been suspended or that no appeal has been lodged against the award, and it seemed therefore illogical to impose the burden of such a proof on the person seeking enforcement”.⁸⁷¹ Therefore, one could argue against the statement raised by some writers that Article 36 is a mirror of the grounds in Article 34 of the Model Law, which places the burden of proof on the party making the application, not necessarily the defendant.⁸⁷² Further examination of both provisions reveals further disparity. The defendant has the burden of proving the invalidity of the arbitration agreement under Article 34(2)(a)(i), “failing any indication thereon, under the law of this State”, whereas Article 36(1)(a)(i) reads “failing any indication thereon, under the law of the country where the award was made”. The rationale for this disparity is to achieve full compliance with the function of each provision, due to the fact that the action of annulment by the adopting state can only be made within its territory, whereas the award can be recognised and enforced anywhere in the world.⁸⁷³

Accordingly, the party resisting the enforcement of the award is entitled to have it annulled under the law to which the parties have subjected it and / or under the law of the country where the award was made. It may, however, be criticised that the compliance of the formation of the arbitral award tribunal and procedure with the laws of the country where arbitration takes place, as the law of the place of arbitration, should not strictly be taken as the leading or model law governing the issue of irregularities in the composition of the arbitral tribunal or procedure. The choice of *lex loci arbitri* is not a subjective matter, because the choice of venue in many cases is a matter of coincidence, without relevance to the object of arbitration, and unknown to the

⁸⁷¹ H. Harnick, “Recognition and Enforcement of Foreign Arbitral Awards”, *Am J Comp L*, Vol. 31, 1983, pp. 703-712, at p. 708.

⁸⁷² Among these writers is Peter Binder who attempted to examine some of the differences but, however, did not tackle the issue of the burden of proof.

⁸⁷³ Peter Binder, *op. cit*, p. 222.

parties at the time of concluding the arbitration agreement and stipulating the applicable procedure.⁸⁷⁴

More importantly, it appears that the above provision retains the approach of consistency in the Model Law in treating all awards rendered in international commercial arbitration alike, irrespective of the place in which they were made, whether domestic or foreign, unlike the NY Convention, which generally deals with foreign awards only. This approach, as one legal writer expressed, “enhances unification and ... facilitates matters in a field of particular practical importance”.⁸⁷⁵ The Model Law is distinguished from the NY Convention, by taking a more friendly approach, as in the latter, enforcing the award is subject to a reciprocity reservation.⁸⁷⁶ By applying the latter, the party should primarily take into consideration the appropriate place when choosing the seat of arbitration.⁸⁷⁷

Amongst the grounds on which the court can base refusal on its motion is the so-called “public policy”. This is the watchdog that is intended to safeguard the most basic principles governing social, economic and political considerations in a particular state. The principle is very much associated with the principle of sovereignty.⁸⁷⁸ Lack of definition of public policy could lead to the purpose of enforcement in the Model Law being defeated, especially if the enforcing authorities were allowed to interpret the concept of public policy widely. Also the concept of public policy would vary from one state to another. It is not to be expected that the vagueness of public policy can be

⁸⁷⁴ The same comment was presented regarding the same issue in Article V (1) of the NY Convention by the Secretary General, E/Conf. 26/2, 6 march 1958, p. 18

⁸⁷⁵ Peter Binder, *op. cit.*, p. 221.

⁸⁷⁶ Article I(3) of New York Convention grants its member states a so-called “reciprocity reservation”, which limits the application of the Convention to countries that are also members of the Convention. For more read *Ibid*, Para. 8-005

⁸⁷⁷ J. D. M. Lew & L. A. Mistelis & S. M. Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, London, 2003. p. 702

⁸⁷⁸ One legal writer stated that “it is necessary corollary of sovereignty. Under written or unwritten special rules of the forum state’s rules of private international law or on conflict of laws in penal or administrative matters, the courts of the forum state will exclude the application of a foreign law which conflicts with (the basic values of domestic law) in a case before them”. See I. Seidle-Hohenveldern, “Order Public (Public Order)”, in R. Bindschedler (ed.), *Encyclopaedia of Public International Law*, Vol. III, 1997, pp. 788-790, at p. 788

altogether abolished, as the task undoubtedly would involve the efforts of national legislatures to give the concept of public policy a very narrow interpretation. However, the logical expectation is that some boundary to the term should be set, in order to reduce the scope for wide interpretation by the adopting states. Such an attempt was made by the International Law Association Committee on International Commercial Arbitration, in its recommendation on harmonisation of international public policy. However, the Model Law does not prescribe a universal standard of public policy.⁸⁷⁹

The question which might arise is whether Article 36 (1) grants discretionary power to the court. Article 36 (1) indicates that enforcement of an arbitral award *may* be refused only. The word *may*⁸⁸⁰ is a clear indication of the discretionary power of the court, to enforce the award, even if any of the grounds mentioned in Article 36 (1) (a) and (b) exist.⁸⁸¹ In the *travaux préparatoires* of Article 36, the concern was expressed that the permissive language of the word *may be refused* was ambiguous and would be construed to give the court discretion power.⁸⁸² The court of Final Appeal of Hong Kong in the case of *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* enforced the award on the basis of the wording of Article V (1) of NY Convention, which is deemed to be identical to Article 36 (1) of the Model Law.⁸⁸³ The court concluded that the discretion granted to the court enabled the confirmation of the award in certain circumstances where “the factual foundation for the public policy ground arises from an alleged non-compliance with the rules of governing the

⁸⁷⁹ Pierre Mayer, Audley Sheppard, “Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards”, *Arbitration International*, Vol. 19 No. 2, 2003, pp. 249 - 263. The 1999 OHADA Uniform Arbitration Law is an exceptional as it provides that the enforcement shall be refused if the “award is manifestly contrary to a rule of international public policy of the member states”. Harmonisation is likely to be achieved amongst OHADA Member States given the existence of a single supervisory court *i.e.* the Cour Commune de Justice et d’Arbitrage.

⁸⁸⁰ The term *may be* indicates that “although a comment is partly true, there is also another point of view that should be considered” it also indicates that “something is possible or may be true, but is not certain”. Therefore it is as if to say possibly or perhaps. See J. Sinclair, *Collins English Language Dictionary*, London, HarperCollins Publications, 1993, p. 898.

⁸⁸¹ This wording originates from Article V (1) and (2).

⁸⁸² A/CN.9/233, Para. 141.

⁸⁸³ *Hebei Import & Export Corporation v. Polytek Engineering Company Limited*, [1999] 1 HKLRD, p. 665, CFA, excerpt in (1999) 24a *Yearbook of Commercial Arbitration* 652.

arbitration to which the party complaining failed to make prompt objection, keeping the point up its sleeve, at least when the irregularity might be cured".⁸⁸⁴ Other cases show that the discretionary power was exercised to the extent that an award set aside in the state of origin might still be enforced in another state. For example, in the case of *Chromally Aeroservices v. Arab Republic of Egypt*, the US court enforced an award that had been annulled in Egypt.⁸⁸⁵ Therefore, in order to retain the certainty and predictability of arbitration, the court should not be given such discretion and the permissive language of the words *may be refused* should be replaced by the mandatory language, *shall be refused*.

6.11.3 The Mechanism of enforcement of Arbitral Awards in Saudi Arabia

Under the Saudi regulation, there is no formal distinction between arbitral awards, domestic or foreign, providing that the award is issued within Saudi Arabia (Dar al-Islam) by an arbitrator qualified under *Sharia* rules to act as such. However, the lack of statutory provisions for enforcing the foreign award in Saudi law and the strict approach of *Sharia* have limited the acceptance of foreign arbitral award. The limitation is based on Islamic jurists' use of reasoning to arrive to a logical conclusion, in other words, *Ijtihad*.⁸⁸⁶

⁸⁸⁴ *Ibid*, p. 690, For more example see Carolyn B. Lamm & Eckhard R. Hellbeck, "The Enforcement of Foreign Arbitral Awards under the New York Convention: Recent Developments", *International Arbitration Law Review*, Issue. 5, Sweet and Maxwell Contributors, 2002, p. 139.

⁸⁸⁵ *Chromally Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907 (D. D. C. 1996). Also the French Court of Cassation held that "the award made in Switzerland is an international award which is not integrated in the legal system of that state, so that it remains in existence even if set aside, and its recognition in France is not contrary to international public policy" in the case of *Hilmarton Ltd v. Omnium de Traitement et de Valorisation*, March 23, 1994, *Yearbook Commercial Arbitration*, 1995, p. 663. For more information see Dana H. Freyer, 'United States Recognition and Enforcement of Annulled Foreign Arbitral Award- The Aftermath of the Charmoalloy Case', *Journal of International Arbitration*, Vol. 17, No. 2, 2000, pp. 1-10; also see Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed, Kluwer Law International, 2001, pp. 926-930.

⁸⁸⁶ *Ijtihad* is the exercise of reasoning to arrive at a logical conclusion on a legal issue, done by the Islamic jurists to deduce a conclusion as to the effect of a legal precept in Islam

On the basis of the Saudi Rules, enforceability of the arbitral award happens in two instances: when the award becomes final after 15 days of the period for objecting to the award has elapsed,⁸⁸⁷ and when there is confirmation from the authority that the first jurisdiction to hear the dispute that objection to the award is denied.⁸⁸⁸ On the other hand, Article 20 of the Regulation contains a provision by which an arbitral award becomes the enforceable by means of an enforcement order granted by the judicial authority originally competent to hear the dispute. Such an enforcement order is granted upon the petition of an interested party after ensuring that the arbitral award is not contrary to the *Sharia* or the public order. Hence, the question which might arise in this respect is to what extent is an enforcement order needed in the two circumstances laid in Articles 18 and 19 of the Regulation? Some legal writers have argued that according to Saudi rules the award becomes final on the basis of the two instances specified, but not *res judicata*, and that in order for it to be enforceable, a decision granting leave to enforce the award by the authority which has the first jurisdiction to hear the dispute is required.⁸⁸⁹ On the other hand, it might be argued that the enforcement order is not required if either one of these two instances occurs, since the competent authority is not granted the authority to issue the enforcement order on its own motion, nor did the legislature set a time limit for requesting an enforcement order. That is to say, the enforceability of the award occurs by fulfilment of the two instances.

As a result, it seems that the main purposes of making the enforcement of an arbitral award by means of a judicial order is to ensure that the award is fully consistent with the mandatory *Sharia* principles. Consequently, in order to avoid the non-enforcement of an arbitral award within the kingdom, the arbitrators must observe the mandatory *Sharia* rules. At first sight, this requirement seems to constitute a departure from the rule of the enforcement of arbitral awards under the *Hanbali* School, according to which an arbitral

⁸⁸⁷ Saudi Regulation of 1983, Art. 18

⁸⁸⁸ *Ibid*, Art. 19

⁸⁸⁹ Abdul Hamid El-Ahdab, *op. cit*, p. 605; also see Samir Saleh, *op. cit*, p. 319

award is directly enforceable without need for a judicial order. Further, the purpose of the enforcement order is to grant the rights of the third party, since a petition may be submitted by the interested party, if any, other than the defendant and the claimant, ie the heirs of any of the parties, the creditors or guarantor etc. Therefore, the authority of the first jurisdiction should examine prior to the issue of the enforcement order, whether the party requesting the enforcement order fundamentally has an interest in the execution of the award.⁸⁹⁰

In fact, the requirement that the award be consistent with the mandatory *Sharia* principles, which constitute public order in Saudi Arabia, is not the ordinary rule of *Sharia* related to arbitration, as all the arbitral rules of procedure of the Saudi Arbitration Regulation depart from the principle of *Sharia*. The reference to mandatory rules of *Sharia* means that the award must comply with the sources of *Sharia*, ie *Quran*, *Hadith*, *Ijma*, etc. The main concern with regard to awards in commercial disputes is that there is no usury (*Riba*), or aleatory character of contracts (*Gharar*) involved.⁸⁹¹ A question arises whether an award that contains a decision, for example, providing interest or usury (*Riba*) will be unenforceable at all. The competent authority, *Diwan Al-Mazalim*, tried to take a more flexible approach than the provision by separating any part of the award which is contrary to *Sharia*, if possible (although, in some cases, such separation is impossible), in order to make the rest of the award enforceable. In fact, when such separation is impossible, the competent authority will not enforce the award, as it is contrary to the principle of *Sharia*, which is the constitutional law of Saudi. It

⁸⁹⁰ M. N. Al-Bejad, *op. cit.*, p. 240.

