

**The recognition and enforcement of foreign arbitral awards in Saudi
Arabia:**

**An examination of the function of Article (V) of the 1958 New York
Convention in the Saudi legal order**

Written by

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CHAPTER ONE

INTRODUCTION

1.0 Introduction

The United Nations Convention on the Recognition and Enforcement of Foreign Awards (hereinafter referred to as the “New York Convention” or the “Convention”) has been lauded by legal scholars for rejuvenating the choice of arbitration as a dispute resolution mechanism in international disputes.¹ This is through providing a uniform legal framework for recognition and enforcement of foreign arbitration awards and arbitration agreements in the contracting states. According to Alan Redfern, contention is on the fact that not until the adoption of the New York Convention, no other international regime offered a uniform and comprehensive legal framework for recognition and enforcement of foreign arbitration awards and arbitration agreements made by trading parties. However, article V of the Convention provides some exceptional circumstances when the domestic courts may decline to enforce foreign awards, including where the award has not become binding or is contrary to public interest.

Noteworthy is the fact that though offering substantive and procedural framework in dealing with the foreign arbitration agreements and awards, the Convention does not set up an international regime for the enforcement and relies on the courts and other authorities in the member states in implementation and enforcement of the Convention. The implication of this is the enforcement of the decentralization of the Convention, taking place at domestic level of members/signatories. Secondly, it implies that the New York Convention has envisaged a parallel regime of international and national norm. Commitment of member states to the enforcement of the convention is therefore a primary determinant of success in implementation of the Convention.

The Kingdom of Saudi Arabia (KSA) acceded to the Convention in 1994 by virtue of a Royal Decree. The ratification notwithstanding, implementation of foreign arbitration in the KSA, especially with reference to the grounds for refusal under Article (V) of the New York Convention of 1958, is difficult because KSA’s government still requires that all foreign arbitrations be consistent with its Shari’ah laws, which are considered to be superior to all other laws. Consequently, recognition and enforcement of numerous foreign arbitration of awards are declined on account of being contrary to public policy, a ground acknowledged by Article V (2)

¹ Kenneth Davis, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 Tex. Int’l L.J.43, 57; Alan Redfern, ‘Having Confidence in International Arbitration’ (2003) 57 Disp. Resol. J. 60, 61.

(b) of the Convention.² The enforcement hinders procedures by bureaucratic procedures such as the requirement that any award has to be ratified by the Board of Grievances in order to be recognized. The Board of Grievances is the government's judicial organ having jurisdiction over foreign awards and judgments.

The problematic enforcement of foreign awards in the KSA raises questions on the commitment of the KSA in implementing and enforcing the Convention, to which it has an international law duty to implement and enforce. This thesis will seek to examine the enforcement of foreign awards in the KSA, with specific focus on the grounds for refusal as provided for in Article V of the New York Convention, the impact of such refusal and remedies undertaken by KSA to ensure enforcement is effective.

1.1 Hypothesis and Thesis Statement

This thesis argues that Art. V (2) (b) of the NYC, which states that recognition and enforcement may be refused by a competent authority if enforcement of the awards would be contrary to the public policy of the country in question, will mean that any foreign awards contrary to Islamic principles will not be enforced in Saudi Arabia, due to the Kingdom's strict adherence to Shari'ah. Furthermore, it argues that Article V (2)(b) of the NYC provides a safe harbour wherein Saudi Arabia does not have to recognize a non-Saudi Arabian award that is contrary to its public policy. Article V(b)(2) allows Saudi Arabia to embrace the international community and its rules for international dispute resolution and enforcement, without rejecting its own history and public policy. However, Saudi Arabia's apparent negative attitude towards enforcement of foreign awards is based, to a large extent, upon the conflict between the spirit of the NYC and Shari'ah rules applied in Saudi Arabia.

In arguing this thesis, this study proceeds from the hypotheses that the enforcement of foreign awards in Saudi Arabia is impossible or at least extremely difficult, even after the country's adherence to the NYC in 1994. Saudi Arabia's adoption of NYC remains consistent with its historical resistance to treaties on international arbitration. One possible explanation for such an attitude on the part of Saudi Arabia is seen in its persistent protection patterns perpetuated by key KSA authorities, especially with regard to resistance in internationalizing trade related to oil exploration and production.

1.2 Synopsis of the Thesis

² Gayle Hanlon, *International Business Negotiations in Saudi Arabia*, in James R Silkenat and Jeffrey M Aresty and Jacqueline Klosek eds., *The ABA Guide to International Business Negotiations* (American Bar Association 2009).

To ensure a systematic argument of the thesis and qualitative testing of hypothesis, this thesis is presented in nine chapters with various sections, which together play a role in addressing the research questions and proving or disproving the hypothesis developed. Below is a brief synopsis of each chapter:

Chapter 1: Introduction

This introduces the thesis, states the research problems and provides a general background to the study, especially on the key concepts/elements central to the study (such as the KSA's socio-political and legal environment and the New York Convention). It outlines the research questions, aim and significance of the study as well as brief details of each chapter. The methodology and approach adopted for the thesis is also explained. In addition, it is vital to the entire thesis on accounts: it provides a general background to the entire thesis and establishes the problem to be addressed as well as why it needs to be addressed.

Chapter 2: Saudi Arabia: Its Legal and Judicial Systems

This chapter examines the judicial and legal systems of the KSA, including the sources, nature and salient features of these systems. This chapter plays a key role in exposing how the KSA award enforcement regime works, the entities and institutions involved and the enforcement procedures; considering that the power to enforce foreign awards lies with the legal and judicial authorities and that the authorities are derived from the law. It also forms the foundation upon which the performance of KSA's legal and judicial institutions is subsequently examined. Understanding the working of these systems is key in establishing a connection between a party's choice for either arbitration or litigation under the Saudi laws.

Chapter 3: Arbitration in Saudi and Islamic Law

In this chapter, the interplay between arbitration processes in KSA and Shari'ah law that happens to be the fundamental basis of KSA legal system is explored. Furthermore, evolution of arbitration in the KSA through Shari'ah legislative paths is examined in relation to assessing the question on whether the Shari'ah laws are consistent with the principles stipulated in the New York Convention.

Chapter 4: Multilateral International Treaties on Arbitration and their Reception by the Kingdom of Saudi Arabia

This chapter entails the exploration of Multilateral International Treaties on Arbitration and their reception by the KSA. It analyses various multilateral international treaties on arbitration including the New York Convention of 1958, the Washington Convention, the

Convention of June 30 2005 on Choice of Court Agreements, the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, the Energy Charter Treaty and the Riyadh Convention. Moreover, it assesses the position of KSA with respect to progress towards enhancing international arbitration within its jurisdiction and extension.

Chapter 5: Critical Analysis of the 1958 New York Convention

This chapter provides a critical analysis of the 1958 New York Convention. It explores the emergence of NYC, function of the Convention in relation to international trade and commercial law, the structure of the convention and reception of the convention by the international actors through state-signatories and private undertakings.

Chapter 6: The Grounds of Exception to Recognition and Enforcement of Awards Laid Down In Article V(1)

This chapter analyses the grounds of exception in recognition and enforcement of awards laid down in Article V(1), NYC 1958 and their legal function in the KSA. It also examines each ground in relation to the overall aims and objectives of the Convention and draws a comparison among various provisions in terms of their substance and implications in Article V(1). It also explores how the grounds laid out in Article V(1) of the Convention have impacted the enforcement of international awards, particularly in the context of the laws and legislations of the Kingdom of Saudi Arabia. Furthermore, it lays out objective standards against which KSA's refusal to enforce foreign awards, is to be judged.

Chapter 7: The Grounds of Exception to Recognition and Enforcement of Awards Laid Down In Article V(2)

This chapter covers a comprehensive description of the grounds of exception to recognition and enforcement of awards laid down in the Article V(2), NYC 1958. The chapter examines non-arbitrability and public policies, the two grounds in Section 2 of Article V that have been used as grounds for rejection to enforcing foreign awards in Saudi Arabia; considering that these issues are relatively easy to invoke by disgruntled parties to an arbitration agreement. Chapter 7 examines further, the legal implications of these two grounds for refusal to enforce foreign awards in KSA.

Chapter 8: Arbitrability of Investment Contracts under Saudi Arabia's Legal System

This chapter aims at exposing the interpretation and application of Article V of the New York Convention in the context of Saudi Courts. It further analyses the application of Shari'ah

laws in KSA and its impact on the interpretation of Article V of the New York Convention with respect to the recognition and enforcement of foreign awards.

Chapter 9: Conclusion and Recommendations

This is the final chapter of the thesis and covers the conclusion and recommendations of the thesis. It then sums up the main findings of the study and explains the inferences that are drawn from such findings, in relation to the study aims and research questions. It also provides recommendations on how to deal with various unearthed issues in relation to the enforcement of foreign awards. Finally, the chapter provides the implications of the study's findings on future research.

1.3 Methodology and Approach of the Study

The qualitative research method was deemed appropriate for this study since the nature of the study did not require collection of statistical data. In this case, the main focus was the comparison of business entities where both the Shari'ah and arbitration laws are at play. Primary and secondary sources were used to collect data for the study. Primary sources used include sources of law in KSA such as Qurans, legislations, decrees as well as relevant international instruments, including the New York Convention.

The Kingdom of Saudi Arabia's laws relating to trade both locally and internationally were scrutinized and the findings compared against the other international laws. Secondary sources used include past publications that examine how the KSA has been handling foreign issues within its territories. These include books, journal articles, internet sources and authoritative magazines. The primary and secondary sources were obtained physically from the University, personal and public libraries and also electronically via academic databases.

The comparative study approach was adopted to help realize a robust analysis. In this case, the study majored on the conduct of business between the KSA's business entities and those from other countries that do not adhere to Shari'ah law so as to help assess the impact of Shari'ah laws on the enforcement of foreign awards in the KSA.

1.4 Background of the Thesis

This section discusses the socio-economic, political and legal environment of KSA. A brief historical background and the role of the New York Convention are also discussed, paying attention to the Convention's Article V, which is equally a key centre of focus in this study. The aim of this section is to provide general information pertinent to the topic of the thesis.

The Kingdom of Saudi Arabia (KSA)

The Kingdom of Saudi Arabia (KSA) is a complete Monarchy ruled and headed by a king. Its constitution is a set of Islamic laws embodied in Shari'ah³. KSA is the largest country in the Middle East by landmass. It constitutes the largest percentage of the Arabian Peninsula. The bordering states to the Kingdom on the northern side are Iraq and Jordan, Qatar and Kuwait to the north-eastern side and to the east, the United Arab Emirates⁴. In a recent Survey done in 2011, KSA's economic freedom⁵ stood at a score of 66.2. This implies that Saudi's economy was in position 54 amongst the free-most world economies. Compared to its previous performance, the kingdom has improved by moving up two points. This suggests that KSA is not one of the world's leading nations in terms of economic liberation; rather, it is relatively a protectionist state.⁶ Generally, it is a state-controlled economy whereby the government runs almost all activities, including enforcing price controls for a variety of goods and services.

It is crucial to note that since KSA produces and exports large amounts of oil, it has a significant influence on international trade.⁷ As a leading global oil producer, KSA is a dominant member of the Organization of Petroleum Exporting Countries. In 2005, the country joined the World Trade Organization (WTO). The KSA's dominant position together with its decision to join WTO have prompted the country to initiate a series of economic reforms in order to comply with various relevant international trade conventions so as to attract more foreign investors for economic diversification.

KSA's legal system is founded on Shari'ah law. These are Islamic laws derived from the Islamic Holy Book (the Qur'an), the traditions of Islam as taught by Prophet Muhammad (the Sunni) and the Islamic scholarly consensus formulated after the death of Prophet

3 Florian Pohl, *Modern Muslim Societies: Muslim World* (Marshall Cavendish 2010).

4 Robert Alexander, *Saudi Arabia: Modern World Nations* (Infobase Publishing 2007).

5 Economic freedom is "the fundamental right of every human to control his or her own labor and property. In an economically free society, individuals are free to work, produce, consume, and invest in any way they please, with that freedom both protected by the state and unconstrained by the state. In economically free societies, governments allow labor, capital and goods to move freely, and refrain from coercion or constraint of liberty beyond the extent necessary to protect and maintain liberty itself." "Frequently Asked Questions". See ;Index of Economic Freedom <<http://www.heritage.org/Index/FAQ.aspx>> accessed 17 March 2013; John Weeks, *Population: An Introduction to Concepts and Issues* (Cengage Learning 2011)

6 John Weeks, *Population: An Introduction to Concepts and Issues* (Cengage Learning 2011).

7 Sara Pendergast and Tom Pendergast, *Asia & The Percific* (Gale Group 2002).

Muhammad.⁸ Scholarly interpretations by Muslim scholars also assist in the understanding of Shari'ah laws.

Generally, the Islamic laws tend to have significant variations from most of the conventional global statutes that are not very much informed by any religious practices and beliefs.⁹ Religious elements in the Saudi laws together with the existence of a myriad of other business laws that lean towards Shari'ah laws (which are also religious) have left the KSA business community caught in between using lawsuits or arbitration in resolving business conflicts arising in the international business arena. Studies done in the past indicate that a significant number of business entities would prefer to settle their disputes outside the judicial courts by engaging an independent arbitrator or tribunal.¹⁰

The Judicial system of the KSA has three major components. The Shari'ah Court System is the largest of the three components. The Shari'ah courts preside over a majority of the cases within the legal system of KSA. The Shari'ah courts are further subdivided into divisions namely: Summary and General Courts (also known as the Courts of the First Instance), Supreme Judicial and the Courts of Cassation. The second component of the judicial system of the KSA is the Board of Grievances, which adjudicates upon cases where the government is an involved party. The third and last component consists of numerous quasi-judicial committees formed by the government ministries to adjudicate over certain specialized cases as mandated by relevant statutes.¹¹ For instance, the Labour Committee presides over and adjudicates upon labour disputes.¹²

The New York Convention of 1958

The New York Convention of June 1958 is described by stakeholders as the most successful private treaty in relation to international laws.¹³ It is recognized by and being

⁸ Willard Beling, *King Faisal and Modernization of Saudi Arabia* (Taylor & Francis 1980).

⁹ Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*. ed. Jan Michiel Otto– (Leiden Univ. Press 2010).

¹⁰ Gayle Hanlon, *International Business Negotiations in Saudi Arabia*", in James R Silkenat and Jeffrey M. Aresty and Jacqueline Klosek eds., *The ABA Guide to International Business Negotiations* (American Bar Association 2009)

¹¹ Corinna Standke, *Sharia-The Islamic Law* (GRIN Verlag 2008).

¹² Ibid.

¹³ Alan Redferd, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004).

implemented in over one hundred and forty nations.¹⁴ The New York Convention of 1958 was put into place after concerned stakeholders expressed dissatisfaction with the then Protocol on Arbitration Clauses in Commercial Matters¹⁵ and the Geneva Convention on the Execution of Foreign Arbitration Awards of 1927.¹⁶ This replacement was initiated by the International Chamber of Commerce.¹⁷

One of the reasons for the enactment of the New York Convention of 1958 was the increasingly growing international business transactions.¹⁸ The global economy was growing at a significant rate; more and more international business entities were conducting business transactions on a global scale that consequently led to an increase in the number of trade-related disputes. These situations necessitated the need to establish an internationally recognized body of laws;¹⁹ as has now been embodied in the New York Convention of 1958.

1.5 Research Questions

The primary research question that the study seeks to answer is: To what extent has Saudi Arabia signified its commitment to implementing the New York Convention, particularly in her application of Article V? It is from this primary research question that the following sub-questions arise:

- i) To what extent are Shari'ah laws and other KSA's laws compatible with the New York Convention?
- ii) How do KSA authorities apply Article V in their refusal to enforce foreign awards?

1.6 Aims and Significance of the Study

14 Johan Erauw and Paul Volken (ed) and Vesna Tomljenovic (ed), *Liber Memorialis Petar Sarcevic: Universalism, Tradition and the Individual* (European Law Publisher 2006).

15 Protocol on Arbitration Clauses in Commercial Matters, Sept. 24, 1923, 27 L.N.T.S. 158 entered into force on July 28 1924 [hereinafter Geneva Protocol].

16 Redferd, 132

17 Dennis Thompson, 'Journal of World Trade Law' (2007) 2 1,15.

18 Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International 2003).

19 Ibid.

This study seeks to examine the commitment of the KSA towards the implementation of the New York Convention, particularly with regard to the application of Article V in refusing the enforcement of foreign awards. The compatibility of Saudi Arabian laws (including Shari'ah law) with the New York Convention, particularly Article V is also examined. By examining the compatibility of KSA's laws and principles of Shari'ah laws²⁰ with the New York Convention, one would objectively determine whether challenges faced by Saudi Arabia in applying the New York Convention are due to the country's legal infrastructure or the lack of political will to implement the provisions of the New York Convention. The level of compatibility of these sets of laws is essential in determining the level of successful promotion and enforcement of awards from foreign nations, as terms of the awards will usually be subject to Shari'ah laws.

In this regard, this thesis is expected to make a number of academic and policy contributions. It adds to the several pieces of literature on the realities and challenges of implementing Article V of the New York Convention by member states in such a specific context as that of Saudi Arabia. Secondly, there have been controversies arising from the provisions of Article V of the Convention, particularly against the background of arguments that application of the Article is susceptible to abuse, as a signatory state may rely on this provision as a disguise in refusing the enforcement of foreign awards within its territory.²¹ By closely examining the application of Article V in the specific case of Saudi Arabia, this study seeks contextualize the debate and also find out from a more pragmatic context why the whole provisions of the conventions have not been effective. From a policy perspective, the findings of this study will be insightful to the Saudi Arabian government authorities, especially on the extent of requisite municipal adjustments or reviews that need to be done so as to fulfil her obligations under the New York Convention. The recommendations provided in this thesis will also be insightful with regard to legislative, policy and administrative reviews that may be undertaken in a bid to enable the KSA abide by her obligations under the New York Convention.

20 Which are of universal application in the country

21 See Neil Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' (1996) 12 Arb. Int'l 28, 43; Xia, Xiaohong, 'Implementation of the New York Convention in China' (2011) (1)International Commercial Arbitration Brief 1 20,24

CHAPTER TWO

SAUDI ARABIA: ITS LEGAL AND JUDICIAL SYSTEMS

2.0 Background

In order to fully understand the subject of arbitration in the KSA, it is imperative to get a clear understanding of the workings of the Saudi legal and judicial systems. In this chapter, a brief background history of the Kingdom of Saudi Arabia is highlighted. In order to derive rational and logically justified reasons as to why the state is unwilling to embrace and comply by the New York convention and arbitration awards, it is absolutely necessary to understand the historical background of the culture and the origin of Saudi's laws and protocols. It is from this history that the establishment of the various legal and judicial systems emanate and from which point, the relationship of these systems with the relevant international systems to which the KSA is a party is examined.

With a population of 18 million, excluding expatriates, the Kingdom of Saudi Arabia takes up 80% of the land area of the Arabian Peninsula.²² The Kingdom of Saudi Arabia is made up of several administrative provinces: Central Province, Western Province, Eastern Province and the Southern Province. The Central Province is known as Najd and it is where Riyadh, the kingdom's capital is located. The Western Province is known as al-Hijaz and houses the cities of Makkah, Jeddah and al-Madinah. The Eastern Province is al-Ahsa and this is where the provincial capital of al-Dammam is found. Finally, the Southern Province is known as Asir and this is where the provincial capital Abha is found. The Kingdom has a rich history that can be grouped into three periods.

The first period began in the mid-eighteenth century when Prince Muhammad Ibn Sa'ad, the then leader of al-Dir'iyyah²³ agreed to an alliance with Muhammad Ibn 'Abd al-Wahhab, an Islamic scholar who founded the Islamic Reform Movement. The latter unified Muslims by having them adhere to the principles of true and pure Islamic faith and letting go of the modifications (bid'ah) adopted by the many followers of Islam in the new world. This alliance became crucial in unifying the majority of the Arabian Peninsula people, to form the Kingdom of Saudi Arabia that we know today.²⁴ This reform movement would later spread to other parts of

²² The recent census was done in 1992.

²³ Al-Dir'iyyah is now a small town near Riyadh in the Central Province of the Kingdom of Saudi Arabia.

²⁴ Stephen Humphreys, 'Islam and Political Values in Saudi Arabi, Egypt, and Syria' (1979) 33 The Middle East Journal 8.

the Arabian Peninsula. The Prince took over al-Hadjis in 1806 to create the First Saudi State, which existed until the Egyptian Army occupied and razed al-Dir'iyah in the early part of the nineteenth century.

The start of the second period is identified with Prince Turki Ibn 'Adb Allah as the ruler. He created the Second Saudi State in 1818 and designated Riyadh as its capital. The prince's reign was a powerful one as he dominated some sections of the Arabian Peninsula. Unfortunately, incessant conflict among his heirs allowed al-Rashid's Family to capture the capital and end the rule of the Second State in 1881.

The third period may be considered as the most important period in Saudi history. It started in the early parts of the twentieth century when King 'Abd al-Aziz took over and brought about the unification of most parts of the Arabian Peninsula, including Riyadh which was captured in 1900, al-Ahsa in 1913 and al-Hidjaz in 1924.

In September 1932,²⁵ the currently existing Kingdom was established by King 'Abd al-Aziz. He died in 1953, after which his eldest son, King Sa'ad, ascended to the throne. He however stepped down from the throne to give way to his brother King Faysal. Faysal was assassinated in 1975 and succeeded by King Khalid. Khalid died in 1982. His successor was King Fahad, who also later died in 2005, giving way to the current ruler, King Abdullah.

2.1 Characteristics of the Legal System

The Kingdom of Saudi Arabia is ruled as an absolute monarchy where the King is the leader. All legislative and executive rights are handled by the King through the Council of Ministers. This subsection aims to elucidate and discuss the progress and development of the Saudi legal system. Of the few Islamic countries, the Kingdom of Saudi Arabia is one of those in which Shari'ah law is existent and prevalent. In fact, the Shari'ah is regarded as the basic law in Saudi Arabia.

When King 'Abd al-Aziz reigned in most parts of the Arabian Peninsula, he was faced with three different legal systems.²⁶ The first legal system, which was prevalent in al-Hidjaz, was greatly influenced by the Ottoman Laws drawn from European Laws, specifically the French, German and Swiss Laws. The Ottoman Empire once captured al-Hidjaz which is also known as

25 The Royal Decree No 2716 dated 17/05/1351 A.H.(18/09/1932 AD).

26 Solaim A, 'Saudi Arabia's Judicial System' (1971) XXV The Middle East Journal 403.

the center of the Islamic World because this is where the two holy cities of Islam, Makkah and al-Madinah, are found.

The second system was from the little towns in Najd. It held that the local Amir, otherwise known as governor and a judge were responsible for resolving disputes between the people in their jurisdiction. On the onset, the Amir would try to reconcile the parties. If this failed, he would refer the decision to the judge who would then make a final ruling on the case. The Amir was then tasked with implementing whatever the judge's decision was. He would receive assistance from the town notables and the police force in implementing the judge's decision.

The third system was known as the customary tribal law. It consisted of unwritten laws which developed and evolved alongside the tribe itself. Each tribe had a judge who, normally, would base his ruling on precedent cases. The judgments passed became binding to all tribe members.

King 'Abd al-Aziz did not pursue any changes in the three systems. He rather tried to unify the three systems to make them work as a single judicial system. He succeeded in doing so by creating the Constitutional Instructions of the al-Hidjaz Kingdom on August 26, 1926.

While the new system was not enacted for Najd or for the entire Kingdom of Saudi Arabia, it is clearly understood that it was applicable to the entire country.²⁷ The new system mandated that:

“The legal standards of all regulations shall always be in accordance with the Book of God, the Sunnah of the Prophet Muhammad and the conduct of the Companions of the Prophet and the first virtuous generation.”²⁸

According to one legal writer, the Constitutional Instructions of 1926 was an administrative act which presided over the country's administration. It is not to be identified as a constitutional act which identifies the extent of the powers of the judicial, executive and legislative branches of government.²⁹ Nonetheless, it would appear that the contents of the

27 Joseph Schacht, 'Islamic Law in Contemporary State' (1959) 18 *The American Journal of Comparative Law* 137; Soliman Afifi, 'Constitutional and Judicial Organisation in Saudi Arabia, A thesis submitted for the Degree of Ph.D. to John Hopkins University' (1978) 23.

28 The Constitutional Instructions of Al-Hidjaz Kingdom of 1926 Art 6.

29 El-Ahdab Abdul Hamid, *Commercial Arbitration with the Arab Countries*, (Graham & Trotman 1990)

Constitutional Instructions of 1926 may have had constitutional aspects. The text cited above is one such excerpt from the Instructions which portrays its constitutional aspects.

The legal system of the Kingdom of Saudi Arabia is based on the Shari'ah law. According to Muhammad Ibn 'Abd al-Wahhab, the legal system bears significant reference to the Hanbali School of Islamic Jurisprudence, one of the four main such schools. The others are the Hanafi, Shafi and Maliki schools, all of whose thoughts are considered valid, despite the differences. The Hanbali school was established by Ahmad Ibn Hambal (750-855 A.H.)³⁰ in Baghdad, Iraq.³¹ All these schools are similar when it comes to the fundamentals but differ in some of the more specific aspects of the legal systems. (see text at section 3.8 and accompanying notes)

While the school of Hanbali firmly adheres to the teachings of the Qur'an and the practices of their prophet Muhammad, it can be considered as having the most liberal stand compared to other schools in terms of allowing one the liberty to engage in contractual transactions. Consequently, the school establishes that every condition that has been agreed upon by both parties as an element of the contract is legitimate and therefore must be accomplished, unless it is in conflict with the Shari'ah.³²

The ideologies in the Shari'ah delegate the religious leadership duties of the country to the King, otherwise called the Imam. The King has the capacity to decree any essential administrative legislation for the betterment of the country and for realizing the needs of the society. Some of these needs could be necessitated by changing circumstances. These legislations are called "regulations" and not "laws" as the believers of Islam deem God as the only legislator. The practice is that the ruler of the country may only issue administrative

30 The abbreviation "A. H." means the Hijri date which is the official calendar in the Kingdom of Saudi Arabia.

31 The other major schools are; the Hanafi school founded by Aba Hanifah al-Nu'Man Ibn Thabit in Kofah, Iraq, which is prevalent in Egypt, Syria, Lebanon and Turkey; the Maliki school founded by Malik Ibn Aras in al-Madinah, The Kingdom of Saudi Arabia, which is prevalent in Morocco, Algeria, Tunisia, Sudan, Kuwait and Bahrain; and the Shafi'l school founded by Muhammad Ibn Idris al-Shafi'l in Egypt, which is prevalent in the Kingdom of Syria, Lebanon, Palestine, Jordan, Iraq, Pakistan, Syria and Iraq. See Mahmassani S. *Falsafa al-Tashri' fi al-Islam (The Philosophy of Jurisprudence in Islam)*, English Translation by Ziadeh F, Leiden, (The Netherlands. E. J. Brill, 1961) 19-39.

32 Layish Aharon, 'Saudi Arabian Legal Reform as A Mechanism to Moderate Wahhabi Doctrine' (1987) 107 (2) *Journal of American Oriental Society* 284.

regulations. These regulations are then released by the Council of Ministers as authorized by the King.³³

In an effort to alter and unify the existing legal and judicial systems, King Abd al-Aziz passed the Resolution of the Judicial Institution of 1928, which mandated that the Hanbali School becomes the foundation of the country's judicial system. The Resolution allocated the following Hanbali texts as the preferred sources of law:

- i) Sharh Muntaha al-Iradit by Mansar al-Bahwati
- ii) Kashf al-Kina 'an Matn al-Ikna by the same author
- iii) Commentaries of al-Zid
- iv) Commentaries of al-Dalil

During conflict resolution, if no solution was forthcoming, Hanbali legal manuals would be used as secondary sources. The discovery of Oil in 1938 resulted in a swift advancement in many sectors of the country. This development led the government, with representation from the Council of Ministers and the King, to release a range of pertinent administrative regulations that would regulate the development in the different sectors, particularly in commerce and industry. As a result, the government initiated specific regulations including the Commercial Court Regulation of 1931, the Nationality Regulation of 1954, the Companies Regulation of 1965, the Workmen Regulation of 1969, the Arbitration Regulation of 1983 and the Basic Regulation of 1992.

In actual sense, the number of administrative regulations has kept increasing over the years in an effort by the government to attain a good balance between conventional Islamic legal concepts and the needs and requirements of the modern Kingdom of Saudi Arabia.³⁴

2.2 Sources of the Legal/Judicial System

Being an Islamic state, the Kingdom of Saudi Arabia draws a significant portion of its laws from its religious teachings. All other appendages of the law, commonly known as regulations, that pertain to modern life are only regarded if they are in line with the Shari'ah law. There are four sources for the Saudi Legal System, namely: the Shari'ah (Islamic law), state regulations and resolutions, international treaties and traditions and practices.