⁸⁹¹ Samir Saleh, *op. cit.*, p. 320. *Riba* is a guaranteed profit without any possibility of loss, ie “interest”; also it is a kind of reward without work. It was argued that the rationale behind the interdiction of interest was due to the main goal of Islam being the establishment of an economic system where all forms of exploitation are alleviated. That is to say, Islam intended to establish justice between the financier and the entrepreneur. For more see Naif Al-Shareef, *op. cit.*, pp. 154-158; also see M. Chapra, *Objective of the Islamic Economic Order*, Leicester, The Islamic Foundation, 1996, pp. 14-21.; “*Gharar* is the concept of risk. Any contract containing speculation, or contract clause that turns on the happening of a specified but uncertain event, is void under the principle of *Gharar*” see Kristin T. Roy, “The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards?”, *Fordham International Law Journal*, Vol. 18, 1994-1995, p. 947, Also see Abdul-Rahim Al-Saati, ‘The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence’, *Journal of King Abdullaziz University: Islamic Economy*, Vol. 16, No. 2, 2003, pp. 5-10.

could be argued that the insertion of such a flexible approach by the Broad of Grievances into a written provision in the Saudi Regulation would elevate the level of reasoning of accepting the strict approach of *Sharia* principle from the point of view of the winning party, ie foreign party, such that both the importance of *Sharia* principle and enforceability of the award are respected.

Once the award is declared enforceable, it is deemed to possess the same status as a judgement made by the authority which granted the enforcement order.⁸⁹² Article 44 of the Implementation Rules emphasises that the enforcement order becomes executable upon its issue. It states:

Whenever an order is issued for execution of the arbitration award, the latter becomes an executionary instrument and the clerk of the authority originally competent to try the case shall give the winning party the execution copy of the arbitration award, containing the order for execution and ending with the following phrase:

"All concerned government authorities and departments shall cause this award to be executed with all legally applicable means if such execution required application of force by the police."

In the case where the award is not executed voluntarily, an award is usually executed by the principality of the region where the assets of the person against whom the award is to be enforced to be found.⁸⁹³

It might be argued, especially from the point of view of the losing party, that there is a gap in the Regulation in respect of the ability to refuse enforcement by full determination of either one party if the latter furnishes to the competent authority proof that the award is unable to be enforced for reasons that cannot appear to competent authority, e.g invalid arbitration agreement, the arbitral tribunal is not composed as agreed in the agreement, etc. This difficulty arises since the regulation fails make a

⁸⁹² The Saudi Arbitration Regulation of 1983, Art. 21.

⁸⁹³ Salah Alhujailan, "National reports: Saudi Arabia", *4 Year Book of Commercial Arbitration*, 162, 1979, p. 168.

balance between the opportunity for the competent authority to close the bar in front of the enforceability of the award, since the regulation grants the competent authority supervisory power to examine the award to ensure it contains nothing that violates of the *Sharia* and public policy, and the opportunity of the parties to raise an objection to the enforcement of the award. It does so by providing grounds on which the parties may base their objection, corresponding to the position of leading arbitral rules, such as the grounds set forth in Article 36 of the Model Law.

6.11.4 Enforcement of foreign arbitral awards

The importance of arbitration depends on the credibility of the process of the enforcement of an arbitral award. This dilemma often becomes more complex in the case of foreign arbitral awards. Enforcement of foreign arbitral awards may be frustrated by the claim of sovereign immunity, where the defendant is a state or one of its constituent subdivisions or agencies. Thus, a number of bilateral and multilateral conventions have been concluded for the purpose of regulating the enforcement of foreign awards in order to solve this problem.

Generally, it is expected that the municipal legislation of the state determines the legal basis for the enforcement of foreign arbitral awards, but in the case of Saudi Arabia, the regulation governing arbitration lacks any provision which determines the issue of enforcing foreign arbitral awards.

However, the competent authority, *Diwan Al-Mazalim*, is authorized to admit applications for the enforcement of foreign judgements and the judgement of foreign arbitral awards.⁸⁹⁴ Therefore, it would be practically expected that *Diwan Al-Mazalim* would apply the rules governing the enforcement of foreign award in the same way as

⁸⁹⁴ The *Diwan Al-Mazalim* Code, Art. 8 1(g)

those to enforce a foreign judgement.⁸⁹⁵ Although Saudi has a traditional policy of enforcing non-Saudi judgements and judgement of non-Saudi arbitral awards, the obstacles that must be overcome to achieve this enforcement are often onerous. The competent authority, *Diwan Al-Mazalim*, requires that certain conditions be fulfilled in order for a foreign award to be enforced by the board, which will significantly increase the time and cost involved in enforcing non-Saudi arbitral awards. First, the award at issue must be included in a foreign judgement confirming it. Secondly, the foreign judgement must be authenticated by the consulate of Saudi Arabia in the place of issue, as well as by the Ministry of Foreign affairs and the Ministry of Justice. Thirdly, it must be translated into the Arabic language by a sworn translator if it is issued in a foreign language. Fourthly, it must be rendered on the basis of proceedings which comply with the principles of fair trial as prescribed by the Islamic *Sharia*.⁸⁹⁶ Furthermore, the Saudi traditional policy on enforcing non-domestic awards is considered a very unsophisticated approach, since it requires a double leave to enforce foreign awards. Such a requirement may effectively limit the options for foreign arbitral awards to be enforced in Saudi Arabia.

A petition to be submitted to the *Diwan Al-Mazalim* by the interested party initiates the procedure for the enforcement of a foreign award. After ensuring that the award at issue is not contrary to *Sharia* or public order, an enforcement order is granted by the *Diwan Al-Mazalim*. Thus, the main purpose of requiring a foreign arbitral award to be enforced by the Board is to ensure that the award is not contrary to *Sharia* or public order. Accordingly, in order for a foreign award, rendered in respect of a dispute involving foreign investment in Saudi Arabia, to be enforced in the Kingdom, arbitrators must pay

⁸⁹⁵ Enforcement of foreign arbitral award is granted by the rules of *Sharia* as in Sura Al-Nesaa verse 35 “If a couple fears separation, you shall appoint an arbitrator from his family and an arbitrator from her family; if they decide to reconcile..”, it is to indicate the contrary of the claim that the approach of *Sharia* play very strict role in enforcing the foreign arbitral awards.

⁸⁹⁶ Hussain Al-Baharna, “The Enforcement of Foreign Judgement and Arbitral Awards in the GCC Countries with Particular Reference to Bahrain”, *Arab Law Quarterly*, Vol. 4, 1989, p. 339.

close attention to mandatory principles of the Islamic *Sharia* and make the award in conformity with these principles. This, of course, implies that at least one of the arbitrators should be a Muslim who has sufficient knowledge of the Islamic *Sharia*.

It is interesting to note that a problem might arise from the vacuum of the Saudi legal system concerning the enforcement of foreign awards; namely, since there is no specific legislation regulating this matter, it is not clear whether the *Diwan Al-Mazalim* would re-examine the merits of the case before issuing the enforcement order. If the Board does so, this is a time consuming process which will result in considerable delay in issuing the enforcement order. The Implementation Rules of the *Diwan Al-Mazalim* Code could be improved by clarifying this matter.

However, Saudi Arabia took a crucial step in order to alleviate the difficulty faced as a result of the failure of such statutes to govern the enforcement of foreign arbitral awards. It has ratified a number of conventions which govern the enforcement and recognition of foreign arbitral awards, such as the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards of 1958.⁸⁹⁷ In order to assess the effectiveness and the improvement of the attitude of the Saudi system following the adoption of the NY Convention, some questions should therefore be answered. Has the adoption of the NY Convention, after almost two decades, facilitated effectively the process of the enforcement of foreign awards? On the other hand, has the adoption of the NY Convention effectively facilitated the Saudi system in finding the middle ground between the application of the mandatory *sharia* and opening the door for foreign arbitral awards to be enforced in Saudi Arabia?

⁸⁹⁷ Royal Decree No. M/11, dated 16/07/1414 AH (1994 AD); Saudi Arabia had ratified more conventions regulating the enforcement of foreign arbitral award such as the Arab League Convention of 1952, Washington Convention of 1965.

6.11.4.1 Role of New York Convention in Saudi

Obviously, the first impact in Saudi as a result of acceding to the NY Convention is to increase the number of foreign investments in Saudi, which surely indicates the confidence of foreign investors that they can settle disputes arising from contracts with Saudi businessmen, since arbitral awards concluded from these disputes will be enforced in Saudi Arabia on the basis of the NY Convention. Further, the Convention will decrease the reluctance of foreign investors to enter into arbitration, where Saudi is the place of arbitration, as an award issued in Saudi will be enforced in any contracting state. More importantly, contrary to the position in relation to leave of execution of foreign arbitral awards without an international convention, the NY Convention attempted to avoid the approach of requiring a double leave to execute the foreign arbitral awards. An arbitral award that arrives in Saudi Arabia does not substantially require the foreign competent authority to obtain leave in order for it to be enforced in Saudi.

6.11.4.2 Rules facilitating the execution of foreign award

Article IV of the NY Convention determines the documentation that the applicant must attach to the petition submitted to *Diwan Al-Mazalim* in order to recognise and execute the foreign award.⁸⁹⁸ However, the Convention leaves to the contracting state, where recognition and enforcement of the arbitral award are sought, the liberty to undertake the execution of foreign arbitral awards, according to its procedural basis stipulated in its national law. However, the Convention significantly imposes a limitation on the liberty of the competent authority, *Diwan Al-Mazalim*, in that it must not impose substantially more difficult requirements or higher fees or charges on the recognition

⁸⁹⁸ According to the Royal Decree No. M/51 dated 17/02/1402 A.H (14/12/1981 A.D) which entrusted *Diwan Al-Mazalim* with the mission of settlement of foreign arbitrator awards execution applications. Also the circular of *Diwan Al-Mazalim* No. 7 dated 15/08/1405 A.H (6/05/1985 A.D) to settle the application of arbitrator awards applications.

and enforcement of the arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards.⁸⁹⁹ These required documents as:

- the application of petition to enforce foreign arbitral award must be submitted to the president of *Diwan Al-Mazalim*, or alternatively to the vice president. Such application should include:
- the original award and a duly certified copy of it;
- the original arbitration agreement and a duly certified copy of it.
- translation of the award and arbitration agreement into Arabic language by an official sworn translator or by Saudi consular in the country where the arbitration was taken place, if the award and the agreement were in a foreign language.

It seems from the last two requirements that the arbitration agreement is excluded from the Convention if the agreement is conducted orally. Otherwise, inclusion of such agreements in the requirements found in the Convention and the method to be followed by the competent authority in order to authenticate this method of arbitration agreement would limit the options for the competent authority to use personal reasoning, as it differs from judge to another.⁹⁰⁰

6.11.4.3 Refusal of enforcing foreign arbitral awards in Saudi

The reason for raising this issue is due to the disparity of the approach of the NY Convention and the attitude of the Saudi arbitration rules, in not granting the parties or the competent authority, apart from the issue of *Sharia* and public policy, the right to refuse the enforcement of a domestic arbitral award. It seems here that this stance taken by the Saudi legislature is a clear indication that foreign and domestic arbitral awards

⁸⁹⁹ New York Convention of 1958, Art. III.

⁹⁰⁰ The reference to personal reasoning in this part of the study does not correspond to personal reasoning in the sources of *Sharia*, as explained in Chapter Two of this study.

are treated differently in Saudi. However, Article V of the Convention runs counter to the Saudi attitude and distinguishes between the grounds for refusal of enforcement that may be invoked by the respondent only and those that may also be raised by *Diwan Al-Mazalim* on its own motion.

Grounds that are raised by the respondent are⁹⁰¹:

- if the respondent proves the incapacity of either party to the arbitration agreement or the invalidity of this agreement either under the law applicable to it or under the law of country where the award was made;⁹⁰²
- if the respondent proves that he was provided insufficient opportunity to present his case, or improper notice for the appointment of the arbitrator or arbitration proceedings.
- if the respondent proves that the award is not within the scope of the arbitration agreement;
- if the respondent proves that the composition of the arbitral tribunal has not been in accordance with terms in the arbitration agreement;
- if the award has not become binding on the parties or if the award has been annulled by the competent authority of which the award was made.

Grounds that are raised by *Diwan Al-Mazalim* are:

- The latter is granted the right to refuse on its motion the recognition and enforcement of foreign arbitral award according to article V(2), such refusal is limited to certain circumstances, as follows:
- if the subject matter of the dispute is not arbitrable under the Saudi law. According to Arbitration Regulation, any dispute that cannot be settled by conciliation can be settled by arbitration.

⁹⁰¹ New York Convention of 1958, Art. V(1).