33 Shamma Samir, 'Law and Lawyer in Saudi Arabia' (1965) 14 International and Comparative Law Quarterly 1035.

34 For discussion of this point, Seaman Bryant, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'ah to Regulate Development' (1980) 18 (3) Columbia Journal of Transnational Law 478,81.

2.2.1 The Shari'ah (Islamic Law)

The Shari'ah is the ultimate legal source in Saudi Arabia. All other sources must not go against what is stipulated in the Shari'ah or they shall be deemed null and void. The Shari'ah has deciding power on the majority of legal issues including property, criminal, conduct, marriage, inheritance and all other affairs not covered by regulations. Basically, there are two kinds of Shari'ah sources, namely: Principal or primary sources and Supplementary sources.

The principal sources include the Qur'an, the Sunnah (traditions of the Prophet Muhammad), the Idjma (consensus) and the Qiyas (analogy) while the supplementary sources include Instihan (juristic preferences).

2.2.1[A] Primary Sources

2.2.1[A] [i] The Qur'an

The Qur'an is the Holy Book of Islam. It is also the principal source of Islamic jurisprudence. All believers of Islam trust that the Qur'an contains the very words of God. It keeps a balance between moral, spiritual and social life, particularly the relationship between God and man. It also regulates human to human relationships.

While the Qur'an does not institute a formal system of law that can solve all legal problems within a society,³⁵ it includes specific principles from which solutions to legal problems can be drawn.

2.2.1[A][ii] The Sunnah

The Sunnah is the second principal source of Islamic Jurisprudence. The Sunnah, which translates to "habitual practice", contains Muhammad's sayings, deeds and unspoken approvals of an action or practice. It gives an explanation of the teachings in the Qur'an as well as an interpretation of its general provisions. Hence, when the Qur'an does not expressly state a solution to an issue, naturally, the next resort for Muslims becomes the Sunnah.

2.2.1[A][iii] The Idjma (Consensus of the Opinions)

After the death of Muhammad and the rise in the number of believers of Islam around the world, new questions arose, which the Qur'an and the Sunnah did not expressly provide answers

³⁵ Ibid 48.

to. The Idjma, which means “consensus”, addresses what the Qur’an and the Sunnah fail to explicitly answer.³⁶

A consensus is defined as the agreement of Islamic scholars in any particular area of rules on a new problem and it is to be followed if the principal sources are unable to provide an answer or if the two primary sources do not provide a clear solution.

However, even Islamic scholars themselves vary in their opinions on the meaning of the Idjma. Some believe in and insist on the validity of the Idjma, claiming that all Islamic scholars around the world should be in agreement with rules on new questions/problems. On the other hand, some believe that the Idjma is a general accord of opinion among Islamic scholars in a specific location. A very limited number of Islamic scholars affirm a binding accord that the Idjma is restricted to agreement of the Companions of the Prophet.³⁷

2.2.1[A][iv] The Qiyas (Analogy)

The literal meaning of “Qiyas” is “analogy”. Islamic scholars refer to the Qiyas when the Qur’an, the Sunnah and the Idjma fail to specify a rule on a certain problem. This source enables the application of an equivalent rule in cases where a given cause or effect is similar to a cause or effect previously identified by the law.³⁸

2.2.1[B] Complementary Sources

There exist other less important sources of Islamic law. One such source is the *al-maslaha an* (juristic preference). This means the deviation from a precedent ruling to give way to another rule for a greater legal reason that would require such an act.³⁹

2.2.1[C] Basic Standards of the Shari’ah

36 David Karl, ‘Islamic Law in Saudi Arabia; What Foreign Attorneys Should Know’ (1991) 25 (1) The George Washington Journal of International Law and Economics 139.

37 Mahmassani S, supra note (12), pp. 76-78; Kourides Nicolas, ‘The Influence of Islamic Law in Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contract’, 1970, vol. 9, no. , 2, *Columbia Journal of Transnational Law* 391.

38 Mahmassani Hani, supra note (12) 80,82; Kourides Nicolas, supra note (23) 391.

39 Mahmassani Hani, supra note (12) 83; Amin Sayed Hassan, ‘Legal System in the Gulf States’ (1983) Lloyd’s Maritime and Commercial Law 72.

It cannot be said that there is a definite set of standards to pinpoint whether the matter in question is permissible or forbidden by the Shari'ah. Yet, there are specific passages in the Qur'an and the Sunnah, which are the primary sources of the Shari'ah⁴⁰ that directly indicate rules in dealing with such matters. One such case is usury (interest), which is forbidden by the Shari'ah as the Qur'an clearly states. The Shari'ah exists for the interest of the people. Therefore, Shari'ah scholars have come to a consensus that five major privileges should be preserved. These are mentioned below.⁴¹

The Shari'ah will protect religion, offspring, life, mind and even material wealth as a necessary benefit. The Shari'ah forbids innovations (Bid'ah) in religious tenets in order to preserve religious beliefs. It has similarly upheld life by imposing retaliation (Kisas) and blood money (Diyah). On the other hand, offspring is safeguarded by prohibiting adultery. For the preservation of mind, wine and any kind of alcohol is forbidden.

As for material wealth, it is preserved by encouraging the gaining of money only by lawful means while making illegal, acts of thievery, deceit and taking another person's possession without a just reason. Additionally, usury and gambling are also prohibited as Islamic teachings specify that gaining something in return for nothing is immoral and wrong in its own context.⁴²

The prohibition of usury suggests that any binding agreement that charges a very high interest rate or results in a very high profit margin will be deemed as oppressive and exploitative, which will ultimately void the contract or agreement.⁴³

The issues and questions which the Shari'ah addresses are classified as either substantive or procedural.

2.2.2[C][i] Substantive Issues

40 Ibid 15,16

41 Al-Shatibi AbuIshak Ibrahim bin Musa, *al-Muwafak a fi`Upd al-Shariah. (The Analogy of the Principles of the Shari'ah)*, (2nd ed, Al Iman Establishment 1975) ; Khallaf Aline, '*Abd al-Wahhab., Ilm Usd al-Filch (Principles of the Shariah)*, (17th ed, Public Administration Institute Press 1985) .

42 Noel Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (London 1984).

43 Peter Sloane, 'The Status of Islamic Laws in the Modern Commercial World' (1988) (22) *International Lawyer* 748.

The Shari'ah clearly forbids specific substantive matters that include usury, gambling, drinking wine or any alcoholic drink and consuming some foods, specifically pork. These are stated in the Qur'an. The Qur'an includes verses that clearly state that gambling and drinking wine is not an acceptable act in the Muslim society. Still, there are certain substantive matters and questions that the Shari'ah has failed to address. As such, scholars have held different views on such issues. One specific case is the use of musical instruments, which many scholars have prohibited. Meanwhile, other scholars allow Muslims to listen to music and even use musical instruments.⁴⁴

2.2.2[C][ii] Procedural Issues

The Shari'ah mandates that people should give respect to procedural matters. For instance, judges and arbitrators are required to give due respect to the standard of equal treatment. Both parties must be granted the chance to present their claims and evidences in any legal proceeding.⁴⁵

Similar to substantive matters, there are some issues which have not been specifically addressed by the Shari'ah. One such case is where scholars have varying opinions regarding the capacity of women to act as judges or arbitrators.⁴⁶ (See text at section 3.9.1 and 6.4.7 A)

In conclusion, there are also certain matters which are clearly forbidden in the Shari'ah texts and as such, all contracts that happen within such contexts are automatically deemed null and void.

2.2.2 National Regulations and Resolutions

Technically, the difference between "legislation" and "regulation" in Saudi Arabia lies only in the terminology. Any difference in the meaning of the two terms has no sensible importance as all legislations in the Saudi region include all the features inherent in secular legislation. Both have the characteristics that any proper legislation would have in any jurisdiction.⁴⁷

44 Ali Ibnhazim, *Al-Muhalla* (undated) 9 55, 63.

45 Jhirah, 'Abd al-Mun'am a., *Nizam al-Kad & fial-Mamlaka al-'Arabiyyah al-Sa 'adiyyah (Judiciary System in the Kingdom of Saudi Arabia)* (Public Administration Institute Press 1988) .

46 S H Amin, supra note (18) 139.

47 Ibid 313.

The official process for the issuance of a regulation involves a number steps. When a need for a certain regulation is recognized, a committee of legal advisors in the concerned ministry shall arrange for a draft of the proposed regulation. This will then be submitted to the Division of Experts in the Council of Ministers for review and revision if necessary, after which it will be presented to the Council of Ministers for deliberation.

If the council approves the proposed regulation, it will be forwarded to the Consultative Council for further review. This council will then send it back to the Ministers with their comments and recommendations if any. At this stage, the Ministers will study the comments and submit the final draft to the King. If the King approves of the regulation, a Royal Decree will be issued and be published in the official gazette, called the "Um al-Kura".

Additionally, ministers and some leaders of government agencies are given the power to enforce administrative resolutions and by-laws of regulations through the issuance of ministerial circulars. Such circulars are not published in the "Um al-Kura" and do not supersede the Royal Decree.

Lately, there has been an increase in the number of regulations in the Kingdom of Saudi Arabia and this is mainly because of business and commercial activities. It is important to give a summary of the most significant regulations. The following sections will state how these regulations may be grouped.

2.2.2[A] Constitutional and Administrative Policies

2.2.2[B] The Basic Regulation.⁴⁸

2.2.2[C] The Consultative Council Regulation

2.2.2[D] The Provincial Government Regulation

2.2.2[E] The Council of Ministers Regulation

2.2.2[F] The Civil Service Regulation

2.2.2[G] Commercial Regulations.

2. 2.2[G][i] The Commercial Court Regulation

⁴⁸ Alexander Kritzalis, 'Saudi Arabia' (1992) 26 (3) *The International Lawyer* 830.

2. 2.2[G][ii] The Investment of Foreign Capital Regulation

2. 2.2[G][iii] The Companies Regulation

The following are the forms of business authorized under the Companies Regulation of 1965:

- i) Joint Liability Partnership
- ii) Mixed Liability Partnership
- iii) Mixed Liability Partnership by Shares
- iv) Limited Liability Partnership
- v) Joint Ventures
- vi) Joint Stock Company
- vii) Variable Capital Co-operative Company

This Regulation was amended in 1967, 1982 and 1992.⁴⁹

2. 2.2[G][iv] Other Commercial Regulations

2.2.2[H] Labour and Social Securities Regulations

2.2.2[H][i] The Labour and Working Regulation

2.2.2[H][ii] The Social Securities Regulation

2.2.2[I] Criminal Regulation

2.2.2[J] Tax Regulations

2.2.2[K] Miscellaneous Regulations

2.2.3 International Agreements

2.2.4 Tradition and Practice

2.3 The Saudi Judicial System

⁴⁹ The Royal Decree No M/5 dated 12/02/1387 AH 1967 AD); the Royal Decree No M/23 dated 28/06/1402 AH (1982 AD); also the Royal Decree No M/22 dated 30/07/1412 AH (1992 AD).

The Saudi judicial system is perceived to be dual in the sense that it is made up of a hierarchy of the Shari'ah Courts and a variety of other adjudicative organs.⁵⁰ However, the Saudi judicial system is actually not a dual system since it is composed of three systems of dispute resolution mechanism: the Shari'ah Courts, the Board of Grievances (the Administrative Court) and the Specialized Judicial Organs. This can be said primarily from the Board of Grievances Regulation of 1982 which clearly states that the Board of Grievances is regarded as an independent judicial commission associated directly with the King.⁵¹

The variety of the commissions in the judicial system has become undesirable since it causes a multitude of complications. For example, two or more judicial commissions may claim that they have the jurisdiction to decide on a specific case. In others cases, they refuse to act on the dispute believe they have no jurisdiction over the matter.

In 1981, the Council of Ministers released a resolution, which prompted the composition of the specialized courts for the settlement of commercial, labour and traffic disputes to match the regulations issued by the authorities.⁵² However, the resolution is yet to be applied in actual practice.

The government's intent to reform the judicial system will likely abolish the specialized judicial organs and transfer jurisdiction to the Board of Grievances. For instance, the Board of Grievances has jurisdiction over all new cases that would have been dealt with by the Commission for the Settlement of Commercial Disputes.⁵³

This solution, however, does not fit the description of the Board of Grievances, since the Board has the authority to determine the disputes in which one of the parties is the government or one of its agencies. Consequently, the government has declared that the position was only temporary until the application of the Council of Ministers Resolution No. 167, which was issued in 1981.

2.3.1 Foundation of the Judiciary

50 Alison Lerrick and Javed Qkhan Mian, *Saudi Business and Labour Law: Its interpretation and Application* (Graham & Trotman, 1982)

51 The Royal Decree No M/51 dated 17/07/1402 AH (1982 AD) Art I.

52 The Council of Ministers Resolution No 167 dated 14/09/1401 AH(1981 AD).

53 Nancy Turck, 'Dispute Resolution in Saudi Arabia' (1988) 22 (2) *The International Lawyer* 419,20.

The Institutions of the judiciary are divided into three, namely:

- i) The Shari'ah Courts
- ii) The Board of Grievances
- iii) Specialized Judicial Organs

2.3.2 The Shari'ah Courts Before Reforms

The previously existent courts system in Saudi Arabia was based on the model created in 1932 by the Kingdom's founder, King Abdul Aziz. Ever since, there have been developments that have gradually reshaped the courts. The Shari'ah Courts fell under the governance of the Judicial Regulation issued in 1975 and amended in 1975 and 1981.⁵⁴ There are six qualifications in order for one to be a qualified judge. These qualifications are stated under the Judicial Regulation of 1975, Article 37.

- Must be a Saudi national
- Must be of good conduct
- Must have full legal capacity
- Must have a degree from a Saudi Shari'ah College, or its equivalent provided that they pass a special test conducted by the Ministry of Justice
- Minimum age requirement is twenty-two years; for appellate judges, the minimum age is forty years
- Must not have been sentenced for any crime or dishonour or dismissed from a public post as disciplinary action (even as disabilities from such matters are removed at a later date)

There are also a number of reasons as to why a judge may be removed from office. Such reasons include death, resignation, retirement and reaching the retirement age of seventy years.⁵⁵ Additionally, there are other specific reasons that may prompt the removal of a judge from office. These include medical reasons that may prevent them from effectively performing official duties, the loss of confidence and status as a requirement by the judicial body and if a judge gets an assessment of "below average" in three consecutive evaluations.⁵⁶

⁵⁴ The Royal Decree No M/64 dated 4/7/1395 AH (1975 AD) amended by the Royal Decree No M/76 dated 14/10/1395 AH (1975 AD) and the Royal Decree No M/4 dated 1/3/1401 AH (1981 AD).

⁵⁵ Ibid Art 85 (a b and c).

⁵⁶ Ibid Arts 57 51 and 69; Alison Lerrick and Javed Qkhan Mian supra note (57) 220,22.

Shari'ah Courts have general jurisdiction in all matters, including but not limited to, civil, criminal, personal status, real property, inheritance and family relationships, except those that are excluded by specific regulations.

The Judicial Regulation of 1975 created hierarchical systems such as the Higher Judicial Council, the Appeal Courts, the General Courts and the Summary Courts.

2.3.2[A] Reforms

The 2007 Royal Decree led to an overhaul of the Saudi Judicial System. This overhaul resulted in the creation of three levels of the Shari'ah Courts. These levels are the high court, the Court of Appeals, and the First Instance Courts. Prior to these reforms, the court system was criticized as being too slow and shrouded in mystery (opaque). Among the reforms announced by King Abdullah were the introduction of specialised courts that would respectively deal with criminal, family, commercial and labour cases. The judges and other judiciary staff were to undergo training so as to be able to deal with the emerging more complex and technical cases. These reforms were seen as a way of encouraging investment by enhancing transparency and professionalism in the judicial system. The three levels of Shari'ah courts that make up Saudi's judicial system are discussed hereunder.

2.3.2[A][i] The High Court

The high court is the supreme court of the land. It replaced the supreme judicial council seats in Riyadh. It is presided over by a president who is assisted by other judges with the ranks of chief of appellate courts. These judges exercise the court's jurisdiction through the various specialized courts, which are formed under the High Court⁵⁷. There are three judges in every sitting, with the exception of the criminal court whereby five judges sit in situations with potential capital punishment sentences⁵⁸.

The president of the High Court is appointed by a Royal Decree and should have the qualifications of a chief appellate judge. The chiefs are appointed by a Royal Decree on the recommendation of the Supreme Judicial Council.

There is also established a general council of the High Court which is presided over by Chief of the High Court. The General Council has the mandate of preparing precedents and

⁵⁷ The Law of the Judiciary, Royal Decree No M/78 art 5 dated 19/9/1428H Oct 1 2007.

⁵⁸ *Ibid* Art 10(4).

procedures to be followed in the administration of the courts functions. The general council is also instrumental in the reviewing of decisions, which have departed from the general precedents to be followed by the high court. Whenever a circuit of the court deems it right to depart from a position it has previously adopted, or from a position which has been adopted by a previous court circuit, then the matter will be referred to the chief of the high court who will refer the matter to the General Council for ruling.⁵⁹

2.3.2[A][ii]Court of Appeal

These courts are below the High Court in rank but above the first-degree courts. They serve the function of reviewing decisions, which are entered into by the first-degree courts. These courts handle both civil and criminal matters. The review is done by a three judge bench with the exception of the criminal appeals, which are attended to by a five-judge bench. The Court of Appeal consists of five circuits namely criminal, labour, personal status, commercial and civil.⁶⁰ These circuits are specialized according to the matters they attend to. The court is presided over by a president who is appointed by the chief of the appellate court.

2.3.2[A][iii]First Degree Courts

These courts are the lowest in rank among the Shari'ah Courts. They are established in provinces and district of Saudi Arabia and their number in a district depends on the judicial needs of the people in that district. These first-degree courts consist of general courts, criminal courts, labour courts and personal status courts.⁶¹ The general circuits deal with an array of cases, which do not fall under any of the remaining circuits. The summary courts were dissolved into criminal circuits. In the First Degree Courts, there is a one- or three-judge bench depending on the nature of the case. However, in criminal circuits, there are always three judges regardless of the matter involved. The number of judges who sit in a circuit is determined by the Supreme Judicial Council. Each of the above first-degree courts has a number of circuits under it, which are formed to tackle specific matters. The circuits under the criminal courts are juvenile case circuits, discretionary punishment circuits, prescribed punishment circuits and retaliatory circuits.⁶²

⁵⁹ *Ibid* Art 14.

⁶⁰ *Ibid* Art 16.

⁶¹ *Ibid* Art 24.

⁶² *Ibid* Art 20.

The matters at the special committees of the Ministry of Labour and Ministry of Transport were transferred to general courts. This resolved the criticism directed at the special committees due to their lack of judicial backing and whose rulings could not be enforced in any court of law. There were claims that the courts were marred with discrimination and corruption.⁶³

The courts of Guarantee and Marriages were merged into Personal Status Courts to hear matters concerning marriage, divorce and succession. There are also specialized courts in every district established under the umbrella of the general courts in areas where the specialized courts have not been established. The specialized courts have the same jurisdiction as the other specialized courts and are presided over by one or three judges as determined by the supreme judicial council.

2.3.3 The Supreme Judicial Council

The Supreme Judicial Council is the chief authority in the Shari'ah judicial system. It composes of ten members and a chairman who bears the title of minister. This Council has administrative, consultative and judicial functions and works in two committees.

2.3.3[A] The Permanent Committee

The Permanent Committee is made up of five full-time members of the title of chairman of the Appeals Court. It has power to evaluate all death, stoning or amputation sentences, to study issues submitted by the King and to communicate opinions on judicial matters when the Minister for Justice requests such.

The Permanent Committee may allow the criminal investigation or prosecution of a judge. If a judge is confined because they are suspected to have committed a criminal act, the Committee is to be informed within twenty-four hours. The committee has the authority to order the release of the judge in question even in the absence of bail as well as order the judge's arrest. In case of detention, the Committee can set the detention period and even extend it as necessary.⁶⁴

2.3.3[B] General Committee

⁶³ The Implementation Mechanism of the Judiciary Law and the Board of Grievances Law, sec 1(9).

⁶⁴ Alison Lerrick and Javed Qkhan Mian, *supra* note (57) 224.

The General Committee is made up of the chairman, members of the Permanent Committee, and five part-time members. The five part-time members consist of an Appeal Court chairman or representative, the Deputy of the Minister for Justice and the three most senior chairmen of the general courts located in Makkah, al-Madinah, Riyadh, Jeddah, al-Dammam and Jiyzen.

The functions of the General Committee are limited. It has the capacity to turn away from precedent cases and therefore create new precedents. Additionally, it has the capacity to cite general principles of Islamic law in retort to legal questions raised by the Ministry of Justice. It also has supervisory command over the judiciary. It has the capacity to manage lower courts and can render disciplinary action on erring judges.

Lastly, the General Committee can listen to appeals from judges who have evaluation grades of “below average” in the event of routine inspections and whose grades have been substantiated by the Administrative Inspection Committee. The decisions rendered by the General Committee are absolute.⁶⁵

2.3.4 The Board of Grievances (Administrative Court)

2.3.4[A] Background

The classical Islamic legal system has two types of courts, one of which is the Board of Grievances.⁶⁶ It was created by a regulation issued in 1955⁶⁷ and which has been improved on gradually over the years.⁶⁸ In 1982, a comprehensive Royal Decree was created and it reconstituted the Board as an administrative court that would be identical to the French Conseil d’Etat.⁶⁹ In 2007, the Royal Decree approved an overhaul of the judicial courts as well as the Board of Grievances, an independent judicial commission not related to any government official

⁶⁵ Ibid. 224-25

⁶⁶ David E. Long, ‘The Board of Grievances in Saudi Arabia’, 1973, vol. XXVII. *The Middle East*

⁶⁷ The Royal Decree No. 2/13/8759, dated 17/09/1374 A.H. (1955 A.D.).

⁶⁸ The Board of Grievances Regulation No. 3570/1, dated 01/12/1379 A.H. (1959 A.D.) and the Council Ministers Resolution No. 818, dated 17/05/1396 A.H. (1976 A.D.)

⁶⁹ The Royal Decree No. M/51 dated 17/07/1402 A.H. (1982 A.G.).

except the King himself.⁷⁰ The judicial members are given rights identical to those of the Shari'ah judges. They also have similar responsibilities.⁷¹

The Board of Grievances now consists of a president, vice presidents and assistant vice presidents. These vice presidents are appointed through Royal Decrees and have to be of the ranks of Chief of Appellate Court. There is in place, an Administrative Judicial Council, which is made up of the president of the board, senior vice president, chief of the high administrative courts and four judges of the rank of chief of appellate court. This administrative judicial council performs the functions similar to those of the judicial council and meets at least twice every month.⁷²

The hierarchy of the court of grievances is divided in the same way as the Shari'ah courts. There is in place a high administrative court, administrative court of appeals and the administrative courts.

The Board of Grievances is an essential party in arbitration cases in the KSA as it plays a crucial role of actively supervising arbitration proceedings. In addition, the enforcement of all foreign and local arbitral awards falls under the jurisdiction of the Board of Grievances. The 2007 reforms entrenched in the new Board of Grievances Law mandate that a technical arbitration affairs bureau be established; whose functions include classifying and publishing decisions of the board⁷³. This is key given that it will encourage transparency and fairness in the undertakings of the Board of Grievances.

2.3.4[B] The High Administrative Court

The High Administrative Court is the highest court in the courts of grievances hierarchy. It is headed by a president who is appointed by a royal order and is of the rank of a minister. The judges of the High Administrative Court are of the rank of chief of appellate courts and are appointed by a royal order on the recommendation of the administrative judicial council.⁷⁴

⁷⁰ The Board of Grievances Regulation of 1982, Art I.

⁷¹ Law of the Board of Grievances, Royal Decree No M/78 art 23 dated 9/9/1428H Oct 12007.

⁷² *Ibid* Art 8.

⁷³ Art 21 of Board of Grievances Law (2007).

⁷⁴ *Ibid* Art 8.

2.3.4[C] Administrative Courts of Appeal

These courts are constituted above the Administrative courts but below the High Administrative Courts. They deliberate on appeals from the administrative courts and apply Shari'ah law in their proceedings. There are four circuits in this hierarchy of courts. These are disciplinary circuits, administrative circuit, specialized circuit and the subsidiary circuit. Each of these circuits is composed of a three-judge bench.⁷⁵

2.3.4[D] Administrative Courts

The administrative courts handle administrative disputes involving government departments. These disputes include: contract related disputes, enforcement of foreign judgments, compensation cases and disciplinary cases. These matters are decided through circuits developed in the administrative courts and which are presided over by a three- or one-judge bench. The Administrative Judicial Council has the mandate to decide which matters require a three-judge bench and which others require a one-judge bench. These circuits are employment, administrative, subsidiary and disciplinary.⁷⁶

The Courts of Grievances do not have jurisdiction over any criminal matter, which they previously had before the 2007 reforms. Criminal courts, which existed at the time of the reform, were transferred to the first-degree criminal courts of the judicial system. The Courts of Grievances also have jurisdiction over most disputes between administrative committees.

2.3.5 The Specialized Judicial Organs

There are many specialized judicial organs in the Kingdom of Saudi Arabia. It is uncommon that any state regulation is released without a provision either creating a secular commission to have authority over disputes arising under the regulation, or creating the competence of an existing secular commission to resolve disputes that subsequently arise. Each commission has limited jurisdiction as mandated by the provisions of the regulations presiding over it. This sub-section will expound on the most important specialized judicial organs. Some of the specialized judicial organs were abolished in the 2007 judicial reforms while others were renamed.

⁷⁵ *Ibid* Art 12.

⁷⁶ *Ibid* Art 13.

2.3.5[A] The Commercial Papers Committee/Commission for Settlement of Negotiable Instruments Disputes

This Committee was created in 1968 as a committee within the bounds of the Ministry of Commerce.⁷⁷ The Committee has authority over claims regarding bills of exchange, checks and promissory notes. In the 2007 judicial reforms, it was changed from the Commercial Papers Committee to the Committee on Settlement of Negotiable Instruments Disputes.

The committee has five branches in Riyadh, al-Dammam, al-Kasim and al-Ahsa. Each branch is made up of a panel consisting of three members, including a chairman well-versed in the Shari'ah and recommended by the Ministry of Justice and two legal experts recommended by the Ministry of Commerce. In 1986, there were too many cases in Riyadh and Jeddah that a single judge handled each case instead of the usual three-member panel.⁷⁸

The parties involved may directly forward their case to the Committee or be submitted by the Civil Rights Directorate of the Police. The non-prevailing party can appeal a Commercial Paper Committee judgment within fifteen days of the issuance of the decision. All appeals are forwarded to the Legal Committee (LC) in the Ministry of Commerce, which can verify, modify or invalidate the previous verdict.

According to the Minister for Commerce, Resolution No. 487, which was ratified in 1991, some protest offices were created in a number of Saudi Chambers of Commerce and Industry, including the Riyadh Chamber of Commerce and Industry, Jeddah Chamber of Commerce and Industry, al-Dammam Chamber of Commerce and Industry and al-Madhah Chamber of Commerce and Industry. A legal adviser from the Legal Division in each Chamber of Commerce and Industry generally deals with cases regarding the Commercial Papers where the adviser endeavours to resolve the matter amicably before referring the disputes to the Commercial Papers Committee, if no acceptable settlements were arrived at.⁷⁹

2.3.5[B] The Committee for the Settlement of Banking Disputes (CSBD)

In 1985, a Resolution passed by the Minister for Commerce mandated that disputes, which arise between banks and their clients because of banking contracts and transactions, be

⁷⁷ The Ministry of Commerce and Industry Resolution No 354 dated 05/11/1388 AH (1968 AD).

⁷⁸ Turck Nancy, *supra* note (60) 422.

⁷⁹ The Minister of Commerce Resolution No 487 dated 19/06/1411 AH (1991 AD).

forwarded to the Legal Committee in the Ministry.⁸⁰ This Legal Committee is made up of three legal advisors employed or seconded to the Ministry of Commerce, instead of the Commission for the Settlement of Commercial Disputes or the Commercial Paper Committee.

A number of legal writers questioned the validity of this resolution since the Commission for the Settlement of Commercial Disputes and the Commercial Paper Committee had been created by resolutions of the Council Ministers and their jurisdiction could not take the place of a ministerial resolution.

Following the mandates of the Council of Ministers Resolution No. 792/8,⁸¹ a conciliation committee composed of three members was created within the Saudi Arabian Monetary Agency (SAMA), the Central Bank, to review disputes between banks and their clients, not related to commercial paper. Additionally, the Commission for the Settlement of Commercial Disputes and the Shari'ah Courts were directed to defer hearings of all banking cases and forward them to the Office of the Presidency of the Council of Ministers for transfer to the SAMA Committee.

In practice, the Committee for the Settlement of Banking Disputes, initially, tries to resolve a case through an amicable settlement. If in any case it fails, it has the capacity to issue an absolute binding decision on the case.