⁹⁰² According to the arbitration rules, the incapacity of either party to the arbitration agreement may be for instance involved by a Saudi Governmental agency, providing that the concerned agency did not provide an authorisation from the Council of Ministers to resort to arbitration.

-if the foreign arbitral award is contrary to the public policy of Saudi, enforcement will be refused.

It is to be expected that the Convention will prove beneficial in Saudi Arabia since it governs the process of executing foreign arbitral awards and also sets forth the circumstances under which a member nation can refuse to enforce a foreign arbitral award. The benefit lies in granting provisions that are not found to be existed in the domestic legislation, even for the execution of domestic awards. However, the accession of Saudi Arabia to the NY Convention created some barriers that always defeated the possibility of enforcement of foreign arbitral awards in Saudi, in addition to the difficulty that foreign investors face to comply with the mandatory *Sharia*.⁹⁰³

6.11.4.3 (i) Public Policy

The concept of public policy within the Saudi framework is to be derived from the principle of *Sharia*. Members of *Diwan Al-Mazalim* will not execute the foreign arbitral award if it is contrary to the *Sharia*, on the basis of public policy granted by Article V(2) of the Convention. Although the main purpose of the NY Convention within Saudi is to ensure that non-Saudi awards issued in a contracting state are enforced in Saudi Arabia, Article V (2) (b) of the NY Convention provides a safe port whereby Saudi is not obligated to enforce a foreign arbitral award that is contrary to its public policy.⁹⁰⁴ Thus, the previous article seems to invalidate the purpose that the Convention is meant to accomplish, by allowing the Saudi competent authority to reject all arbitral awards that are contrary to its public policy. As the law and policy of Saudi Arabia are mostly different from the laws of other nations, the Saudi competent authority, *Diwan Al-Mazalim*, might easily refuse to enforce the arbitral award of the concerned nation on the basis of Article V (2) (b) of NY Convention. Therefore, as Roy argues, according to

⁹⁰³ Omar Ba Kashab, *op. cit*, p. 181.

⁹⁰⁴ Kristin T. Roy, *op. cit*, pp. 953-954.

the latter article, Saudi Arabia would not enforce foreign arbitral awards any more than it did prior to its accession to the NY Convention.⁹⁰⁵ The difficulty is compounded by inconsistency in applying the principle of public policy in Saudi. A domestic arbitral award is not enforced if the arbitral tribunal consists of a non-Muslim arbitrator according to the Arbitration Rules, which depart from the principle of *Sharia* (public policy). In contrast, in the case of foreign arbitration, the arbitral award might be enforced even if the composition of the arbitral tribunal consists of non-Muslims, if so agreed by the parties.⁹⁰⁶

Saudi Arabia, by acceding to the NY Convention, accomplishes the dual goals of achieving the acceptance needed from the international community and retaining its historical law and religion. Nevertheless, the traditional policy of the Saudi competent authority which has the first jurisdiction to hear the dispute provides the lesser of two evils to the foreign investors, in that the awards concerning them are not completely unenforced, but only the part of the award which is not contrary to *Sharia* and public policy will be enforced. However, it might be argued that since the principle of public policy is found in other arbitral rules which successfully act as a vehicle for recognising and enforcing arbitral awards, such as the Model Law, it might be preferable to accede to the Model Law, since by comparison the latter is superior to the NY Convention in respect of overcoming the difficulty created by the principle of reciprocity, since the former enforces the arbitral award irrespective of the country in which the award was made.⁹⁰⁷ Moreover, the approach of the Model Law also would overcome deficiencies in the Saudi regulation with respect to the domestic awards, ie failure to specify grounds of refusal that may be raised by the parties, since the Model Law implicitly does not

⁹⁰⁵ *Ibid*, p. 954.

⁹⁰⁶ According to an interview with Dr. Fahad Alhugbani senior judge at *Diwan Al-Mazalim*, according to practice, when receiving the application of executing foreign arbitral award, the *Diwan Al-Mazalim* examines only the identity of the award, without paying any attention to the formalities of the issuing the award, which in some cases can be contrary to the public policy (*Sharia*)

⁹⁰⁷ UNCITRAL Model Law of 1985, Art. 36 (1)

differentiate between domestic awards and foreign awards. Also, applying the NY Convention would limit the contracting states to those rules set forth in it, whereas adopting the Model Law does not prevent the adopting state from modifying the rules to correspond to its general policy.

6.11.4.3 (ii) Reciprocity

The second barrier arises from the issue of Royal Decree No. M/11, declaring that the Kingdom of Saudi Arabia will apply the principle of reciprocity in respect of recognition and enforcement of foreign arbitral awards. The principle of reciprocity is applied in the field of political relations.⁹⁰⁸ In the application of the principle of reciprocity in enforcing foreign arbitral award, it should not be expected that if a state enforced arbitral awards issued in Saudi, Saudi would be forced to enforce the arbitral awards of that state. The contrary is true, apart from the fact that reciprocity is a defective approach for the reason that a considerable number of states have acceded to the NY Convention. This is because the principle of reciprocity in fact gives power to the competent authority to narrow the principle when applying it in the enforcement of the foreign awards, and Saudi Arabia implements very strictly the approach of judicial independence.

It should be noted that the Kingdom made no reservation-as was done by other countries-concerning the nature of the dispute subject-matter of the award as it did not require that this dispute be a “commercial” dispute.⁹⁰⁹

⁹⁰⁸ Dr. Omar Ba Kashab, *Op. cit*, p. 183.

⁹⁰⁹ Abdul Hamid El-Ahdab, “Saudi Arabia Accedes to the New York Convention”, *Journal of International Arbitration*, Vol,11, NO,3, (1994), pp.87-92, p. 91

6.12 Summary

Apart from the final award, which decides the whole dispute, there are various types of arbitral awards which may be made during the arbitral process, for instance, the interim and partial. There is no provision in the Model Law stating the right for the arbitral tribunal to issue the partial and interim awards per se and the only term used 'final award'. However, the drafter's intention was that the arbitral tribunal should possess this right. The situation is slightly different in the Saudi Regulation, where when the drafters used the term "*all awards*" to refer to other types of awards beside the final.

The arbitral rules differ as to the elements to be contained in the arbitral awards, however, they share the requirement that the arbitral award must be unambiguous and dispositive. Article 31 of the Model Law set out that arbitral awards must be in writing and signed by the arbitrator. The drafters of the Model Law used the term "writing and signed". It could be argued that if the award is to be signed, it must necessary be in writing, however, the opposite is not always true. Since arbitration is one of the consensual contracts, the decision must be justified to both parties by the arbitrators, and their decision must be issued within a certain period. The Model Law seems to compromise between the civil law approach and the common law approach, since it gives the parties the freedom to decide whether to include the reason of the award or not. Even though the Model Law seems to make an achievement regarding the content and form of the award, it failed to determine the validity of the arbitral award if one of the elements required is omitted.

The Saudi Regulations does not differ from the other rules regarding the content of the award. The Regulation failed to include any provision to determine the validity of the award if one of the elements is missing, which according to practice would increase the court intervention upon the arbitral process. The Saudi Regulation gives full entitlement to the parties to determine the time limit within which the award must be made in the

arbitration agreement, as they have the best knowledge of the suitable period for settling the dispute. On the one hand, the regulation drafters seem to take the same approach as the Model Law in giving the parties the freedom to decide the time limit; however, on the other hand they have set a time limit of ninety days, which indicate their intention to maintain the speed of the arbitral process in the case of disagreement of the parties to include the time limit in the arbitration agreement.

At the last moment the arbitral tribunal holds a deliberation to enable the arbitrators to reach the award. The deliberation should not be exposed to any party and must be secret. It is argued that the Model Law failed to include a provision on deliberation, whereas, under the Saudi Regulation, in the final session the arbitrators review the case and make a deliberation. Thus, the regulation in this respect goes further than the Model Law, but it again furnished the court the opportunity to intervene in the case if one of the arbitrators refused to participate in the deliberation, as the regulation is silent in this regard. The decision is made either by majority vote or unanimously. Neither the Model Law nor other rules succeeded in solving the problem where a decision cannot be reached and there is deadlock. The Model Law drafters recognised this problem and proposed that in such a case the chairmen of the arbitral tribunal has the decisive power to decide the dispute alone.

The Saudi legislature distinguishes between making the award in arbitration and conciliation. In arbitration the award shall be made by majority vote, whereas in conciliation the award shall be made unanimously. The regulation has gone no further to resolve the problem of deadlock, as the Model Law proposal received criticism. Nevertheless, giving the presiding arbitrator the decisive power is the lesser of the two evils in the case of failure to reach a decision.

The arbitral tribunal often has jurisdiction to correct any minor clerical or typographical errors and interpret any ambiguity of language of the award at the request of either party

or on its own motion. The Implementation Rules has explicitly granted the arbitral tribunal the power to correct any material errors in the award, also to interpret any ambiguity in the original text of the award. However, although the Implementation Rules fills the gap that is found in the Regulation regarding the correction of the material errors, but it does not fix any time limit for the parties to submit the request to the arbitral tribunal. This might result in a complication as to who is to correct the award, the arbitral tribunal or the competent authority, especially in the case when the time of the arbitration or deposit of the arbitral award has expired.

Any party to the dispute has the full entitlement to challenge an arbitral award, whether national or foreign, before the competent authority. The Model Law avoids any doubt or conflict of jurisdiction as to whom the application of annulment should be submitted to, since it retains the exclusive jurisdiction of the court of where the arbitration takes place. There are many grounds upon which either party may challenge the award. Some of these grounds are to be proved by the parties, whereas the others must be examined by the court on its motion. It seems that the grounds that are found in the Model Law are identical to those of the New York Convention, which shows the intention of the Model Law drafters to reduce the impact of the place of arbitration. The request for the challenge should be submitted to the competent authority within a certain time limit.

Under the Saudi Regulation and its Implementation Rules, either party to the dispute has the right to challenge the arbitral award before the competent authority. The Regulation specifies thirteen days within which the request of challenge must be submitted to the competent authority. However, it seems that the Regulation drafters have deliberately left the grounds of annulment unspecified, to be inferred from the grounds for the refusal of enforcement of Article 36 of the Regulation. However, this approach has led the competent authority to hear challenges on the merits of the award rather than on procedural matters.

Even though the arbitral award must be enforced voluntarily by the loser party, the New York Convention and Model Law provisions dealing with the enforcement of the arbitral award attempted to find a universal enforcement mechanism. A request to enforce the award must be submitted to the competent authority combined with the authenticated original award and a certified copy of it.

The competent authority has the power to refuse to issue the enforcement order if one of the parties succeeds in presenting evidence that there are one or more reasons for setting aside the award.

According to Articles 18 & 19 of the Saudi Regulation, enforcement happens in two instances; after the period for objecting to the arbitral award elapses or when there is a confirmation from the competent authority that a request of objection has been denied. The Saudi legislature has realised the usefulness of the NY Convention for Recognition and Enforcement of the foreign arbitral award, which plays a crucial role in assisting the winning party to enforce the arbitral award if the state issuing the award is a contracting state, as the country of the losing party's assets is not always Saudi Arabia. However, when there is an award issued by a foreign law or under the rules of one of the conventions governing arbitration which is not ratified by the Kingdom of Saudi Arabia, the party should refer the request for enforcement to the Board of Grievances. The Board will consider the principle of reciprocity and the merits of the case and will check that the foreign award does not contradict to the public policy of the Kingdom of Saudi Arabia. Then the *Diwan Al-mazalim* issues a final decision, which may grant or reject the enforcement of the award.

CHAPTER SEVEN

CONCLUSION

7.1 Conclusion

In this study, the arbitral process has been discussed, from the stage where the dispute took place until the arbitral award is enforced. The rules of procedure as set out in the UNCITRAL Model Law and other international and national arbitral rules in the commercial arbitration arena have been analysed. The position of Saudi Arabia concerning arbitration was discussed and analysed after illustrating the arbitral process in the national and international arbitral rules, with special reference to the provisions of the Arbitration Regulation of 1983 and its Implementation Rules of 1985.

An attempt was made to give the reader the general background of arbitration by giving several definitions either linguistically and technically. Even though there are several definitions of arbitration, there is no universal one that can unify all the aspects that are found in all the definitions. As it is said, arbitration cannot be easily defined even though it can be identified. Exploring the nature of arbitration demonstrated the advantages that can be found in this method, which has made it a unique method in comparison with the methods of ADR. Among these advantages are the speed of the process, the confidentiality and the freedom of the parties to determine the constitution of the arbitral tribunal, the arbitrators and their number, the place of arbitration and the time for hearing unlike litigation, where the time and the place of the hearing are rarely suitable for the parties of the dispute.