2.3.5[C] Customs Committees (CC)

The Customs Regulation, which was promulgated in 1953,⁸² established the Custom Committees to handle cases which involve smuggling or attempted smuggling.

Each Primary Committee is composed of four customs officials and a legal advisor. Decisions handed by these Committees are done so by a majority vote and are subject to appeal until after fifteen days of the party's acceptance of the notification of the decision. Otherwise, the verdict becomes absolute and executable. The right to appeal is restricted to the defendant and the General Director of Customs.

There are two Appeal Custom Committees. One is based in Riyadh and the other in Jeddah. It consists of three members who render decisions on all appeals coming from the

⁸⁰ The Minister of Commerce Resolution No 822 dated 13/04/1406 AH (1985 AD).

⁸¹ The Council of Ministers Resolution No 729/8 dated 07/10/1407 AH (1987 AD)

⁸² The Royal Decree No 425 dated 05/03/1372 AH (1953 AD).

Primary Customs Committees within their territorial authority. All verdicts are handed down based on a majority vote and must be endorsed by the Minister for Finance and National Economy.

2.3.6[D] The Committees for the Settlement of Labour Disputes (CSLD)

The Labour and Workmen Regulation of 1969 established two levels of committees for the resolution of labour disputes as follows:

- i) The Primary Committee
- ii) The Supreme Committee

The Primary Committee is based in Riyadh and Dammam and each consists of a panel of three members. The Chairman of each Primary Committee should have a degree in the Shari'ah and at least one of the other two members too must have a degree in the Shari'ah or law.

The Primary Committees can render final decisions on:

- Disputes wherein the amount involved is not in excess of 3,000 Saudi Riyals
- Stays of execution of unlawful termination
- Disputes concerning fines or request for exclusion from fines

Moreover, the Primary Committees have authority, in the first instance above all other labour disputes.

The Supreme Committee on the other hand, is found in Riyadh and consists of a five-member panel. The panel is made up of three representatives of the Ministry of Labour and Social Affairs, one member from the Ministry of Commerce and one member from the Ministry of Petroleum and Mineral Resources.

When a labour dispute arises, it is forwarded to the Labour Office at the region where the employee is working. If the Labour Office is not successful in negotiating an amicable settlement between the two parties, the case will be forwarded to the Primary Committee in its territorial jurisdiction.

The Primary Committee does not have final jurisdiction and the decision can be brought to appeal within thirty days of the date of receipt of the notification of the decision to the Supreme Committee. It can nullify the decision in whole or in part. Supreme Committee judgments are absolute and executable.

2.3.6[E] Other Specialized Judicial Organs

There are still other specialized judicial organs, which have limited authority following regulations. For instance, the Committee on Settlement of Insurance Disputes that is mandated with the adjudication of insurance disputes and the Environmental Committee are below the presidency of the Meteorology and Environmental Protection which entertains environmental claims. It should be noted that most of these committees have judicial powers and an order from the committee can be appealed to the Board of Grievances.

CHAPTER THREE:

ARBITRATION IN SAUDI AND ISLAMIC LAW

3.0 Introduction

This chapter will delve into the evolution of arbitration in the Kingdom of Saudi Arabia (KSA) through Shari'ah and legislative paths. It discusses how arbitration emerged and evolved as a concept in the Kingdom. It presents how arbitration is aligned with Shari'ah and as part of Saudi's legal system.

3.1 Demand for Arbitration in Saudi Arabia

Increasing globalization in commerce subsequently increases the prospects of disputes between commercial partners, be it between businesses, governments or businesses and governments. Going through a litigation process to resolve commercial disputes entails longer periods of court appearances and waiting for court decisions as well as higher litigation expenses. A foreign company will also find it hard to deal with a country's legal system which they are not familiar with. Many of foreign companies would rather, prefer to settle it out of court with their disputing partners instead of going the legal way. Thus, arbitration has become a popular alternative for an economical and speedy resolution to international commercial disputes.

Arbitration is generally defined as a method of dispute resolution wherein disputing parties refer to an impartial arbitrator to legally resolve their disputes by carefully looking at the facts of the dispute issue that will be presented in the arbitration tribunal⁸³. Thus, it is much simpler compared to a litigation process. This is also the reason why many foreign companies prefer to include provisions for arbitration in their investment contracts in a given domestic economy.

Arbitration is considered impartial and flexible when it comes to choosing procedures.⁸⁴ This makes it easier for foreign investors, for instance, to opt for a procedure that will not

⁸³ Al-Ahdab A, 'The responsibility of the Arbitrator' (1988) 90 The Journal of Arab Arbitration .

⁸⁴ Forde Michael, *Arbitration Law And Procedure* (Round Hall Ltd 1994).

hamper their operations. Hiring a specialist arbitrator who understands the issue being disputed as well as the legal background surrounding it, regardless of whether or not they are lawyers,⁸⁵ makes the arbitration process much easier to deal with. In addition, there are many countries that enforce arbitration worldwide, making it a widely acceptable option for dispute resolution. Foreign companies are assured of the existence of arbitration as an option when they invest in a certain country that allows it as an alternative dispute resolution mechanism.

Although arbitration has its advantages as an option for dispute resolution, it also has its perceived disadvantages. The risk of an unequal decision in arbitration awards is the common disadvantage perceived by some parties. The lack of a jury to review the facts of the dispute is also seen as a disadvantage; hence many parties prefer going through a litigation process. Another disadvantage seen, is the potential for spending a much higher amount in finding suitable arbitrators. Many are also sceptical of the procedures that the arbitration panel may adopt and which, at times, may be biased towards one of the parties.

Emergence of Increased Demand for Arbitration in Saudi Arabia

The Kingdom of Saudi Arabia benefitted from globalization mainly through foreign investments generated by its economy. These investments opened up employment opportunities for the country's citizens and also provided additional federal income that could be used to fund government spending on infrastructure development and social services. Investments actually started coming in with the growth of the country's oil industry. Later on, the country's development plans supported promotion of foreign investment in non-oil industries to encourage economic growth. This resulted in an increase in commercial activities, which subsequently led to an increase in the number of contractors carrying out infrastructure development projects as well as other investment partners in other industries.

The Kingdom of Saudi Arabia is a signatory to the New York Convention⁸⁶ which acknowledges arbitration as a method of international commercial dispute resolution. Member countries are obliged to enforce the awarding of dispute resolution. Saudi's economy benefitted significantly from the country's openness in declaring support for the arbitration process as an alternative to dispute resolution. International companies invested heavily in Saudi Arabia as a

⁸⁵ Crowther Harold, *Introduction to Arbitration* (McGill University 1998).

⁸⁶ United Nations Commission on International Trade Model Law on International Commercial Arbitration, 1985.

result. This has expanded Saudi's investment relations which span an estimated 155 countries.⁸⁷ Further, the country's foreign trade posted an estimated growth rate of 41% from 2004 to 2005 with absolute amounts of 640.30 billion riyals and more than 900 billion riyals⁸⁸ respectively.

3.2 Evolution of Arbitration in the Kingdom of Saudi Arabia

Arbitration only became popular in Saudi Arabia over the past four decades. However, its existence in the Arab society dates back even before the onset of Islam in the region. The following section briefly discusses the evolution of arbitration in the Kingdom of Saudi Arabia. The discussion begins from the existence of arbitration as an acceptable mode of dispute resolution before Islam became the religion in Saudi Arabia, followed by its evolution as an acknowledged practice under Islam and finally how it evolved into Saudi's legal system when it became a necessary tool for the country's development.

3.3 Arbitration Before Islam

The evolution of arbitration in KSA can be traced back to the pre-Islamic period. Arbitration was the primary means of dispute resolution⁸⁹ in the Arab world during the pre-Islamic period. There is proof verifying that arbitration was used during the ancient civilization, particularly in Egypt, Mesopotamia and Assyria. It followed a simple process but with no set rules to make it a systematic arbitration process. It first involved the disputing parties trying to resolve their issues through negotiations in cases touching on matters such as succession, property ownership among others. If such negotiations yielded no fruits, members of tribal communities would then their disputes to their tribal chiefs for resolution. The tribal chiefs would then appoint an arbitrator, known as a *hakam*, usually a male of high moral standing in the community with a reputable family background in dispute resolution. However, it was not mandatory for community members to go into arbitration when they had conflicts. Besides, the awarding of a decision was not obligatory but relied mostly on the powers of the arbitrator⁹⁰.

87 Chamber of Commerce and Industry; Dr. Abdallah Al-Hammudi, 'Foreign Trade of the Kingdom of Saudi Arabia' (2006) 24 Business World Magazine .

88 Ibid.

89 Ibn Saad M, *At-Tabaqat Al-Kubra* (Dar Sadir Press 1968).

90 Al-Bjad M, *Dirasah Li Niham at-Tahkikm*, (1st edition, Public Administration Institute Press 1990).

This information illustrates that Arabs were already familiar with the concept of arbitration even before the practice of Islam. They had already embraced and applied it in conflict resolution prior to the onset of Islam.

3.4 Arbitration under Islam

Considering that arbitration existed long before the coming of Islam, it can be argued that it is therefore, easier for Arabs to view arbitration as a concept for dispute resolution when Islam acknowledges its use in everyday life. In fact, as early as 15 centuries ago, Islam was already in favour of arbitration as a way of resolving disputes in the different facets of Muslim life. Such disputes arose in areas such in family affairs, religion, economy, society and politics.⁹¹ Since KSA is an Islamic nation, arbitration is a key component of its Islamic law. The Quran, Sunna, Ijma and Qiyas are the four sources of Islamic law that recognize arbitration as an important component of dispute resolution.

3.5 Arbitration as a Tool for Development:

As previously mentioned, supporting the arbitration process became a necessity for Saudi Arabia as it pursued economic development in the midst of globalization. Attracting foreign direct investments has been a key component in the development plans of the country. In particular, the expansion of the country's oil industry as well as the expansion of its foreign trade to more than 150 economies⁹² made arbitration a necessary component in attracting investment to the country. As earlier indicated, the pursuit for an increase in trade consequently resulted in an increase in commercial disputes between economic partners or between the government and its contractors. This phenomenon threatened to overwhelm the Saudi legal system given the potentially huge number of disputes that were likely to be filed in the courts. Also, institutionalizing an arbitration process within the legal system of the country would encourage continued confidence from foreign investors. This implies that the economy would continuously benefit from employment generation, entrepreneurial opportunities and increased government income among others. Thus, arbitration in Saudi Arabia at this point evolved from the bassinette of Islam towards economic development.

3.6 Arbitration in the Saudi Legal System

91 Ad Diri, *Aqd at Tahkim Fi al-Fiqh al-Islami* (1st edition, Dae al Khuld, 1985).

92 Chamber of Commerce and Industry, 'Foreign Trade of the Kingdom of Saudi Arabia' (2006) 24 Business World Magazine Business World Magazine 8.

The need to address investors' concerns in their contracts led to the institutionalization of arbitration into a separate law in KSA. The Saudi Arabia Arbitration Law was legislated in 1983⁹³ and its Executive Implementation issued in 1985.⁹⁴ Thus, to address concerns of its target market for its development plans, Saudi Arabia elevated arbitration into its legal system in order to pacify the concerns of its foreign investors. It should be noted, though, that the Arbitration Law is solely based on the Shari'ah Law or Islamic Law.⁹⁵ Thus, it seems that arbitration has come full circle in Saudi Arabia with its foundation going back to Islamic Law.

3.7 Arbitration under Shari'ah:

Sources of Shari'ah

The Quran and the Sunnah as well as the other two sources of Shari'ah recognized the principle of arbitration as a tool for conflict resolution. The Quran is the principal source of Shari'ah. Chapter two describes it as the Holy Book of Islam that regulates the relationship between God and man and between man and fellow man. Several verses in the Quran use the rule of arbitration in the Muslims' daily life. For example, the Quran specifies the use of two arbitrators in cases of spousal disputes wherein each spouse is represented by an arbitrator.

The Quran stipulates the authority of the government and the person it appoints to judge the results of the decision of arbitration as Allah's representatives. The Quran also signifies that offering compensation to a person who has been a victim of an erroneous act is justifiable based on the decision of two arbitrators. The following is the excerpt from the applicable verse: "The compensation is an offering, brought to the Ka'ba, of a domestic animal equivalent to the one killed, as adjudged by two just men among you."⁹⁶

On the other hand, the Sunnah contains the practices and sayings of the Prophet Mohammed. There are several instances where arbitration is resorted to in the Sunnah. For example, Prophet Mohamed arbitrated between tribes in determining who was to have the honor of transferring the sacred black stone to the Ka'ba. All tribes wanted to have that honor, hence none wanted to give way to the other, resulting in a dispute and possible tribal war. Prophet

93 Appendix I, Saudi Arbitration Law of 1983.

94 The Executive List (1985) of Saudi Arbitration Law (1983).

95 El-Ahdab Abdul Hamid, 'Arbitration in Saudi Arabia under the new Arbitration Act 1983 and its Implementing Rules of 1985, 1986' (2011) 3 Journal of International Arbitration 79.

96 Quran, Surah 5 Verse 95.

Mohamed decided to give the award to all heads of the tribes, meaning that they would be the ones to carry the sacred stone to the Ka'ba⁹⁷. Thus, no single tribe would lay claim to the honor, rather, they would all feel honoured. Another instance where arbitration was used in the Sunnah was when Saad bin Muaz arbitrated on the problem of Bani Qurayza Jews.

3.8 Arbitration under the Four Main Islamic Schools and Contemporary Muslim Schools

As mentioned earlier, there are four main Islamic Schools that define commercial arbitration in line with their respective interpretation of the Shari'ah law. In general, all of these schools share a common definition of arbitration, emphasizing on three components namely: the settlement of disputes, the presence of an arbitrator to guide dispute settlement and the application of judgment. Even the contemporary Muslim schools share this component in their definition of arbitration with emphasis on a binding decision based on the Shari'ah as instituted by the Organization of Muslim Conference through the Islamic Jurisprudence Panel.⁹⁸

The process of choosing a suitable arbitrator is the crucial step in carrying out these components. Each of these schools has its own dispute resolution doctrines and stand with regard to choosing arbitrators as well as the supposed nature and scope of arbitration.

3.8.1 The Hanbali School

The Hanbali School's teachings are profoundly based on the Quran and the Sunnah. The school stresses that an arbitrator must be chosen based on a particular set of qualifications, similar to those of a court judge because an arbitrator's decision is compulsory and binding under Shari'ah;⁹⁹ hence, disputing parties must accept his decision, particularly the award. However, an arbitrator's representation of one party is open to revocation as long the decision or award has not been reached yet. A disputing party can revoke the right of an arbitrator to represent it if the decision to do so is done before a decision is reached. The logic behind this is the view that arbitration is likened to the power of attorney, wherein it can be revoked any time a member of the disputing party finds it necessary. The Hanbali School allows the use of arbitration in all types of disputes. However, in some instances, it exempts parties from punishments that were decreed in the Quran.