Arbitration was a formal way of settling the dispute among the Arabic tribes before Islam. Several incidents that occurred during that period give an indication of the trust and respect accorded to arbitration rulings. However, arbitration in this period lacked a

regulatory judicial system. Usually the arbitrator was selected from among the wise of a community. At that time there were many known arbitrators, both male and female.

There was a considerable change in the concept of Arab arbitration after the mission of Prophet Mohammed had come to reveal Islam. Many ideas of arbitration were transformed. Therefore, arbitration is a legitimate means to settle disputes among mankind in the Islamic jurisprudence, as evidenced by the *Quran*, the word of God, the *Sunna* the words and practice of Prophet Mohammed (peace be upon him), consensus (*Ijma*) and analogy (*Qiyas*). Even though the four *Sunni* schools differ slightly in their opinions regarding some issues in the Islamic jurisprudence, they share the attitude that arbitration is a legitimate method; however, they each value the significance of arbitration differently. Within the context of *Sharia*, arbitration is different from adjudication and deliverance of legal opinion (*Ifta*). Even though adjudication shares with arbitration the task of declaring the Islamic rules, the two differ in certain aspects. For instance, the judge derives his competence from the head of the Muslim state (*imam*), implying that adjudication is the original forum for settling disputes, whereas the arbitrator derives his competence from the arbitration agreement. Also, adjudication does not require the consent of the disputing parties to hear the case, whereas arbitration depends on the consent of both parties. As regards the practice of *ifta*, it is the effort made to identify the Islamic ruling on any particular matter that requires clarification. From time to time, people are faced with uncertainty as to the correct way of proceeding in a particular difficulty, not knowing whether their proposed action may be lawful or unlawful according to the *Sharia*.

The understanding of arbitration law in Saudi was very limited until the Aramco case occurred. The Saudi legislature realised that lessons should be learned from that case. Arbitration was made exclusively for private parties after the Saudi legislature

prohibited the submission to arbitration of disputes arising between the Saudi Government or one of its agencies in the Resolution No. 58 of 1963.

At that time there was no one specific regulation which governed matters concerning the arbitral process, although there were a few regulations containing some provisions which regulated certain issues of arbitration, for example, the Commercial Court Regulation of 1931, the Labour and Workman Regulation of 1969 and the Chambers of Commerce and Industry Regulation of 1980. Accordingly, arbitration between private parties was sporadic.

In a very important step to promote the role of arbitration as a means of settling disputes arising from commercial transactions, the Council of Ministers decided to ratify the Arbitration Regulation by the Resolution No. 164 on the 4th of April 1983. The King also gave his approval by the Royal Decree No. M/46 on the 25th of April 1983. This Regulation was published in the Official Gazette, *Um al-Qura*, on the 3rd of June 1983.

In 1985, its Implementation Rules were issued by the Council of Ministers Resolution No. 7/2021/M. These Rules have clarified numerous aspects regarding arbitration and specifically answered many of the questions left unanswered by the Arbitration Regulation of 1983.⁹¹⁰

The Arbitration Regulation of 1983 has given clear answers in respect of the arbitrators: their number, appointment, qualifications, replacement and fees, the language of arbitration, the applicable law, the method of making arbitral awards and their enforcement. In addition, the Arbitration Regulation of 1983 and its Implementation Rules of 1985 permit governmental agencies to settle their disputes with private parties by arbitration, provided that authorisation is obtained from the President of the Council of Ministers.

⁹¹⁰ Niel F. Allam, Arbitration in the Kingdom: The New Implementation Rules, *Middle East Executive Reports*, vol. 8, no. 8, August 1985, p. 9.

Confusion may take place among the judicial authorities if the Saudi government failed to appoint the special judicial authority who has the original jurisdiction to hear the dispute. Therefore, the Board of Grievances is appointed to carry out this task as supervisory body in the arbitral process of the commercial disputes. The Board of Grievances (the Administrative Court) is an independent judicial commission with ties to no governmental authority other than the King.

As part of the developmental movement that has occurred in Saudi towards international arbitration, it had acceded to a number of bilateral and multilateral conventions governing arbitration as a means of settling disputes. Among these are the Washington Convention of 1965 concerning the settlement of investment disputes, The Arab League Agreement of 1952 and the New York Convention of 1958 for the recognition and enforcement of foreign arbitral awards.

There are two main types of arbitration agreement. The first is the submission agreement to refer specific existing disputes to arbitration. The second type is an arbitration clause to submit a potential dispute to arbitration. The Arbitration Regulation of 1983 explicitly recognises the different types of arbitration agreement. Recognition of an arbitration clause is considered one of the main changes adopted by the Arbitration Regulation, since the concept of arbitration clause before this Regulation was not covered by Saudi legal regulations or recognised by the judicial authorities. The court, for instance, was not bound to submit the case to arbitration when there was an arbitration clause. An arbitration clause is independent from the main contract, and cannot be automatically be affected by the fortunes of the substantive contract. This trend, juridical autonomy, is reflected in various arbitration rules such as Model Law Article 16(1). The autonomy principle and its corollary- the *kompetenz-kompetenz* rule- mean that the law governing the main contract need not necessarily be applied to the arbitration clause. This point was raised in the case of *Dow Chemical France v. Isover*

Saint Cobain. The Saudi Regulation is silent in respect of the juridical autonomy principle. However, the Saudi law seems to have adopted the doctrine of the autonomy of the arbitration clause within the framework of a compromise solution. It grants the competent authority the power to examine the relation between the arbitration clause and other clauses in the contract.

The Arbitration Regulation requires the parties to the dispute to prepare an arbitration instrument, whether arbitration is based on an arbitration clause or a submission agreement, and to have this instrument approved by a competent authority before the commencement of the arbitration proceedings. If either party to the dispute refuses to cooperate with the other party to prepare such an instrument, the competent authority will intervene at the request of the other party and request the refusing party to respect the arbitration agreement and to participate in preparing an arbitration instrument. However, this requirement may lead to an increase in the intervention of the courts and to delay in the commencement of the proceedings.

There are some provisions as to the validity of the arbitration agreement. For instance, parties' consent is the most important requirement that the arbitration agreement should fulfil. Another is agreement in writing. Other arbitral rules, such as Model Law in Article 7(2), have facilitated the requirement more by permitting the arbitration agreements to be concluded by other means, such as orally or by modern communication means (fax, telex, email...). Parties to a contract must enjoy full legal capacity. Incapacity of one of the parties may invalidate the arbitration and the arbitral process will lapse at the point of discovering the incapacity. The Model Law has reflected this principle in Article 34(2) (i). The wording of the article overcomes the vagueness, of not specifying which law to determine the capacity of the parties, inherent in Article V (1) (a). States and public entities are prohibited from resorting to arbitration in some states such as France. However, other states have regulated that authorisation

from the head administration is needed for public entities to enter into an arbitration agreement. The New York Convention has gone further to allow recognition and enforcement of the arbitral award in dispute between parties, regardless of the nature of the parties whether private or public.

An arbitration agreement is one of the consensual contracts under *Sharia*, which means that it derives its competence from the will of the parties. Since the Regulation and its Implementation originated from the principle of *Sharia*, therefore, parties' consent is required. The Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985 do not state that the arbitration agreement should be in writing. However, it requires this form implicitly, because any arbitration instrument must contain the names and signatures of the parties and arbitrators, the subject-matter of the dispute and so on. Furthermore, forms of agreement by oral or modern communication means, such as fax or telex or email, do not exist in the Regulation and its Implementation.

In *Sharia* the legal capacity is divided into: *ahliyyat al-wujub*, the potential passive capacity to acquire rights, and *ahliyyat al-ada*, an effective capacity to exercise rights and discharge obligations. The Arbitration Regulation expressly requires the parties to have full legal capacity to refer a dispute to arbitration, which comes under *ahliyyat al-ada*. A person of full legal capacity can enter into an arbitration agreement unless his capacity gets affected by an impediment such as insanity or prodigality or imbecility. A guardian must take the role of deciding the legal action of such a person. The same applies to a minor of the age of reason. A bankrupted person is considered under incapacity from the date of declaring the bankruptcy, and cannot enter into an arbitration agreement, unless the arbitration concerns non-financial matters.

The Arbitration Regulation abolished the prohibition of the government and its agencies from entering into a contract with any other party containing an arbitration clause.

However, it is subject to authorisation of the Prime Minister, to ensure that the dispute arbitrated is not contrary to the general rules of the country.

The existence of the arbitration agreement, whether submission agreement or arbitration clause, demolishes any jurisdiction of adjudication. The Model Law drafter has been well concerned about the wording of the article concerning that the court will refer the dispute to arbitration *unless* it finds the agreement is null and void. “Unless” grants that the ordinary court takes over the jurisdiction of the dispute in such a case. The Egyptian Court of Appeal held that the effect of the arbitration agreement is only upon the parties to the agreement, even if a third party is connected to the subject matter.

The main effect of the Arbitration Regulation is that a dispute brought to the court must be submitted to arbitration where there is an arbitration agreement. This step constitutes a significant improvement on the former situation where the arbitration agreement was unenforceable. However, the effect of the agreement under the Regulation seems to be uncertain, due to the fact that the agreement lacks effect on its own, as the Regulation provides that the parties must send the agreement to the court of the original jurisdiction to register and approve the arbitration request. Further, the Saudi Regulation is silent in respect of the time by which either party to the dispute should invoke the arbitration agreement before the court.

Not all disputes can be settled by arbitration, subject to the nature of the dispute. However, what is considered to be non-arbitrable in one country might be viewed as amenable to the process of private arbitration in another country. Model Law and NY Convention recognised the doctrine of arbitrability, with provisions for refusal of the recognition and enforcement of the arbitral award if the subject matter of the dispute is not arbitrable under the law of the contracting state. The burden is on the state law recognising the arbitral agreement, which might be different from the law governing the process of the arbitration.

The Regulation explicitly states that all disputes on any matter of law may be resolved by arbitration, except matters which cannot be resolved by conciliation, such as *Hudud* crimes and *Lian* between spouses. According to practice, matters related to public policy which is derived from *Sharia*, even though the Regulation drafters were silent on this point, are not arbitrable. Consequently, arbitration is not allowed in respect of disputes arising out of the contract dealing with usury or gambling, because these contracts are not allowed in *Sharia* law. The Regulation drafters have also failed to include disputes that are prohibited under provisions of the Ministry of Commerce which are still to be followed, such as disputes between partners of a company or between a company and its partners, disputes relating to commercial agency contracts and disputes between foreign contractors.

The establishment of the arbitral tribunal is not less important than the issuance of the arbitration agreement. The first step in the establishment of the tribunal is the appointment of the arbitrator(s). The Model Law grants the parties the freedom to determine the selection of the arbitrator(s) and their numbers, contrary to most of the arbitral rules, which impose an uneven number. The Model Law is the middle approach to compromise between on one the hand the effectiveness of an uneven number, as in most of the arbitral rules, where the number of the arbitrators will be three if the parties failed to make such a determination, and on the other hand the will of the parties to determine the number of the arbitrators, even if it is an even number.

Before the adoption of the Saudi Regulation, there was no provision to mandate an uneven number of arbitrators. The Saudi legislature and people in the business arena lacked full awareness of arbitration, to the extent of not applying the Model Law approach in giving the parties the freedom to choose the number of arbitrator(s), whether even or uneven, as the award by the majority facilitates issuing the award smoothly. Therefore, the requirement of an uneven number of arbitrators by the

arbitration regulation helps to remove deadlock. According to the Arbitration Regulation, the parties have full freedom to appoint arbitrators themselves, or they may opt for selection by a third party chosen by them, or by co-operation between themselves and a third party. The competent authority will appoint arbitrators if the parties are unable to agree, or if either party does not nominate his arbitrator.

There are some major qualifications which are required by most arbitration laws, although they sometimes vary, for a person who attempts to take the role as an arbitrator. The Arbitrator must enjoy full legal capacity to be able to enter with the parties into a contractual relationship which entails rights and obligations. Sufficient experience is also needed. Some arbitral rules requires that the arbitrator should be a lawyer or at least has an experience in law. Since arbitration is governed by rules of law it must be said that at least the umpire arbitrator or the sole arbitrator should be a lawyer to ensure that the arbitral process is legally on track. Other rules have required that the arbitrator or the umpire must be a commercial man. Arbitrators must remain impartial and independent during the arbitral process until the arbitral award is rendered. None of the arbitrators, including those appointed by the parties, should be predisposed towards any of the parties and, on the contrary, all the arbitrators should be in a position to carry out their functions impartially and without bias. It has been doubtful whether nationality may affect the impartiality of the arbitrator. The Model Law made it clear that an arbitrator' holding the nationality of one of the parties does not indicate the impartiality of the arbitrator and is not an essential element of that impartiality. Most of the arbitral rules do not differentiate between male or female when referring to the qualification of the arbitrator.

The Saudi Arbitration Regulation requires that an arbitrator should be selected from amongst experts and must be of good conduct and full legal capacity. However, *Sharia* requires that arbitrator should possess that same qualifications as a judge. The Shafi and

Hanbali Schools hold the opinion that the arbitrator need not have the same qualifications as a judge. Article 3 of the Implementation Rules takes the approach of requesting that the presiding arbitrator should be aware of the *Sharia* and commercial Regulation. From the wording of the article, the presiding arbitrator need not necessarily be a graduate from a *Sharia* College. That is to make sure the presiding arbitrator represents the legal side and the other arbitrators represent the technical side of the dispute. Therefore, it is crucial that the Saudi legislature requires sufficient experience, impartiality and independence in persons who wish to act as arbitrators. These stipulations raise some questions which need clear answers from the Saudi legislature. For instance, the requirement of full legal capacity raises the question of the ability of women to act as arbitrators in Saudi Arabia. *Sharia* law does not recognise women's full competence to give evidence, as the testimony of two women is equivalent to that of one man. The majority of *Sharia* scholars adopt the view that women are unable to act as judges or arbitrators. Further, the Board of Grievances refuses to ratify an arbitration agreement containing a woman arbitrator, or to enforce an arbitral award made by a woman arbitrator, whereas the Board of Grievances may recognise some foreign arbitral awards, even if the arbitral tribunal contains a woman. Therefore, it is important that the Saudi legislature gives a clear answer on this.

A similar problem arises regarding the ability of non-Muslims to act as arbitrators. Non-Muslims are unable to act as arbitrators in domestic arbitration, because the applicable law of the dispute in the Kingdom of Saudi Arabia is normally the *Sharia*. Nevertheless, in the case of international commercial arbitration held in the Kingdom, it is not necessary that the members of the arbitral tribunal are Muslim, particularly when foreign law is applicable. In addition, the Board of Grievances recognises foreign arbitral awards, which are usually made by tribunals containing non-Muslim arbitrators.

Parties to the dispute may agree mutually upon the dismissal of the arbitrator orally or by written notification. If the dismissed arbitrator thinks that the dismissal was based on unreasonable grounds and suffers from such action, whether morally or financially, he is entitled to seek compensation. According to the arbitral rules, such as the Model Law, parties are entitled to challenge the arbitrator if a justifiable doubt as to his impartiality and independence appears to one of the parties. Failing to perform their functions properly or other reasons which may cause a defect to the arbitral process are not covered by the Model Law as grounds for challenging the arbitrator. However, challenge may be rejected if parties fail to prove they were unaware of the reason at the time of the appointment. The request of challenge must be submitted by a written statement to the arbitral tribunal if the challenge is not successful, then to the competent authority. More importantly the Model Law provides that, while such a request to the court is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. The Model Law classifies the termination of the arbitrator either by withdrawing from the office or by request of one of the parties when the arbitrator becomes *de facto* or *de jure* to perform his function. A replacement for the challenged arbitrator should be appointed according to the same rules applied for the appointment of the arbitrator being replaced.

According to the Arbitration Regulation, an arbitrator may be dismissed by the mutual consent of the parties to the dispute. Article 11 of the Regulation makes clear that a dismissed arbitrator is entitled to compensation only if he had started his task. The Saudi Regulation drafters did not specify the grounds of dismissal nor refer to the grounds for dismissal of the judges. Also, either party has the right to challenge an arbitrator, for the same grounds as challenge of a judge, within five days of the day on which the reason for challenge appeared and at any stage of the arbitration proceedings, unless the arbitral award has already been made. Article 4 of the Implementation Rules

presented more grounds for challenge. Neither the Arbitration Regulation of 1983 nor the Implementation Rules of 1985 include any provision relating to the issue of the liability of the arbitrator which, it could be argued, would be a good reason for the parties to request a challenge if the arbitrator proved negligent in carrying out the task of the arbitration professionally. The request of challenge shall be brought to the competent authority, unlike the provision in the Model Law where the arbitral tribunal enjoys the jurisdiction to decide upon the challenge. Also, the provision does not revoke the right of the parties to request the arbitrator directly to resign from his task, as this will reduce the court intervention. However, the time limit for making the challenge will be counted from the date the party requested the arbitrator to resign, which will cover also the time for making the request to the competent authority, in case the arbitrator refused to resign. The time limit of the arbitral award will be extended thirty days, according to Article 14 of the Regulation, unless the parties agreed upon the time extension in the agreement. Neither the Regulation nor the Implementation Rules specify that after submission of the request for challenge, the arbitral proceedings will be postponed until a decision is made and therefore the agreed time of the arbitral award will also be postponed while the competent authority is considering the request for challenge, since the challenged arbitrator cannot conduct the arbitral proceedings. According to Article 9 of the Regulation, the arbitral award must be rendered within ninety days from approving the agreement. It might be argued that the period between the request for the challenge and the appointment of the replacement is longer than thirty days. Whether the period in between is less or more than thirty days, the arbitration process should be extended for this period.

Arbitrators have the right to claim from the parties to the dispute the fees for their work and for time spent on the case. The fees and expenses are fixed by the parties after consultation with the arbitrators themselves. If they are unable to agree upon a specific

amount the competent authority should be able to fix it. There are three methods: first, the *ad valorem* method where fees are calculated as a percentage of the total amount of the dispute; secondly, the *per diem* method which establishes a daily rate for work done by an arbitrator on the case and thirdly, the *fixed fee* method where an agreed sum is payable to the arbitrators by way of remuneration. Likewise, the Saudi Regulation granted the right to the parties to claim fees from the parties. Which should be deposited to the competent authority five days after approving the arbitration agreement, and will be paid to the arbitrator within one week of the date on which the enforcement order of the arbitral award has been issued. Article 23 of the Regulation stated that the decision of the competent authority concerning the fees is final, while Article 46 of the Implementation Rules gives the parties the right to object to the decision of the fees within eight days before the competent authority. When an arbitrator fails to attend the session, while parties, their representatives, witnesses and the other arbitrators attend, the hearing room may have been reserved and stenographers hired to transcribe the proceedings, the costs may be substantial. Will the absent arbitrator be liable for the wasted costs? The regulations are silent on these matters, and also fail to define the relationship between the parties and the arbitrator in order to define their responsibilities and liabilities.

The purpose of constituting the arbitral tribunal is to create the legal environment for making the arbitral award final and enforceable.

There are various types of arbitral awards which may be made during the arbitral process, for instance, interim, partial and final awards. The issue of an interim award is normally obtained to decide upon one or more issues of the dispute which occur at the preliminary stages of the arbitral process, such as the issue of jurisdiction of the arbitral tribunal to decide certain issues of the dispute. Further, such an award may sometimes be required to determine the substantive issues of the dispute, such as the

sum of money that is to be unquestionably payable by one party to the other. In contrast, a final award must be rendered by the arbitral tribunal to decide all the issues submitted by the parties. An additional award is functioned when one or two issues of the dispute are omitted from the final award, such as the costs of the arbitration. The Model Law drafters do not refer in its provisions to partial or interim awards. However, members of the Model Law working group are in the process of considering additional language to the provision that would unquestionably adopt the interim award and grant enforceability to it. This intention should extend to third parties as well. Unfortunately, the arbitral tribunal is not granted the power by the Saudi Regulation to issue interim and partial awards. Such a power would facilitate the arbitral tribunal to carry out the arbitration proceedings efficiently. However, the wording of Article 18 of the Arbitration Regulation refers to “*all* awards issued by arbitrators” which can be enforced as arbitral awards, so the aforementioned lack of clarity seems to be resolved. In the case of *M. Ind* (an industrial company) *v. E. Co.* (a French industrial company) the arbitral tribunal made an interim award to decide the issue raised by one of the parties, as to whether the arbitral tribunal had jurisdiction to determine the subject-matter of the dispute.

There are certain forms and components that arbitral awards should fulfil. Although the arbitral rules differ as to the elements to be contained in the arbitral awards, they share the same requirement that the arbitral award must be unambiguous and dispositive. Article 31 of the Model Law set out that arbitral awards must in writing and signed by the arbitrator. In fact, these conditions are linked, because if the award must be signed that implies that the award must be in writing. The reasoning of the arbitral award is among the elements that is imposed by some arbitral rules, such as the Model Law, to enable the competent authority as well as the parties to understand the award as explained by the arbitrator(s). Credit must be given to the Model Law drafters for giving

the parties the freedom to agree whether to include the reason or not; however, otherwise it is necessary. Stating the place of the award will facilitate the allocation of the competent authority to recognise and enforce the award, while the date will assist the competent authority to identify whether the arbitral tribunal rendered the awards within the time limit specified either in the provision or in the agreement. The Model Law drafters succeeded in raising the points related to the form and content of the award, yet, they failed to indicate the validity of the award that omits these formalities.

The Saudi Regulations do not differ from the other rules regarding the content of the award. Therefore, they require the date and place where it is made, and the reason for the award, the names and signatures of the arbitrators. The drafters intended with these forms and components to speed up the execution of the awards because such formalities will assist the competent authority to identify whether the arbitral tribunal has respected the general rules of equity and of the applicable law before commencing on the enforcement order of the award. The provisions regulating the form and content of the arbitral awards in the Saudi Regulation are more comprehensive than those of the Model Law. Nevertheless, neither the Regulations nor the Implementation Rules have identified the validity of the arbitral awards when the arbitral tribunal does not respect one or more of the formalities, such as when the award does not include the signatures of the arbitrators. However, in practice if the competent authority found that one of the elements had been omitted from the award, it would either set aside the award and decide the case by itself or remit it to the arbitral tribunal to include the omitted element. The parties to the disputes granted the right to set a time limit within which the arbitral award should be issued. This time limit plays a very crucial role in maintaining the speed and certainty of the arbitration. The time limit may be extended by the request of the parties or the arbitral tribunal submitted to the competent authority or by mutual consent of the parties or the arbitral tribunal itself. Normally the time limit starts to run

from the date of approving the arbitration agreement. The ICC made it very clear to the arbitral tribunal that it starts from the day of the last signature of the so-called terms of reference. The Model Law is silent in determining the time limit within which the arbitral award must be made. Thus, the drafters left the issue for the parties or the arbitral tribunal to determine in the arbitration agreement.

The Saudi Regulation gives full entitlement to the parties to determine the time limit within which the award must be made in the arbitration agreement, as they have the best knowledge of the suitable period for settling the dispute. The drafters set a mandatory time limit if the parties did not agree upon in the arbitration agreement, which is ninety days from the day of approving the arbitration document. If the arbitral tribunal does not issue the award within the time limit, either one of the parties can refer the case to the competent authority. The competent authority, *Diwan Al-Mazalim*, may then decide the dispute or extend the time limit for another thirty days. There are circumstances where the time limit will be extended for thirty days by the power of the Regulation, such as in the event of the death of one of the parties or at the event that one of the arbitrators lost his capacity. The issue of the time limit for making the award raises some questions, such as whether a request for an extension of the time limit should be submitted before the time limit expires, because the parties will lose the right to extend the time limit after the expiry date. This situation raises the question regarding the validity of the arbitral award made after the expiry of the time limit. The Saudi Regulation drafters are silent regarding these questions. The provision should be reviewed to set forth their position on these issues.

At the last moment the arbitral tribunal holds a deliberation to enable the arbitrators to reach the award. The deliberation should not be exposed to any party and must be secret. Under the Saudi Regulation, at the final session the arbitrators review the case and make a deliberation. The drafters have gone further to require that the session of the

deliberation should be held *in camera* and only attended collectively by the panel who attended the hearings. The word “only” emphasises that the deliberation should not be exposed to any party. However, this provision raises questions regarding the validity of deliberation if one of the parties deliberately fails to attend the deliberation.

After holding the deliberation the arbitrators are ready to make the decision by using the majority vote or unanimously, or sometimes by the presiding arbitrator if he is granted this competence by the mutual agreement of the parties or by the law governing the arbitration. The Model Law, like most arbitral rules, follows the majority vote. However, there is a deadlock on these provisions regarding the failure to reach a majority vote, for instance if the result of votes is 1:1:1 of the three arbitrators. The drafters of the Model Law realised this deadlock and presented a prescription that in such case the presiding arbitrator has decisive power to decide the dispute alone.