⁹⁷ Ibn Hisham , *as-Sirah an-Nabawiyah* (Dar Ihya a-Turath 1945).

⁹⁸ Abul Enein, 'Liberal Trends in Islamic Law (Sharia) on Peaceful Settlement of Dispute' (2000) 2.J. Arab Arb 1. 82 .

⁹⁹ Dusuqi Muhammad, *Hashiat at-Dusuqi ala ash-Sharh al-Kabir* (Dar Ihya al-Kuttub al-Amiah 1990).

It is worth mentioning at this point that the Hanbali is the officially recognized authoritative school in the Kingdom of Saudi Arabia and the foundation of its legal system. The school's high regard for the Quran and Sunnah has on numerous occasions, threatened to make it unpopular due to what was viewed as intolerance to other views from different quarters as well as segregation against its opponents in judicial and leadership offices. According to the school, teachings from the Quran and Sunnah take precedence over all other opinions and consensus.

3.8.2 The Shafi School

Like the Hanbali School, the Shafi School also emphasizes that an arbitrator must meet certain requirements to settle disputes between parties. It considers arbitration as a legal process even in the absence of a judge to supervise over it. However, it allows the revocation of arbitrators even up to the point where the award is issued, due to the logic that the power of an arbitrator is the same as the power of attorney, which is a similar view to that of the Hanbali School. Thus, it gives lesser importance to arbitrators compared to court judges because it limits the scope of arbitrators to the reconciliation of disputing parties. The dispute must be referred to a judge if the reconciliation between parties is not reached through arbitration.

The Shafi School classifies dispute cases or issues to guide in determining whether arbitration is the necessary tool for dispute resolution. The first classification is the disputes allowed for arbitration which are considered forgivable offenses such as about money and contracts. The second classification involves issues that involve unforgivable offenses such as the rights of Allah and the custody of orphans. The third classification involves disputable issues that can either be the subject for arbitration due to agreements of parties or not, due to the absence of jurisdiction of the law on arbitration such as the regulation of marriage.

3.8.3 The Hanafi School

The Hanafi School does not stipulate any criteria to select an arbitrator. It stresses, though, the close connection of arbitration to conciliation prompting it to limit the scope of arbitration to reconciliation only. However, it puts lesser weight on award compared to a court judgment.¹⁰⁰

The Hanafi School emphasizes that arbitration is basically a contract between two parties to settle their disputes; hence they are obliged to accept the award or the arbitrator's decision. However, like the Shafi School, it stipulates that the issue of dispute must be brought to a court judge if reconciliation is not reached between the two disputing parties. It believes that the court

100 Ibn Kuthaie, *al-Bidaya Wal Nihaya* (Dar ul Marifah 1987).

judge has the sole capability to issue decisions with legal standing. Just like the Hanafi School, it also allows arbitration in all dispute issues except for those issues with punishments that are already established in the Quran.

3.8.4 The Maliki School

The Maliki School does not have any set of criteria or qualification for the selection of arbitrators. It binds the arbitrators to first seek reconciliation between disputing parties. Like the Hanbali School, it favors arbitration that directly leads to a binding decision. It is very confident with the process of arbitration to the point that it allows an opposing party to be selected to arbitrate between parties. Further, it supports the formation of a tribunal that is acceptable to both parties. Unlike the Shafi School, however, it does not allow for the revocation of the role of arbitrator particularly after the process of arbitration has already started.¹⁰¹ Just like the Hanafi School, it does not allow arbitration for punishments that are already decreed in the Quran. It also does not allow arbitration to be used for personal issues such as divorce, marriage and relationship issues.

3.9 Islamic Schools' Common Views on Arbitration

With regard to arbitration, the different schools of Islam share some common views, most of which are Shari'ah-based. For instance, all of these schools believe in the conformity to the rule of contract. There has to be an existing dispute and the disputing parties must mutually consent to participate in the process of arbitration. Likewise, the recommended arbitrator, who should be acceptable to both parties, is offered the role to arbitrate and which he must accept. This mutual consent between the parties and the arbitrator's subsequent acceptance to participate in the arbitration process conforms to the rule of contract,¹⁰² which has the aspect of offer and acceptance.

Another common view among the Islamic Schools is the decision to only allow issues to qualify for arbitration, if they are consistent with the provision of Shari'ah. The arbitration must also be carried out and the dispute determined in accordance with the Shari'ah. Lastly, the schools also have the same opinion that closed door meetings of disputing parties in arbitration is an important aspect to the process so as to probably reach conciliation.

3.9.1 Differing Views on Arbitration among the Islamic Schools

¹⁰¹ Ibid.

¹⁰² Abdin Meerzain, 'Radd al-Mukhtar' (1956) 5 alaa Durr al-Manthur 88

Although, the four schools of Islam share some common views on arbitration, they also have, in some areas, differing views about it. Despite all the schools believing in the validity of the arbitration contract, there are other aspects of the contract that each school considers more weightier than others. For example, the Maliki school stresses on the neutrality of the arbitrator; the Hanbali school on the arbitrator's qualifications while the Hanafi school does not believe in the contract's binding effect.

As earlier discussed, the schools also differ on the issue of revocation of the role of an arbitrator. The Shafi and Hanbali Schools such revocation so long as it is done prior to the rendition of the arbitral award while the other two Schools do not allow for revocation of the role of arbitrators after the arbitration process has already started. The latter view is significant in the sense that it meets international standards with regard to commercial arbitration.

The nature of disputes up for arbitration also does vary from one school to the other. A wider range of cases are allowed for arbitration by the Hanafi School than the rest of the schools. However, cases with fixed, publicly administered punishments are prohibited for arbitration by the Hanafi school. This stand is shared by the Shafi and Malik schools, which also in addition, forbid arbitration in family related cases. The Hanbali school allows arbitration in certain cases involving fixed, publicly administered punishments depending on the subject matter. All compensation and financial cases are allowed for arbitration by the Shafi and Malik schools.

Further, three schools, namely Maliki, Hanbali and Shafi do not allow women to act as arbitrators. In contrast, the Hanafi School looks at women with an equal sense of acumen as men; hence it allows them to serve as arbitrators. On the other hand, the Maliki and Hanbali Schools are open to the idea of utilizing non-Muslim legal systems in cases where one of the disputing parties is a non-Muslim. The views of these two schools are confirmed to be practiced today when many Muslim countries sign the terms of the New York Convention which pursue arbitration using a non-Islamic legal system.

3.9.2 Application of Commercial Arbitration under Saudi Law

Arbitration is recognized by Islamic Law which approves its use in all levels of dispute resolution within the acceptable tenets of Islam. The different schools of Islam accept issues for arbitration that are not against the teachings of Islam, such as issues to do with lending money with interest, which is considered anti-Islamic. The Quran teaches the followers of Islam that they must use arbitration to resolve conflicts so long as it does not breach the decrees of Allah. It is therefore expected that Shari'ah or Islamic Law is the base of the Saudi Arbitration Law and

its executive implementations issued in 1983 and 1985 respectively. It is for this reason that arbitration is not allowed for issues that are anti-Islamic.¹⁰³

Shari'ah and other pertinent laws must apply to the concept of arbitration in Saudi Arabia. It is for this reason that arbitration somewhat follows a private law practice wherein disputing parties agree to go into arbitration to resolve their disputes. The arbitrator's ruling is considered legally binding, particularly the ruling on compensation.

3.9.3 The Saudi Arbitration Law

The passage of the Saudi Arbitration Law in 1983 legalized the concept of arbitration in KSA. This law allowed the government to go into arbitration in order to resolve conflicts with commercial companies as well as those between commercial companies. The government though, needs the approval of the Prime Minister in order to resolve its conflict with a commercial entity through arbitration.

Saudi Arabia experienced an immense surge in commercialization due to the economic development focus of the government in the last four decades. Such development is mainly brought about by the expansion of the oil industry and the outward-looking development plans of the government. This phenomenon popularized the demand for commercial arbitration in the country. International commercial entities prefer arbitration over litigation since they do not want to delve into the judicial process of a country that they are not familiar with. Also, arbitration is much simpler, faster and flexible.

The following sections present the salient points of the Saudi Arbitration Law, particularly in reference to commercial arbitration and its application in Saudi law.

3.9.4 Nature of Arbitration

Article 1 of the Saudi Arbitration Law specifically stipulates that arbitration should be voluntary. Disputing parties are not mandated to go into arbitration. The law implies that arbitration is a private matter and is not linked to any organization that promotes arbitration. It means that the sole parameters of the arbitration process are within the decision of the disputing parties and not of any procedures of a particular organization. The parties are the ones that decide the time and place of the arbitration proceedings. The proceedings must be held in private since commercial parties prefer to protect the secrets of their trade.

103 Juhani Al, 'Explaining the New Saudi Arbitration Law' (2005) 40 Chamber of Commerce Magazine 6.

Arbitration between commercial entities is considered an internal affair within Saudi Arabia; the country applies Islamic law in applying arbitration. It is for this reason that Arabic is the main language used in the arbitration process, testimonies of witnesses and preparation of documents. It is also considered internal to Saudi Arabia since the approval of the judiciary is required over the arbitration process document.

The government of KSA, however, does not stifle the right of the disputing parties to raise the issue of arbitration to any regional or international arbitration centres. After all, the country is a member of several regional and international agreements that regulate the process of arbitration and its subsequent enforcement of the award.

Limitation of Arbitration

The Saudi Arbitration Law does not allow anti-Islamic dispute issues to be covered by arbitration. For example, a dispute about money lent at an interest will not be covered under the arbitration law since lending money at an interest is considered anti-Islamic. Article 2 stipulates that cases allowed for arbitration are those that are allowed for conciliation. This is the basis upon which cases related to marital disputes and public order such as naturalization offenses, financial regulation, taxes, criminal offenses and inheritance issues are not accepted for arbitration, as these are not allowed for conciliation. These issues can only be ascertained by the government through the judiciary.

3.9.5 Components and Process

The Saudi Arbitration law stipulates the processes and components involved in arbitration that any commercial entity must go through under a commercial arbitration process. First, the disputing parties must have an arbitration agreement which signifies that they are voluntarily going into arbitration to resolve their dispute. They will then enact a contract identifying the place and time for the arbitration process as well as the procedures and applicable laws. Once this has been complied with, both parties go on to the second process which is the appointment of their chosen arbitrators to represent them in the arbitration proceedings. Evidence and witnesses from both parties will be presented through these arbitrators. They will then go forward with the arbitration proceedings; which is the third process, wherein the disputing parties face each other at a venue previously agreed upon.

. The fifth process involves the preparation of the arbitration document which contains the results of the arbitration or the agreement that was reached during the same. It must be submitted to the assigned judicial office that supervises the arbitration process. This office will

then give its judicial approval as part of the sixth step in the arbitration process. The judicial approval must be given within 15 days after being submitted.¹⁰⁴ It should be noted that the assigned judiciary is required to record the request for arbitration put forward by both parties after deciding to go into arbitration.

The seventh step in the arbitration process is the issuance of award which must be made on the date set in the arbitration document. However, if the arbiters failed to set an award date, then it must be set 90 days after the approval of the arbitration document.¹⁰⁵ The arbitration document serves as the summary of all oral statements and documents of the parties; hence the reasons and wordings of the award, the date of its issuance and the signatures of the arbitrators¹⁰⁶ must be included in the document. If this has been complied with already, then, the eight step in the arbitration process must be enacted, which is the authentication and notification of the parties on the award issued in the process. The award issued by the arbitrators must be deposited within five days to the judicial authority supervising the arbitration process.¹⁰⁷ The disputing parties will each receive a copy of it. The disputing parties can appeal the award, which represents the ninth step in the arbitration process, 15 days after the judicial authority has been notified of the same.

3.9.6 Application Issues

More and more parties are inclined to go for arbitration in resolving disputes than opting for litigation. As a result, there are issues that shroud the application of the Saudi Arbitration Law. For instance, it is faced with issues of ambiguity between arbitration and reconciliation. Although arbitration is the main goal of the law, it also encourages that disputing parties make an effort to reconcile first. Further, arbitration is only allowed for cases where reconciliation is endorsed. Also not clear within the law is the requirement to enforce an arbitration agreement in order to make the arbitration contract valid and substantial. The law also fails to define *arbitration*, which is aggravated by the absence of precedent cases as reference for law experts and arbitration researchers.

Another ambiguous aspect of the Saudi Arbitration Law is the role of the judiciary when a party appeals the award. It does not directly stipulate who will look into the objection to the award.

104 Art 6, Saudi Arbitration Law of 1983.

105 Art 9, Saudi Arbitration Law of 1983.

106 Art 17, Saudi Arbitration Law of 1983.

107 Art 18, Saudi Arbitration Law of 1983.

Furthermore, there is also an issue against the Saudi Arbitration Law concerning the consistency of the law with reason, making more people prefer arbitration over litigation. The main reason why commercial partners prefer arbitration over litigation is due to the faster pace of decision making in the former than the latter. However, it is ironical to note that initiating the process of arbitration through ratification takes about three months to complete; which is considered too long.

The provision in the law that one of the parties can actually object to the award decision even after previously agreeing to it during the arbitration process makes up another point of irony within the law itself. In addition, the judicial authority has the option to revoke the award. In the end, it makes arbitration a meaningless option for dispute resolution.

Another impediment in arbitration concerns the exorbitant fees charged resulting from the high charges set by the parties for the arbitrators. The law states that the disputing parties agree on the fees of arbitrators and deposit it with the judicial authority.¹⁰⁸ Arbitration, in the first place, is supposed to be a better option for dispute resolution due to its lower cost as compared to litigation. However, in some instances this is not the case.

3.9.7 Perceived Factors that Could Make Arbitration a Success in Saudi Arabia

Arbitration has become a popular choice to resolve commercial disputes. However, there are still factors that can make arbitration more successful in Saudi Arabia, particularly the implementation of the Saudi Arbitration Law. First, there should be clarity on the judicial review of arbitration awards, which must be identified and be in line with international standards, if applicable. This will help lessen the ambiguity of the law when it comes to the role of judicial authority in the review of awards. It is important to note that while Saudi Arabia subscribes to the Hanbali school of thought, which considers arbitration as good and binding as a court judgement, the law has not been previously clear on whether judicial confirmation ought to be sought in the event that the opposing party is unwilling to comply with the award. Secondly, institutional arbitration centres must be established to standardize arbitration procedures.