The Saudi legislature distinguishes between making the award in arbitration and conciliation. In arbitration awards shall be made by majority vote, whereas in conciliation the award shall be made unanimously. Neither the Regulation nor the Implementation Rules contains any back up provisions for the case when a majority vote cannot be reached.

The arbitral tribunal often has jurisdiction to correct any minor clerical or typographical errors in the award at the request of either party or on its own motion. Further, the arbitral tribunal also has the jurisdiction to interpret any ambiguity of language of the award at the request of the parties when the arbitration agreement or the law governing the arbitration grants it this authority. The Model Law drafter went further to set a 30-day mandatory time limit from the date of issuing the award to submit the request of the correction, although this time limit is extendable if necessary. The Implementation Rules have explicitly granted the arbitral tribunal the power to correct any material errors in the award, also to interpret any ambiguity in the original text of the award.

The Saudi legislature is silent regarding the time limit within which the request for correction and interpretation should be submitted to the arbitral tribunal.

Any party to the dispute has the full entitlement to annul the arbitral award, whether national or foreign, before the competent authority. It is possible in some national laws for the parties to waive their right to annul the arbitral award by inserting such a provision in the arbitration agreement. There are many grounds upon which either party may challenge the award. Some of these must be proved by the party, such as that the arbitration agreement was under incapacity; or the parties were not given proper notice of the appointment or the arbitral proceedings or otherwise unable to present their case; or the award dealt with a dispute not falling within the agreement of the parties . Other grounds must be examined by the court on its motion, such as if the subject matter of the dispute is not arbitrable under the law of the state; or if the award is in conflict with the public policy of the state where the arbitration is taken place. The request for the challenge should be submitted to the competent authority within a certain time limit. The Model Law drafters specify a three months time limit for making the application for annulment. However, if the application is referred after the expiry of the time limit the parties lose the right to challenge and the competent authority would have the power to consider the reasons and circumstances leading to delay.

Under the Saudi Regulation and its Implementation Rules, either party to the dispute has the right to challenge the arbitral award before the competent authority. The provisions concerning the challenge are not clear as to whether the competent authority, such as the Board of Grievances, has the competence to examine all the merits of the dispute when it makes the decision on the request for the challenge or on the reasons for the challenge. Under the Saudi Regulation the decision of challenging the arbitral award lacks finality, since the parties are allowed to object to the decision of the Commercial Circuits of the *Diwan Al-Mazalim* regarding the challenge before the Appellate Review

Committee. This will create an obstacle to resort to the arbitration in Saudi as a settlement method, if the system of arbitration retains the three adjudication levels, and also this position is time consuming and increases expense. Moreover, the Regulation drafters do not specify the reasons upon which the parties may submit a request to challenge the arbitral award. The Regulation specifies thirteen days within which the request of challenge must be submitted to the competent authority. However, the Regulation does not determine the validity of such an application made after the expiry date. In practice, the competent authority, such as the Board of Grievances, has the power to either accept or refuse such a request submitted after the deadline, depending on the reason for such delay.

The arbitral award must be enforced voluntarily by the losing party. There is a line between the recognition and enforcement of the arbitral award. If the arbitral award is enforced, that means it is recognised. However, recognising the award does not necessarily result in the enforcement of the award.

The New York Convention and Model Law provisions dealing with the enforcement of the arbitral award made an effort to find a universal enforcement mechanism. However, a closer look at both regimes would illustrate the difference between them. The elimination of the distinction between the domestic and foreign arbitral award is the main feature of the Model Law. A request must be submitted to the competent authority to enforce the award, together with the authenticated original award and certified copy of it. The Model Law is silent regarding the law governing the authentication and certification of the award. There may be a presumption that the Model Law states, by analogy with the NY Convention states, will request authentication and certification by the diplomatic or consular agent of the enforcing state in the place where the award was issued.

The competent authority has the power to refuse to issue the enforcement order if one of the parties succeeds to present evidence that there are one or more reasons for setting aside the award. These reasons are presented by the Model Law and the New York Convention, which are mostly identical to the reasons for challenging the arbitral awards. However, the provision providing the grounds for annulment is only functional within the territory of the adopting state, whereas the provision providing the grounds of refusal is functional in any state.

According to Articles 18 & 19 of the Saudi Regulation, enforcement happens in two instances; after the period of objecting to the arbitral award elapse or when there is a confirmation from the competent authority that the request for objection has been denied. However, according to Article 20 of the Saudi Regulation an enforcement order must be submitted to the competent authority by the interested party after ensuring that the award is not contrary to the *Sharia* or public order. Therefore, when the arbitral award contains usury (*Riba*) the competent authority will erase the usury part and enforce the rest of the award. However, if such separation of the award becomes impossible, the award will become unenforceable. A question might arise as to what extent the enforcement order is needed in the two instances laid down in Articles 18 & 19. It might be assumed that the award becomes final in the two instances but it still needs the competent order to be enforceable. On the other hand, it might not be required in these two instances, since the Saudi legislature does not specify a time limit for submitting the enforcement order.

The Regulation does not cover the enforcement of the foreign arbitral award as it is only designated to deal with domestic arbitral awards. Alternatively, Saudi has acceded to the NY Convention for Recognition and Enforcement of the Foreign Arbitral Awards, which plays a crucial role in assisting the winning party to enforce the arbitral awards if the state issuing the award is a contracting state. A petition must be submitted to the

competent authority, *Diwan Al-mazalim*, with the original documents attached. However, when there is an award issued by a foreign law or under rules of one of the conventions governing arbitration which is not ratified by the Kingdom of Saudi Arabia, the party should refer the request for enforcement to the Board of Grievances which will consider the principle of reciprocity, the merit of the case and to ensure that the foreign award is not contrary to the public policy of the Kingdom of Saudi Arabia. Then the *Diwan Al-mazalim* issues a final decision which may grant or reject the enforcement of the award.

7.2 Recommendations and Possible Actions

From the foregoing, it seems sensible to adjust the legislation in Saudi Arabia in order to close some of the loopholes that have become apparent, and to help the Regulation become more in line with the normal international practice. This latter will help businesses to join in the arbitration proceedings with more confidence, and thus benefit the whole business of international commercial transactions.

- The Regulation requires the arbitration agreement to be in Arabic. It is recommended that the Saudi legislature consider that the arbitration agreement may be in other languages if the parties agree, since the Saudi Foreign Investment Act gives non-Saudi investors the opportunity to enter into a joint-venture with Saudi businessmen and translating legal document from Arabic to another language is not appropriate, as it might lead to some ambiguities.
- It is recommended that the Saudi legislator reviews the regulation and inserts a provision, which confirms the juridical autonomy of an arbitration clause from the main contract.
- It is recommended that the Saudi legislator recognises the validity of an arbitration agreement concluded by one of the modern means of communication,

such as fax or telex or email or orally, particularly as the importance of these methods is increasing rapidly in the commercial sphere.

- Although this regulation has reduced the scope of prohibition of the Saudi government or one of its agencies to settle disputes by arbitration, it is recommended that the Saudi legislature abrogates this prohibition in general, or at least in domestic arbitration, as there are many Governmental Agencies which participate in economic and commercial activities as a result of owning a percentage of the capital in companies.
- It would be helpful if the Saudi legislature stipulated the production of an arbitration agreement before taking any step in the court proceedings. Otherwise, the party loses the right to stay these proceedings on the existence of an arbitration agreement if he has participated in them.
- The Saudi legislature should not give the competent authority the opportunity to intervene in the appointing the arbitrator even if the parties have failed to do so. It would be better to activate Article 5 of the Implementation, which states that a list containing the names of arbitrators shall be prepared by agreement between the Minister of Justice, the Minister of Commerce, and the Chairman of the Grievance Board. If any party tries to frustrate the arbitral process by not appointing his arbitrator the competent authority may select one of the list, bearing in mind that the list of arbitrators should contain a mix of various specialisms.
- It is recommended that the Saudi legislature determine a specific period within which the members of the arbitral tribunal should be appointed by both parties, after which the competent authority will assume this task. This period will assist to eliminate any attempt by the defaulting party to delay the commencement of the arbitration proceedings.

- The Saudi legislature should reconsider the qualification of the arbitrator by drawing a line between a judge, who must have graduated from *Sharia* collage and an arbitrator who might have graduated from any college such as engineering or medicine, but has experience in *Sharia*.
- It is highly recommended that in the case of a dispute involving matters of a technical nature, the two arbitrators should possess the same qualification related to the nature of the subject-matter, whereas the umpire represents the legal knowledge.
- The wording of the Regulation regarding the ethics of the arbitrator requires that the arbitrator be of good conduct and behaviour. The terms used do not cover that the arbitrator must be independent. Carrying out the task with good conduct and behaviour does not mean that the arbitrator cannot be related to one of the parties. Therefore, it is suggested that the legislature should replace the vague terms used in the article with ones that more specifically denote the ethics that the arbitrator should possess, such as that the arbitrator should be independent and impartial.
- The Saudi legislature should reconsider the ability of non-Muslims to act as arbitrators, since the main point is to have the arbitral award in accordance with *Sharia*, which can be approached in a technical dispute by a non-Muslim arbitrator. With analogy to the foreign arbitral award where there is a high percentage of these awards rendered by non-Muslim arbitrators, *Diwan Al-mazalim* enforces these awards after ensuring there is nothing contradicting the *Sharia*. Also, since Saudi became a fully WTO member recently, therefore, it is crucial to maintain a safeguard for foreign investors to choose their arbitrators freely.

- Saudi Regulation prohibits women from acting as an arbitrator, whereas in foreign arbitral awards, *Diwan Al-mazalim* enforces the award with no attention to the formalities of the award. In other words, the Saudi competent authority might enforce an arbitral award rendered by a woman. Therefore, the Saudi legislature should consider the inclusion of women to act as arbitrators', especially if the subject-matter of the dispute concerns women, such as breast surgery.
- As the Regulation and its Implementation Rules lacked any provision that lay out the grounds for challenging the arbitrator. Therefore, it is recommended that the Saudi legislature should consider inserting a provision in the Regulation that determines the grounds for challenging the arbitrators instead of referring to the grounds of challenging judges.
- Article 23 of the Regulation stipulates that the decision of the competent authority regarding the fees of the arbitrator is final, whereas Article 46 of the Implementation Rules gives either party the right to object to the decision of the competent authority regarding the fees of the arbitrator. It is necessary that the Saudi legislature reviews these provisions and sets forth its position in respect of the finality of the decision of the competent authority concerning the fees of the arbitrator.
- The researcher suggests that the Saudi legislature establishes with the collaboration of the Board of Grievances and the Ministries of Commerce and Justice, a list of fee criteria containing minimum and maximum range of fees according to the sum of the contract. This should be similar to the provision of establishing the list of arbitrators by the authority originally competent to hear the dispute to fix the fees.

- It might be better if the Saudi legislator increased the time limit to give the parties sufficient time to submit the challenge the arbitrator to the competent authority, especially when, as sometimes is the case, the place of the arbitration is different from the place of the competent authority.
- The Saudi drafters referred in Article 18 of the Regulation to “*all* awards issued by arbitrators”. It is suggested that there should be a distinction between types of arbitral awards, as each of them functions differently.
- The Saudi legislature imposes a procedure for issuing the arbitral award which is meant for the final arbitral award. It is suggested that the Saudi legislature should impose different procedures for issuing other types of awards, such as partial and interim awards.
- It is recommended that the Saudi legislature confirms the practical reality in the case where one element is omitted from the award either by giving the competent authority the power either to remit the award to the arbitral tribunal or to set side the award and consider the case by itself.
- It is recommended that the Saudi legislature expressly give the competent authority the power to deal with all the issues regarding the questions of time requesting the extension for the time limit and the validity of the arbitral award made after the expiry date.
- At the death of one of the arbitrators Article 13 of the Regulation extends the time for arbitration for thirty days. However, it might happen in some circumstances that the period between the death of the arbitrator and the date of recommencement of the proceedings is longer than thirty days. It would be more sensible that the period for making the replacement and the thirty days should be added to the original time limit, because the replacement arbitrator needs time to go through the case to understand it.

- It is recommended that the Saudi legislature deals with the question which may arise when there is not a majority vote by giving the presiding arbitrator the decisive power to emphasise his vote and issue the award or to give the competent authority the power to decide the case.
- The Regulation's drafters give the parties the right to request the arbitral tribunal to correct any material errors or interpret any ambiguity in the award. It would be better that the Saudi legislature set a time limit for the arbitral tribunal to comply with a request for correction or interpretation.
- It is recommended that the Saudi legislature indicate that the competent authority only examine the reason for the challenge of the arbitral award, with no need to examine the whole merits of the dispute, which would take a long time.
- It is also recommended that the Saudi legislature, in collaboration of the competent authority, *Diwan Al-mazalim*, consider including grounds for challenge of the arbitral award in the Regulation, or consider reviewing the modalities of the grounds of annulment provided in Article 34(2) of the Model Law.
- It is recommended that the Saudi legislature clarifies in the Regulation the authority of the competent authority to examine the reason for delay in submitting application to challenge the arbitral award, and retain the power either to accept or refuse such reasons.
- The Saudi legislature should make the competent authority's decision regarding the challenge final, to prevent the possibility of having arbitration with three adjudication levels.

- It might be better that the Saudi legislature reconsider the wording of Articles 18,19 and 20 to make it clear whether is it essential for the parties to submit the order for enforcement if the two instances referred in Articles 18 and 19 apply.
- It must be said that the Saudi legislature should include in the regulation the issues of determining the process of enforcing the foreign arbitral awards whether the award is issued in a contracting state of the NY Convention or not.

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Appendix One:

**Saudi Arbitration Regulation of 1983 and its Implementation
Rules of 1985**

Kingdom of Saudi Arabia: Arbitration Rules and Codes

Royal Decree: M 46

Date: 12-7-1403

(April 25, 1983)

ARBITRATION RULES

Article (1):

An agreement may be made to refer any existing dispute to arbitration. It may also be agreed, in advance, to refer to arbitration any dispute which may arise as a results of performance of any particular contract.

Article (2):

Arbitration shall not be accepted in matters in respect of which settlement is prohibited. An agreement, with respect to arbitration, shall not be valid unless it is made by the person enjoying legal capacity.

Article (3):

Government agencies may not have recourse to arbitration for settlement of their disputes with third parties except with the approval of the President of the Council of Ministers. This provision may be amended by a resolution of the Council of Ministers.

Article (4):

The arbitrator must be selected from amongst experts and must be of good conduct and of full legal capacity. If more than one arbitrator is appointed, their number must be odd.

Article (5):

Parties to a disputed shall lodge the arbitration document with the Authority having original jurisdiction to consider the dispute. This document shall have been signed by the litigants or their duly authorized representatives and by the arbitrators and must show the subject matter of the dispute, name of litigants, names of arbitrators and their approval to consider the dispute. Copies of relevant documents must also be attached.

Article (6):

The Authority having original jurisdiction to consider the dispute shall cause the application for arbitration to be entered into the proper register and make a formal declaration accepting the arbitration document.

Article (7):

If the litigants have agreed to arbitration prior to the dispute and if a formal declaration, accepting the arbitration documents relevant to a particular dispute, has been made, the

subject matter of such dispute shall not be considered except in accordance with the provisions of these Regulations.

Article (8):

The Clerk of the Authority, having original jurisdiction to consider the dispute shall issue all summons and notices herein provided for.

Article (9):

The dispute shall be decided within the period to be fixed by the Arbitration Board unless otherwise extended. If the litigants have not fixed a date for decision of the disputes in the Arbitration Document, the Arbitrators shall pass their award within ninety days from the date of approval of the Arbitration Document. Otherwise, any of the litigants may bring the matter to the attention of the Authority having original jurisdiction to consider the dispute to decide whether to consider the dispute or to extend the period.

Article (10):

If the litigants fail to appoint the arbitrators or if any of them fail to appoint its arbitrator or arbitrators, or if any one or more of the arbitrators has refused or is stopped to act as an arbitrator or has become disabled or has been dismissed, and if the litigants have not agreed otherwise, the Authority having original jurisdiction to consider the dispute shall appoint the necessary arbitrators upon request by the expediting litigant provided that it be in the presence of the other party or, if he is absent after he has been invited to attend a meeting to be held for this purpose. The number of arbitrators to be appointed shall be equal to the number agreed upon by the litigants or complementary thereto and the decision in this respect shall be final.

Article (11):

The arbitrator shall not be dismissed except with the consent of litigants. An arbitrator who has been dismissed may claim compensation for any work done by him prior to his dismissal, provided that the cause for dismissal was not attributed to him. He may not be prevented from giving his award except for events which happen or appear after the submission of the Arbitration Document.

Article (12):

The arbitrator shall be stopped for the same reasons of estoppel of the Magistrate. The application for estoppel shall be addressed to the Authority having original jurisdiction to consider the dispute within five days from the date of notifying the other party of the appointment of the arbitrator or from the date of the event or the occurrence which justify the estoppel. A request for estoppel shall be decided upon after the litigants and the arbitrator to the estopped have been called to a meeting to be held for this purpose.

Article (13):

The arbitration shall not be terminated by death of one of the parties but the period fixed for the award shall be extended by 30 days unless the arbitrators decide to extend this period further.

Article (14):

If an arbitrator has been appointed in place of the arbitrator who has been dismissed or who has declined to act as an arbitrator, the date originally fixed for the award shall be extended for a period of thirty days.

Article (15):

The arbitrators may by a resolution adopted by majority vote extend the date originally fixed for the award for circumstances relevant to the matter in dispute.

Article (16):

The award of the arbitrators shall be passed by majority vote, but if it is within their authority to reach settlement, the award shall be passed by unanimous vote.

Article (17):

The award shall, in particular, include the Arbitration document, a summary of the examination of the parties, the evidence submitted by each of them, reasons for the award, the date on which the award is passed, the signatures of arbitrators and the dissent of any one or more of the arbitrators.

Article (18):

All directives to be issued by arbitrators, even if relative to investigation procedures, shall be submitted within five days to the Authority having original jurisdiction to consider the dispute with a copy thereof to the conflicting parties. The conflicting parties may, within fifteen days from the date of their notification of the award, submit their objection to such award to the Authority with which the award has been filed. Other wise, the award shall be deemed final.

Article (19):

If the litigants or any of them submits an objection to the award within the period provided for in Article 18 above, the Authority having original jurisdiction to consider the dispute shall either reject such objection and issue an order for execution of the award, or accept the objection and take the action it deems appropriate.

Article (20):

The award of the arbitrators shall be executed when it has become final pursuant to an order by the Authority having original jurisdiction to consider the dispute. This order shall be passed upon request by an interested party after ensuring that it is not contrary to Shariatic principles.

Article (21):

When the order for execution of the award has been passed pursuant to the provisions of Article 20 above, such award shall have the same force and effect as if it has been passed by the Authority which passed the order for execution.

Article (22):

Fees of the Arbitrators shall be fixed by mutual consent of the conflicting parties and, unless paid to them, shall be deposited within five days from the date of the decision approving the Arbitration Document with the Authority having original jurisdiction to consider the dispute and shall be paid within one week from the date of the execution order.

Article (23):

If the arbitrators fees have not been upon and a dispute arose with respect thereto, such dispute shall be decided by the Authority having original jurisdiction to consider the dispute and its decision shall be final.

Article (24):

Decisions necessary for the implementation of these Regulations shall be issued by the President of the Council of Ministers upon a recommendation by the Minister of Justice in consultation with the Minister of Commerce and the President of the Grievances Board.

Article (25):

These Regulations shall be published in the Official Gazette and be implemented thirty days after the date of publication thereof.

**CODES FOR THE IMPLEMENTATION OF THE ARBITRATION
CHAPTER ONE
ARBITRATION, ARBITRATORS AND PARTIES**

Article (1):

Arbitration in matters wherein conciliation is not permitted such as Hudoud(1) Laan(2) between spouses, and all matters relating to the public order, shall not be accepted.

Article (2):

An agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A Guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court.

Article (3):

The arbitrator shall be a Saudi National or Muslim expatriate from the private Sector or others. The Arbitrator may also be an employee of the State, provided, approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the Chairman of the arbitration panel shall have a knowledge of Shariah rules, commercial regulations, customs and traditions applicable in Saudi Arabia.

Article (4)

Any persons having an interest in the dispute or having being sentenced to a (HUD)(3) or penalty in a crime of dishonor, or being from a public position following a disciplinary order, being a judicated as bankrupt, unless being relived, shall not act as arbitrator.

Translator's Notes:

(1) Hudoud, are the crimes of murder, injury, adultery, drunkenness, theft and robbery which are specifically provided for in the Muslim Holy Book, the Quran.

(2) Laan, is a court procedure under which a confrontation between spouses takes place and through which they terminate their marital relationship after either spouse directs an accusation of adultery against the other.

(3) Hud is the singular of Hudoud (1) above.

Article (5):

Subjects to the provisions of articles (2) and (3) above, a list containing the names of arbitrators shall be prepared by agreement between the Minister of Justice, the Minister of Commerce, and the Chairman of the Grievance Board. The Courts, Judicial Committees and Chambers of Commerce and Industry shall be informed of such lists and the respective and industry shall be informed of such lists and the respective parties my select. arbitrators from these lists or from others.

Article (6):

The appointment of an arbitrator or arbitrators shall be completed by agreement between the disputing parties in an arbitration instrument which shall sufficiently outline the dispute and the names of the ar-bitrators. Agreement to arbitration may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such contract.

Article (7):

The authority originally competent to hear the dispute shall issue a decision for approval of the arbitration instrument within fifteen days and shall notify the arbitration panel of the same.

Article (8):

In disputes where a government authority is a party with others, such government authority shall prepare a memorandum with respect to arbitration in such dispute, stating its subject matter, the reasons for arbitration and the names of the parties, the reasons for arbitration and the names of the parties. Such memorandum shall be submitted to the President of the Council of Ministers for approval of arbitration. The Prime Minister may, by a prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases the Council of Ministers shall be notified of the arbitration awards adopted.

Article (9):

The clerk of the authority originally competent to hear the dispute shall act as secretary for the arbitration panel, establish the necessary records for registration of the arbitration application and shall submit the same to the concerned authority for approval of the arbitration instrument. Such clerk shall also be in charge of the summons and notices provided for in the arbitration regulations and any other assignments as may be decided by the relevant Minister. The concerned authorities shall make the necessary arrangements regarding the above.

Article (10):

The arbitration panel shall fix the date of the hearing for consideration of the dispute within a period not exceeding five days from the date on which approval of the arbitration instrument had been notified to the arbitration panel and shall notify the disputed parties of the same through the clerk of the authority originally competent to hear the dispute.

**CHAPTER TWO
NOTIFICATION OF PARTIES, APPEARANCE, DEFAULT, AND PROXIES IN
ARBITRATION**

Article (11):

Every summons or notice relating to the subject matter of arbitrations made through the clerk of the authority originally competent to hear the dispute, shall be made through the messenger or the official authorities, whether the said proceeding is requested by the disputing parties or initiated by the arbitrators. Police or Mayors are required to assist the relevant authority in performing its duties within their prescribed jurisdiction.

Article (12):

The summons or notice shall be written in the Arabic language and shall consist of two or more copies, according to the number of disputing parties and shall contain the following:

- a. The date, day, month and year in which the summons of notice was made.
- b. The first name, surname, title, profession and domicile of the party requesting the summons or notice, and the first name, surname, title, profession and domicile of his representative, if he is working for another person.
- c. The name of messenger who forwarded the summons of notice, his employer and his signature on the original and copy of the summons of notice.
- d. The first name, surname, profession and domicile of the person to be summoned or notified, and if his domicile is not known at the time of issuance of the summons, then his latest, domicile.
- e. Title of the person to whom copy of the summons has been served, and his signature on the original indicating receipt, or indication of his refusal to take receipt of the summons when returned to the concerned authority.
- f. Name and place of the arbitration panel, the subject matter of procedure, and the date specified therefore.

Article (13):

The papers to be served on summons shall be delivered to the respective person, or to his place of domicile, and may be delivered to a chosen place of domicile determined by the concerned parties.

In case such person is not present at his place of domicile, the summons papers shall be delivered to any person who declares that he is an agent or responsible for the business of the person to be summoned, or his employee or that he or she is living with him such as spouses, relatives or others.

Article (14):

If the messenger did not find the proper person to whom the papers are to be delivered pursuant to the preceding section, or if the person mentioned therein refrained from accepting the papers, the messenger shall state that in the original copy and deliver the same that day to the Police Commissioner or Mayor or the representative of any of them, if the residence of the person summoned falls within their authority. Also, the messenger shall within twenty four (24) hours send the person summoned at his original or chosen domicile a registered letter, informing that the copy was delivered to the administration and stating all such details in the original copy of the summons. The summons or notice shall be valid and effective from the time of delivery thereof as aforesaid.