3.9.8 The New Saudi Arbitration Act

The Kingdom of Saudi Arabia, through Royal Decree M/34 dated April 16, 2012 approved a new law of arbitration to replace the old 1983 regulation that had been in force. This was after approval of the new law by the country's Council of Ministers. In keeping with the New Arbitration Law's Article 58, the law was enacted 30 days following its publication date on

¹⁰⁸ Art 22, Saudi Arbitration Law of 1983.

July 9, 2012. This was in accordance with 19 Sha'baan 1433H. The New Arbitration Law is founded on the UNCITRAL Model Law on International Commercial Arbitration, which is commonly referred to as the Model Law. It is essential to mention that, the Model Law was initially adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL).¹⁰⁹ The Model Law was subsequently modified in 2006 and used as the foundation for the arbitration laws in many nations. The Model Law is intended to facilitate countries in improving and updating their laws on *modus operandi* by taking into consideration the distinct attributes and requirements of global commercial arbitration. Saudi Arabia has employed the Model Law on a foundational level and is consequently making important amendments to deal with pertinent issues, especially by the continual assertion that the arbitration procedure must not contravene Shari'ah Law, in line with the Kingdom's practices.

It is worth acknowledging that the new law promises a raft of changes to the arbitration regime in Saudi whose full effect, however, can only be felt in its application and implementation. Among some of the changes in the new law is the high level of autonomy granted to the disputing parties in determining various important aspects of their arbitration. For instance the parties are allowed the liberty of recognizing institutional rules of arbitration in their arbitration procedure. This happens to bear much similarity with the Model Law. With the arbitration process being conducted under a set of recognized institutional rules, such as those of the International Chamber of Commerce, the uncertainty and confusion that prevailed in the old laws is eliminated.

Apart from being allowed to choose their own governing law, the parties too, have their way with regard to choosing their language of proceedings and arbitrator. Previously, the arbitration proceedings were conducted in Arabic and under the Saudi law. In addition, unlike in the old repealed laws where the arbitration agreement had to be validated by the courts prior to commencement of the arbitration, the new law does away with this requirement.

In another similarity to the Model Law and in the interest of international best practice, the new law grants the arbitrators powers to examine and determine the weight and degree of admissibility of the evidence submitted by the parties. Upon claims by one of the parties that the other party has falsified documents, the law allows the arbitration case to proceed alongside any

109 UNCITRAL, *Digest of Case Law on the Model Law on International Commercial Arbitration* (Vienna UNCITRAL Secretariat 2012).

other parallel proceedings, even if criminal in nature, instituted by the offended party. This in effect, does away with the delay tactics witnessed under the previous law.

Another change of much interest in the new law is the empowerment of the Saudi law courts, if called upon by arbitrators, to assist by supporting the arbitration process. It is worth noting that there have existed challenges in the past pitying the arbitration against judicial processes in Saudi Arabia especially with regard to the enforcement of awards. The courts, under the old law, had to ratify the award before it could be enforced. The new law outlines, exhaustively, the grounds for annulment of an arbitral award, most of which bear great resemblance to those of the model law. This close resemblance between the new Saudi Arbitration Law and the internationally popular UNCITRAL Model Law is meant to build a business-friendly environment for prospective foreign investors seeking to enter the country's market.

Finally, and of great interest also, is the doing away of the requirement in the old law that barred non Muslims and women from serving as arbitrators. The only requirement emphasized in the new law is with regard to qualifications, where the chief arbitrator must be a university graduate with a degree in either law or Shari'ah.

In a nutshell, the new Saudi Arbitration Law is hailed as a significant step towards modernising the arbitration regime in Saudi Arabia as well as attaining a more business-friendly environment for both local and foreign businesses. Most analysts opine that it is still relatively early to tangibly assess the impact of the new law on various aspects of the Saudi environment. However, one major issue remains of concern-the failure of the new law to explicitly address the issue of enforcing foreign awards in the Kingdom of Saudi Arabia. Being a signatory to a number of international treaties and agreements, it remains to be seen how Saudi Arabia will handle this seemingly thorny issue.

3.9.9 Implementing Regulations

The New Arbitration Law's implementing regulations are intended to complement, and clarify how the new law will be comprehensively implemented. The implementing regulations are not intended to introduce additional legislative provisions or articles.

3.10 Conclusion

Arbitration has evolved as a popular tool for dispute resolution amidst increasing international trade brought about by globalization in the Kingdom of Saudi Arabia. Out of necessity, the kingdom has had to adopt arbitration as a tool for international dispute resolution as demanded by its membership to different international treaties that support the enforcement of

arbitration awards. As a result, the country continues to benefit from this through increased foreign investments since its investment climate such as moving towards acceptance of foreign arbitration awards continues to improve. The various advantages of arbitration have made it a popular alternative to dispute resolution. Such advantages include: faster dispute resolution, lower costs, privacy and exclusivity to only the parties involved. However, there are also perceived disadvantages in employing arbitration in conflict resolution, such as biased decisions on arbitration awards and the lack of a jury in determining certain issues in particular disputes.

Arbitration was prevalent in the Arab society even in ancient times and this has also contributed towards making it a popular form of dispute resolution in the international community. Islam, as a religion, has been a fundamental component in the practice of arbitration owing to the fact that the arbitration laws were based on the Islamic Law. However, it can be recalled that arbitration has been in existence even during the pre-Islamic period making, it actually a common form of dispute resolution of all time, beyond religion and economic concerns. In fact, it was the basic form of dispute resolution in the absence of an Arab judicial system¹¹⁰ during the pre-Islamic period.

Commercial arbitration is duly supported by the Saudi government, both present and past as evidenced by the enactment of the Saudi Arbitration Law in 1983. Such a move made Saudi an attractive destination for investors who felt assured that they could rely on the process of arbitration to settle any commercial disputes without being victimized in the host country as parties were allowed the option of lodging arbitration proceedings at specific international arbitration centres. The government further sealed investor confidence when it subsequently ratified several regional and international agreements related to arbitration.

In spite of this development, Saudi's arbitration laws have largely been limited to the confines of pro-Islamic activities. Thus, arbitration is not an option if the subject of the dispute is considered anti-Islam such as a claim involving interest on loan, which is considered against Islam. The application, though, of Saudi Arbitration Law merits issues that need to be addressed by the Saudi government in order to strengthen its implementation. The goal is to make arbitration proceedings more understandable, if not predictable to potential parties so that they have enough knowledge on whether or not to use arbitration as an option to resolve disputes. Therefore, a lot still needs to be done with regard to the actual implementation of and commitment to the enacted laws in order to make arbitration fully effective as a method of dispute resolution.

110 Ibn Saad, *At-Tabaqat al-Kubra* (Dar Sadir Press 1968).

This chapter introduced arbitration by summarily looking at its advantages and disadvantages. These are important considerations for example, for companies involved in commercial disputes, to enable them choose whether to utilize arbitration or litigation in resolving such disputes. The preceding literature in this chapter shows that arbitration has far more advantages to disputing parties than disadvantages. From speedy dispute resolution through arbitration to the simplicity of proceedings and relatively lower costs, arbitration is arguably, a better choice. On the other hand, arbitration may only be a better choice for disputes involving small amounts of money or limited technical matters. Disputes involving complex issues related to the law must be better off when referred to the judiciary in order for the parties to get professional legal aid from the experts.

This chapter also discussed arbitration under Islamic law which, as pointed out, existed even before Islam. There being no developed and structured judicial systems at the time, arbitration was the primary dispute resolution mechanism. Upon the coming of Islam, it still acknowledged arbitration as an acceptable and effective method of dispute settlement. Supporting this fact, is the acknowledgement of arbitration in all sources of Islam such as the Quran and the Sunnah teachings. Islamic schools also contributed to the spread and acceptance of arbitration through their teachings. The discussion on the views of the four main schools of Islam reveals several similarities as well as differences in the practice and implementation of arbitration under Islamic Law (See text at sections 3.8, 3.9, 3.9.1 and 3.9.2). Such similarities and differences relate to issues such as qualifications gender, nationality and religion of arbitrators, strength of award, and intervention of a judicial authority in the arbitration process among others. One notable difference in views across the different schools of Islam is whereby one school, Hanafi allows women to serve as arbitrators while the other three do not. In such a scenario, it is then natural for disputing parties to utilize the school that is seen to favour their concern.

The Islamic schools as well as the Saudi arbitration law stipulate that only cases that lie within the boundaries of Islamic or Shari'ah law are admissible for arbitration. This means that it is likely for foreign companies to find it difficult to agree to arbitration under the Shari'ah law since some of its commercial transactions are considered anti-Islamic. Thus, Saudi Arabia's performance in the implementation of arbitration in the eyes of the international community can become a model for implementation in other Muslim countries. The new Saudi Arbitration Law has taken on the concept of arbitration from western legislations, particularly from English Law. Thus, even though the Saudi Arbitration Law is based on Shari'ah law, it is increasingly becoming popular among foreigners.

CHAPTER FOUR

MULTILATERAL INTERNATIONAL TREATIES ON ARBITRATION AND THEIR RECEIPT BY THE KINGDOM OF SAUDI ARABIA

4.0 Introduction

The need for expediency and fairness in the resolution of international disputes has inevitably led nations across the world to develop different mechanisms and put in place appropriate instruments to help concerned players resolve their disputes; and by so doing allow international trade and general commercial activities to thrive.¹¹¹ Arbitration is one such instrument whose development and use around the world has greatly improved dispute resolution not only at the national level, but at the international level as well.¹¹² The use of arbitration as a tool for dispute resolution has been enhanced worldwide by the adoption of various instruments put in place specifically for this purpose.¹¹³ Nations across the world have recognized the importance of having disputes on the international level resolved; and arbitration has been identified as one of the most effective means of resolving them.¹¹⁴ Unlike other methods of dispute resolution such as conciliation and mediation, arbitration benefits from the fact that there are internationally-enacted arbitration laws which make it possible for arbitration to be used even in cases that have an international dimension.¹¹⁵ Furthermore, dispute resolution by arbitration tends to be faster and easier than other mechanisms of dispute resolution owing to the fact that arbitration, as an alternative dispute resolution mechanism, offers a forum where for the use uniform international laws.¹¹⁶ The most common way of ensuring that arbitration is successful as a method of resolving disputes on the international level (as determined by the success in enforcement of awards) has been through the formulation and implementation, by nations, of not only bilateral but also multilateral international treaties on arbitration.¹¹⁷ Multilateral treaties play

111 Gary Born, *International Commercial Arbitration* (Kluwer Law International 2009).

112 Ibid.

113 Ibid.

114 Yves Dzalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Kluwer Law International 1996).

115 Mistelis Loukas and Brekoulakis Stavros, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009).

116 Ibid.

117 Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd ed, Kluwer Law International 2010).

a very important role in enhancing dispute resolution through arbitration, owing to their ability to achieve both standardization of the norms and uniformity; and as such, assessing and understanding the manner and extent to which the Kingdom of Saudi Arabia has adopted these treaties is of great importance.

Uniformity is very important in international law specifically for its ability to ensure that multiple jurisdictions can use the same law or legislation. This reduces the overall cost of whatever due process one opts for; and also makes it possible for international disputes or rows that involve parties from different nationalities to be resolved more expediently.

In order to better understand the impact that arbitration treaties have had on the implementation of foreign awards in the KSA, it is critical that a distinction be made between multilateral and bilateral treaties on arbitration. This is because the scope of application and enforceability of these two types of treaties has been different – at least within KSA. Bilateral treaties are agreements between two nations or between one nation and a group of nations. Therefore, the most fundamental principle is that such treaties involve two parties.¹¹⁸ Multilateral treaties are often utilized as vehicles of conformity to international norm while bilateral treaties are focused *sui generis* instruments which have limited legal remit. Regardless of the type of treaty chosen, any such choice always impacts arbitration in general and the enforcement of foreign awards in particular.¹¹⁹ For instance, although multilateral arbitration treaties are generally wider in scope and so more likely to bind nations that accede to them (because they are based on the principle of uniformity which in turn results in the principle of standardization of norms; both principles enhancing implementation at the domestic level by adopting minimum harmonization requirements), there are a number of such treaties that are very restrictive in nature,¹²⁰ as the case of KSA illustrates (see the subsequent sections and also the chapter on the grounds of exceptions of the NYC for details).

Therefore, having argued in this manner, it is also worth contending that KSA has tended to resist foreign awards even though it is a party to several multilateral arbitration treaties.¹²¹ This is because the Kingdom does not have in place a legal framework that is supportive of the

118 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003).

119 Gary Born, *International Commercial Arbitration* (Kluwer Law International 2009).

120 Grenville Ashleys, *The Major International Treaties, 1914-1945: A History and Guide with Texts* (Methuen 1987).

121 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003).

existing international legal norms.¹²² In essence, KSA has been rather conservative in its approach towards international arbitration, making the resolution of disputes between foreign and Saudi parties or between non-Saudi nationals who seek enforcement in KSA, rather difficult.¹²³ Most importantly, KSA has tended to prefer entering into arbitration agreements with nations that adhere to Islamic law as it is easier for KSA to arbitrate on the basis of this law. The norm that the Kingdom is party to the GCC and Riyadh Conventions best illustrates this.¹²⁴ The Kingdom strictly adheres to Islamic Shari'ah law with the Quran being the basic source of the law of the country.¹²⁵ To a large extent, Shari'ah law has been frowned upon by many foreign investors because of its tendency to discriminate between Muslims and non-Muslims; and it has also been viewed as generally less supportive of international trade which ought to be free and fair.¹²⁶ By making reference to the general hypothesis of this thesis that the recognition and enforcement of foreign awards in KSA has been at best lacklustre, examining multilateral treaties' reception in the country will prove or disapprove this argument. In essence, the function, adoption and use of multilateral treaties (their receipt and implementation by KSA) is one of the best ways of gauging the extent to which KSA has been willing to recognize and enforce foreign awards and so to generally contribute to international arbitration.

As the following sections that pertain to specific treaties demonstrate, KSA has nonetheless made significant progress regarding adoption of international arbitration treaties and conventions (though this is just a hollow demonstration of compliance that lacks real substance). This, notwithstanding its reservations with quite a number of them which gives the Kingdom the legal right not to conform to those specific issues, that it has reserved.¹²⁷ The main law that governs arbitration in KSA is the *Arbitration Act 1403* which was issued by Royal Decree No. M/46 of 26 April 1983.¹²⁸ This "Arbitration Act" is widely used in conjunction with the

122 Ibid 7.

123 Ibid.

124 Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd ed, Kluwer Law International 2010).

125 El Rahman , *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003) .

126 Habib Mohd and Sharif Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab State' (1999) 14/1 (33)*Arab Law Quarterly*.