Article (15):

Except as provided for in special regulations, the copy of the summons or notice shall be delivered in the following manners:

- a. matters relating to the state, it shall be delivered to the Ministers, District Governors, Directors of Government Departments or their representatives.
- b. In matters relating to public persons, it shall be delivered to the person acting on its behalf according to the law, or his representative.
- c. In matters relating to companies, societies and private establishments, it shall be delivered to the head offices, as indicated in the commercial registration, to the Chairman, Managing Director or his representative, from among the employees. With respect to foreign companies having branches or agents in Saudi Arabia, the papers shall be delivered to the branch of the agent.

Article (16):

The official in charge shall submit the arbitration file to the authority originally competent to hear the dispute, for approval of the arbitration instrument. The clerk of such authority shall notify the parties and the arbitrators of the decision taken with respect to approval of the arbitration instrument within one week from the date of adoption of such decision.

Article(17):

On the day fixed for arbitration the parties shall appear by themselves or through their representatives, by virtue of a notarized power of attorney, or by proxy issued by any official authority or certified by one of the Chambers of Commerce and Industry. A copy of the power of attorney shall be kept in the file of the claim after the original has been reviewed by the arbitrator, without prejudice to the right of the arbitrator or arbitrators

to require the personal appearance of the respective party if the circumstances so require.

Article (18):

In the event of default by one of the parties in appearing at the first hearing, and if the arbitration panel is satisfied that such defaulting party had been properly served notice, the arbitration panel may decide on the dispute as long as the respective parties have filed their statements of claim, defenses and documentation. The award adopted shall, in such case, be considered a decision made in the presence of the parties.

However, if the defaulting party was not properly served a summons, the hearing shall be adjourned to another hearing so that the defaulting party is properly notified. If the defendant parties are many and are only partially served a personal summons, and if they have all, or those who are not served notice, defaulted to appear, the arbitration panel in other than urgent matters shall adjourn the hearing so that the defaulting parties are properly served notice, and the award adopted in such other hearing shall be deemed as if made in the presence of all defaulting parties.

Also, the award of arbitration shall constructively be deemed made in the presence of the presence of the party who appears personally or by proxy in any of the hearings, or filed his statement of defense in the claim or a document relating thereto. However, if the defaulting party appeared prior to the end of the hearing, any award or decision adopted therein shall be deemed null and void.

Article (19):

If the arbitration panel discovers that a summons published to a defaulting party in a newspaper is not proper, it shall adjourn arbitration of the dispute to another hearing and such defaulting party shall be properly served a summons in respect thereto.

**CHAPTER THREE
HEARINGS, TRIAL, AND RECORDING OF CLAIM**

Article (20):

The claim shall be tried openly unless the arbitration panel decides, by its own motion, or if one of the parties requests that the hearing be held in camera for reasons appreciated by the arbitration panel.

Article (21):

The arbitration of the claim shall not, without an acceptable reason, be adjourned more than once for a reason attributed to one of the parties.

Article (22):

The arbitration panel shall reasonably allow each party to make his remarks and defenses either orally or in writing in the times specified by the arbitration panel. The defendant party shall be the last to make his submission and the panel shall complete the case and prepare the award.

Article (23):

The Chairman of the arbitration panel shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing any one in contempt of the hearing. However, if any one present commits a violation, the Chairman of the arbitration panel shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the Chairman of the arbitration panel.

Article (24):

The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing as related to admission, conciliation, waiver or otherwise, and the arbitration panel shall make an award of the same.

Article (25):

The Arabic language shall be the official language to be used before the arbitration panel, whether in the discussion or in writing. The arbitration panel and the parties may not speak other than the Arabic Language and any party who does not speak Arabic shall be accompanied by an accredited translator who shall sign with him the minutes of the hearing, approving the statements made.

Article (26):

Any party may request adjournment of the proceeding for a reasonable period, that period to be decided by the arbitration panel, so that such a party can submit any documents, papers, or remarks which may be productive or have a material effect on the case. The arbitration panel may allow further adjournments if there is justification therefore.

Article (27):

The arbitration panel shall record the facts and proceeding which take place in the hearing. in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties, the minutes shall be signed by the Chairman of the arbitration panel, arbitrators, and the secretary.

Article (28):

The arbitration panel may, by its own motion, or pursuant to a request from one of the parties, require the other party to produce any document which he may possess and which may have material effect on the proceedings, in the following cases:

- a. If such document is a joint document between the parties. Such document will be deemed joint if in particular, it is in favor of both parties or if it proves their mutual rights and obligations.
- b. If one of the parties invoked such document in any phase of the claim.
- c. If the Regulations permit demand for delivery or release of such a document.

The application must state the following:

1. Description of the document requested.
2. Contents of the document, with as much details as possible.
3. The fact in issue for which such document is called.
4. The evidence and circumstances proving that the document is under possession of the other party.
5. The reason for obligating the other party to present the said document.

Article (29):

The arbitration panel may designate the effective means of inquiry in the claim whenever the facts to be proven are proximate to the dispute and are admissible.

Article (30):

The arbitration panel may disregard the evidentiary procedure it has ordered, provided that reasons for such disregard shall be stated in the minutes of the hearing. The arbitration panel may not consider the result of such procedures and shall state its reasons in the award.

Article (31):

The party requesting testimony of witnesses shall specify the facts to be proved in the testimony either orally or in writing, and shall accompany his witness in the specified hearing. Admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to Shariah rules, and the other party may refute such testimony in the same manner.

Article (32):

The arbitration panel may cross-examine the parties at the request of either party or on its own motion.

Article (33):

The arbitration panel may, if necessary, seek the assistance of one or more experts to provide technical report regarding a technical or material matter which may have effect on the claim. The arbitration panel shall mention in its award an accurate statement of the experts' mission and the urgent arrangements which he is permitted to take. The arbitration panel shall estimate the fees of the said expert, the party who shall pay them, and the deposit is not made by the party required to do so or by the other parties to the arbitration, the expert will not be bound to perform his duty, and the right to adhere to the decision made for the appointment of the expert shall be void, if the arbitration panel finds that the reasons given are unacceptable. In performing his duty, the expert may hear the statements of both parties or others and shall submit a report of his opinion on the specified date. The arbitration panel may cross-examine the expert in the hearing concerning the result of his report. If there is more than one expert, the panel shall specify the manner of their performance whether severally or collectively.

Article (34):

The arbitration panel may request the expert to provide a complementary report to overcome any default or omissions in his previous report and the parties may submit advisory reports to the panel. However, in all cases the arbitration panel shall not be bound by the expert's opinions.

Article (35):

The arbitration panel may, on its own motion or at the request of either party, decide to move for inspection of some facts or matters which were disputed and have material effect on the claim and shall make a report of the inspection proceedings.

Article (36):

The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defenses and arguments in the hearing, either orally or in writing, and to record them in the minutes.

Article (37):

If a preliminary issue of a matter falling outside the jurisdiction of the arbitration panel arose during the process of arbitration, or if a document had been claimed to have been forged or if criminal proceedings had been instituted for the forgery or for any other criminal act, the arbitration panel shall suspend proceedings and the date fixed for the award until a final decision is issued from the concerned authority in relation to that matter which had arisen.

CHAPTER FOUR AWARDS, OBJECTIONS, AND EXECUTION

Article (38):

When the arbitration panel is ready to render a decision the panel shall close the case for review and deliberations. Deliberations shall be held in camera and shall only be attended collectively by the arbitration panel who attended the hearings. The panel shall fix, at the time the case is closed or in another hearing, a date for issuance of the award subject to the provisions of articles (9), (13), (14), and (15) of the arbitration regulations.

Article (39):

The arbitrators shall issue their awards without being bound by legal procedures except as provided for in the arbitration regulations and its rules of implementation. Awards shall follow the provisions of Islamic Shariah and the applicable regulations.

Article (40):

When the case is closed for review and deliberation, the arbitration panel may not hear further submissions from either of the parties or their representative except in the presence of the other party, and shall not accept any memoranda or document without

the document being reviewed by the other party; if such explanation, memoranda or document is deemed material, the panel may extend the date fixed for the award and reopen the proceedings by virtue of a decision stating the reasons and justifications therefore, and shall notify the parties of the date fixed for continuation of the proceedings.

Article (41):

Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the Chairman of the arbitration panel in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defenses, substantial defenses, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign the original copy of the award which comprises the above contents and which shall be kept in the file of the claim.

Article (42):

Without prejudice to provisions of articles 18 and 19 of the arbitration regulations, the arbitration panel shall certify any material typing or arithmetical errors that may occur in its awards, by virtue of a decision to be issued on its own motion, or at the request of either party without pleading procedures. Such ratification shall be made on the original copy of the award and duly signed by the arbitrators. The decision for rectification of the award may be objected to by all possible means of objection if the arbitration panel exceeded its right of rectification as provided for in this section. The decision issued against a request for rectification may not be object of to independently.

Article (43):

The parties may request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well as the rules relating to means of objection.

Article (44):

Whenever an order is issued for execution of the arbitration award, the latter becomes an executionary instrument and the clerk of the authority originally competent to try the case shall give the winning party the execution copy of the arbitration award, containing the order for execution and ending with the following phrase:

"All concerned government authorities and departments shall cause this award to be executed with all legally applicable means if such execution required application of force by the police."

FEES OF ARBITRATORS

Article (45):

If both opponents fail to agree on the fees, a decision may be issued for division of fees between them at the discretion of the authority originally competent to try the case; a decision also may be issued for payment of all such fees by one of the parties in dispute.

Article (46):

Any party may object to the estimate of the arbitrators' fees to the authority which issued the decision, the objection to be made within eight days from notification of the fees; the authority's decision on the said objection shall be final.

Article (47):

The concerned authorities shall execute these rules.

Article (48):

These rules shall be published in the Official Gazette and shall be effective from their date of publication.

Appendix Two:
UNCITRAL Model Law of 1985

**UNCITRAL Model Law on International Commercial Arbitration
(1985) (as adopted by the United Nations Commission on
International Trade Law on 21 June 1985)**

CHAPTER I - GENERAL PROVISIONS

Article 1 - Scope of application¹

1. This Law applies to international commercial² arbitration, subject to any agreement in force between this State and any other State or States.

2. The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

3. An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) 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; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

4. For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

¹ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

² 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.

5. This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2 - Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties; such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3 - Receipt of written communications

1. Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

2. The provisions of this article do not apply to communications in court proceedings.

Article 4 - Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5 - Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6 - Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3),14,16 (3) and 34 (2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II - ARBITRATION AGREEMENT

Article 7 - Definition and form of arbitration agreement

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

2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in 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. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8 - Arbitration agreement and substantive claim before court

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.

2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9 - Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III - COMPOSITION OF ARBITRAL TRIBUNAL

Article 10 - Number of arbitrators

1. The parties are free to determine the number of arbitrators.

2. Failing such determination, the number of arbitrators shall be three.

Article 11 - Appointment of arbitrators

1. No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

3. Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

4. Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

5. A decision on a matter entrusted by paragraph (3) and (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12 - Grounds for challenge

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13 - Challenge procedure

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
2. Failing such agreement, a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
3. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14 - Failure or impossibility to act

1. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
2. If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

Article 15 - Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV - JURISDICTION OF ARBITRAL TRIBUNAL

Article 16 - Competence of arbitral tribunal to rule on its jurisdiction

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that

the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17 - Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V - CONDUCT OF ARBITRAL PROCEEDINGS

Article 18 - Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19 - Determination of rules of procedure

1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20 - Place of arbitration

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
2. Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate

for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21 - Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22 – Language

1. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

2. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23 - Statements of claim and defence

1. Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24 - Hearings and written proceedings

1. Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25 - Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26 - Expert appointed by arbitral tribunal

1. Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27 - Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI - MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28 - Rules applicable to substance of dispute

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

2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

3. The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29 - Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30 – Settlement

1. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

2. An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31 - Form and contents of award

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

2. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

3. The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32 - Termination of proceedings

1. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

3. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

Article 33 - Correction of interpretation of award; additional award

1. Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

2. The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the day of the award.

3. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

4. The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

5. The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII - RECOURSE AGAINST AWARD

Article 34 - Application for setting aside as exclusive recourse against arbitral award

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

2. An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was 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 this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4. The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII - RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35 - Recognition and enforcement

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 subject to the provisions of this article and of article 36.

2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language³.

Article 36 - Grounds for refusing recognition or enforcement

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

³ The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

- (i) a party to the arbitration agreement referred to in article 7 was 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; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute 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 recognized and enforced; or
- (iv) the composition of the arbitral tribunal 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; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.