127 Ibid.

128 M Alhoslan 'The Symposium of European-Arabian Arbitration' cited in El-Ahdab, *Arbitration in Arab Countries* v 2, 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91.

implementing regulation that was issued on 28 May, 1985 by the Council of Ministers Decree No. 7/2021/m.¹²⁹ According to Article 1 of the Arbitration Act:

It may be agreed to resort to arbitration with regard to a specific, existing dispute. It may also be agreed beforehand to resort to arbitration in any dispute that may arise as a result of the execution of a specific contract.

In essence, arbitration may be generally resorted to and applied in dispute resolution. However, little has been done to enforce foreign awards in the Kingdom.¹³⁰

This chapter undertakes an analysis of the various multilateral international treaties on arbitration; with the most emphasis being on the manner in which they have been received by KSA. These treaties are the New York Convention of 1958; the Washington Convention; the Convention of June 30 2005 on choice of court agreements; the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in civil and commercial matters; the Energy Charter Treaty; and the Riyadh Convention.¹³¹

4.1 Aim of the Chapter

This chapter's main aim is to assess the position of KSA with respect to progress towards enhancing international arbitration within its jurisdiction.

4.2 Main Objective of the Chapter

This chapter's objective is to illustrate KSA's general lack of commitment to the enforcement of foreign awards in spite of its demonstrated willingness and readiness to adopt multilateral international treaties on arbitration. This is especially where these awards have been granted by nations that do not strictly adhere to Islamic Shari'a law.

4.3 Convention on the Recognition and Enforcement of Foreign Awards (New York Convention (1958))

129 Ibid.

130 Habib Mohd and Sharif Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab State' (1999) 14/1 37 Arab Law Quarterly.

131 Grenville Ashley, *The Major International Treaties, 1914-1945: A History and Guide with Texts* (Methuen 1987).

The New York Convention is arguably one of the most important legal and political tools of modern time as far as addressing international commercial disputes is concerned.¹³² It is the most important multilateral treaty when it comes to arbitration.¹³³ The New York Convention was held in 1958¹³⁴ and through it a lot of political and economic harmonization took place. This harmonization entailed having barriers to trade lifted and the resolution of commercial disputes expedited and made more amicable especially on the international level.¹³⁵ However, disagreements about issues like how best to liberalize trade and enhance dispute resolution persisted years after the Convention. This called for the putting in place of a legal international instrument which could be applied in the resolution of commercial disputes on the international level, while at the same time enhancing trade liberalization.¹³⁶ Although a platform had been found to resolve international commercial disputes, this platform could not be agreed to by all members participating in the Convention because some of the Convention's provisions remained controversial.¹³⁷ With respect to the Convention's Article V, nations such as Saudi Arabia and Egypt expressed concerns that they could not be able to align themselves with its provisions without interfering with their own national laws. Discussions soon followed to try and remedy the situation.¹³⁸ Saudi Arabia is one of the countries that were discussed especially with regard to the differences in its legislative rules¹³⁹. This was because Saudi Arabia is governed by Shari'a (Islamic) Law, and for this reason the country has different legislative systems and yet the whole purpose of the New York Convention was to recognize and enforce foreign awards by ensuring that the country is also incorporated in the World Trade Organization regardless of its political and legislative differences¹⁴⁰. Generally, WTO advocates for free and fair trade; and among its

132 Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (London 2001).

133 Ibid.

134 Mustill Michael, 'Arbitration History and Background' (1989) 6 (2) J Intl Arb 43 at 49.

135 Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May London 2001).

136 Mistelis Loukas and Brekoulakis Stavros, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009).

137 Ibid.

138 Di Pietro D and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May London 2001).

139 John Hamilton, *Primary and Secondary Sources*, (Minn ABDO Pub)

140 Lew Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* p v and para 2, 14

basic and main objectives was ensuring the liberalization of international trade among its member states.¹⁴¹ Protectionism had for a long time stood in the way of free trade, subsequently hindering economic growth and development especially where the nations involved could not get free and unrestricted access to world markets.¹⁴² Following its 1994 accession into the WTO, KSA was supposed to move rapidly away from protectionism and adopt freer approaches to international trade and investment.¹⁴³ Part of this was to be achieved through ensuring that international investors in the Kingdom were assured of the security of their investments through being granted access to internationally-accredited methods of dispute resolution.¹⁴⁴ Most importantly, KSA was supposed to recognize and enforce foreign awards within its jurisdiction.¹⁴⁵

But to date KSA has remained a relatively protectionist state, applying what can be described as double standards by treating its nationals more favorably than foreigners seeking enforcement of judgments rendered elsewhere. This is best exemplified by the case of Emaar, where a non-Saudi firm was denied an award in favour of a Saudi firm.¹⁴⁶ In the 2009 case, the Board of Grievances overturned an award earlier granted in favour of Emaar completely reversing the result by ordering Emaar to pay US\$228 million in damages and granting various other reliefs to Jadawel.

Emaar Properties, a Dubai based real estate developer and Jadawel International, a Saudi Arabian company entered into an agreement in December 2003. The terms of the agreement

141 Kofi Annan, 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference in International Commercial Arbitration' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 2.

142 Kofi Annan, 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference in International Commercial Arbitration' (Enforcing arbitration awards under the New York Convention: experience and prospects 1998)3.

143 Mistelis Loukas and Brekoulakis Stavros, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009).

144 M Alhoslan 'The Symposium of European-Arabian Arbitration' cited in El-Ahdab, *Arbitration in Arab Countries*, v 2, 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91.

145 Ibid.

146 Souhail Karam, 'Emaar Properties to appeal lawsuit ruling' <www.arabianbusiness.com/552235-emaar-compensationruling-reversed> accessed 11 April 2009; Emaar case (2009); Emaar Properties to Appeal ruling (11 April 2011); Mistelis Loukas and Brekoulakis Stavros, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

stipulated that its conditions were subject to the approval of UAE's competent authorities and Emaar's Board of Directors. In 2004, Jadawel International filed a case against Emaar at Saudi Arabia's Board of Grievances. In response, Emaar denied breaching the agreement and maintained that the deal was abandoned because the conditions had not been met. Saudi Arabia's Board of Grievances referred the case to arbitration in 2005, claiming that it had no jurisdiction to handle the matter. It is also worth noting that arbitration was the agreed mode of dispute resolution in the agreement stipulated in the contract. The arbitration was presided over by a three-member tribunal in Riyadh, Saudi Arabia, wherein Jadawel was seeking US\$ 1.2 billion in damages. After a two year long arbitration process, the arbitrators rejected Jadawel's claims ruling that the agreement was unenforceable with no binding effect on Emaar due to the fact that the conditions stipulated in the agreement had never been fulfilled. The arbitral award also ordered Jadawel to bear the legal costs in full. Emaar was also awarded the right to claim compensation in moral and material damages as well as the legal costs incurred. However, Jadawel filed an objection to the award and in 2009, upon re-examination by the Board of Grievances, the award was revoked. The Board of Grievances cited compliance with the Shari'ah law as a basis for its judgment. The revocation saw Emaar lose all the damages awarded to it in the first ruling and Emaar was instead, ordered to pay Jadawel over US\$250 million in damages. According to an unnamed Emaar spokesperson, "It is not clear yet how the whole arbitration process, which has taken over two years and ended with an award in favour of Emaar, was dismissed."¹⁴⁷

In August of the same year, Emaar Properties appealed against the decision at the Board of Grievances Court of Appeal seeking a ruling to reconfirm the original arbitral award. It would later emerge that the two companies had been working on an out-of-court settlement which ended in December 2010 with the case against Emaar being dropped and none of the parties claiming anything against the other. A statement posted by Emaar on the Dubai Financial Market's website read:

"In this respect, both companies would like to announce that the dispute has now been resolved amicably with neither party having any claim against the other in respect of the dispute. We would like to thank all the parties who participated in the efforts and assisted in the achievement of this amicable settlement."¹⁴⁸

147 For more details visit <http://www.thenational.ae/business/property/emaar-to-appeal-saudi-reversal-of-lawsuit-ruling>

148 Ed Attwood, 'Saudi's Al Jaber settles in \$381m Emaar lawsuit' <*arabianbusiness.com*> accessed 27 December 2010; <<http://m.arabianbusiness.com/saudi-s-al-jaber-settles-in-381m-emaar-lawsuit--369496.html>> accessed 08 October 2013.

Yet KSA alone cannot be made to bear the blame for its favouritism and/or recalcitrant action in implementing the NYC.¹⁴⁹ Instead, there is so much to do with the manner in which the NYC is framed such that it has been relatively easy for KSA and other states to get around it without being guilty of any wrongdoing.¹⁵⁰ Generally, the NYC is very porous and so allows for exceptions in enforcing foreign awards.¹⁵¹ Apart from KSA, there are other nations where the public policy exception has been invoked to refuse enforcement of foreign awards. Surprisingly, one of them is the US arbitration which in general has been considered most successful in the world; and where the public policy ground has been known to be least successful as a basis for refusing the enforcement of foreign awards.

A notable case is that of *Laminoirs-Cableries de Lens, S.A. v Southwire Co.* where a French seller and a buyer from the US differed over interest rates and price in a steel wire purchase contract. Applying foreign law, the arbitration panel asked defendants to pay interests at the rate of 9.5 and 10.5%. The losing party contested that enforcing such an award would contravene US public policy. The court duly accepted the defence and the award was not enforced to the extent that, applying French law, an extra 5% annual rate of interest was payable in the event the award was not fully paid by a certain date.¹⁵² While acknowledging that the dispute was under French law, which provides for the 5% p.a. increase in interest should the award not be paid within 60 days, the court declined to enforce this provision, deeming it more penal than compensatory. This part of the award, according to the court was unenforceable Under Article V 2(b) of the New York convention.¹⁵³

149 El Rahman , *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003) .

150 Philippe Fouchard, *Suggestions to Improve the International Efficacy of Arbitral Awards* (ICCA Congress Series no 9 Paris 1998)

151 Di Pietro and Platte Martin , *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) .

152 *Laminoirs-Cableries de Lens, S.A. v Southwire Co.* 484 F. Supp. 1063 (N. D. Ga. 1980).

153 *Laminoirs-Trefileries-Cableries de Lens, S.A.*, 484 F. Supp. at 1069 (citing 9 U.S.C. § 201, art.V, pt.2(b), Convention on the Recognition and Enforcement of Foreign Arbitral Award).

In another case, Electranta, a Columbia government-owned company entered into a contract with TermoRio for the supply of energy.¹⁵⁴ In this agreement, TermoRio was to generate energy which Electranta would then buy. Both parties agreed to use ICC arbitration in the event of a dispute. Soon after the contract was signed, the Columbian Government privatized Electranta, selling all its assets in the process such that the firm could not deliver its part of the contract with TermoRio due to lack of assets. The resultant dispute was referred to the Columbia Arbitration Tribunal as stipulated in the parties' agreement. TermoRio was awarded \$60 million as a result. However, Electranta appealed the decision in a Columbia law court seeking to annul the award on public policy grounds (arguing that it was not able to honour its part of the contract because the government policy at the time made it impossible for it to have assets). The court, the highest in Columbia, nullified the award.¹⁵⁵ The ground for nullification was that the clause on arbitration contained in the agreement contradicted Columbian law. TermoRio filed another suit against Electranta and the Columbia government seeking the original arbitration award to be upheld. In the case, TermoRio cited the Federal Arbitration Act through which Columbia ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and which it claimed required the original award to be enforced. In dismissing the appeal, the District court ruled that the annulment of the original award was done by a competent court of law in the host country, Columbia. Here, reference too was made to Article V 1(e) of the New York Convention.

Porosity in the NYC largely comes from Article V in general and the public policy ground in particular (see subsequent sections). In KSA, public policy means strict adherence to Shari'a law (see the chapter, "Grounds of Exception of the NYC Laid Down in Article V" for a more in-depth description of public policy within KSA). Therefore, anything or any practice that is not in line with Shari'a law is considered to be contrary to the public policy of the Kingdom. Still, other exhaustive grounds for refusal of enforcement of awards exist and include; party incapacity; the invalidity of the arbitration agreement, non-adherence to due process, going over the extent of the submission, faulty composition of the tribunal, major procedural irregularity and the actuality that the award has yet to be deemed binding or has been set aside.¹⁵⁶

The issue of porosity of the NYC is critically important in underscoring its low key reception by KSA. The very wording of Article V makes it possible for KSA to get around its

154 *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

155 *Ibid.*

156 M Alhoslan 'The Symposium of European-Arabian Arbitration' cited in El-Ahdab, *Arbitration in Arab Countries*, v 2, 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91.

other major provisions.¹⁵⁷ Using the public policy exception for instance, KSA has been able to refuse enforcement of foreign awards that are opposed to its public policy.¹⁵⁸ A case in point was that pitting Northrop Corporation against Triad International Marketing.¹⁵⁹ The case sought to establish whether or not the public policy of Saudi Arabia was breached and if so, whether this consideration ought to be applied given that the firms involved were foreign to Saudi Arabia. Northrop, in an agreement entered into in 1970, hired Triad International Marketing as its sole marketing agency abroad including in Saudi Arabia. Five years later in 1975, the government of KSA issued a decree prohibiting the payment of commissions related to armament contracts. Thus, Northrop stopped paying Triad commissions as laid down in their agreement. The matter was taken to arbitration after a protest by Triad demanding to be paid the remaining commissions as covered by the agreement. Their contract provided that California law was to govern the arbitration process:¹⁶⁰ "The validity and construction of this Agreement shall be governed by the laws of the State of California." Further, it stated: "Any controversy or claim between the parties hereto arising out of or in connection with this Agreement ... shall be settled by arbitration," and "the award of a majority of the arbitrators ... shall be final and binding upon the parties." The arbitrators partially awarded Triad its claim. At the confirmation of the award, the district court nullified some aspects of the same.

On its part, Northrop argued that its agreement with Triad was affected by Saudi Arabia's Decree since it was related to marketing and that there was need for the courts to refuse enforcing a the award earlier granted to Triad International Marketing because it was contrary to the public policy of Saudi Arabia (specifically Decree No. 1275). It also argued, further, that Saudi Arabia's Decree 1275 had rendered their marketing Agreement with triad unlawful even under the very California law that was to govern the agreement. The critical issue under scrutiny here was whether it was the Saudi law or the California law that rendered the award unenforceable. The court had ruled in favour of Northrop. The Saudi law, on its part, prohibited commission payment relating to armament agreements. On the other hand, no law in California prohibits payment of commissions whether or not they are illegal under a foreign dispensation. Eventually, the ruling went in Northrop's favour on account of public policy.

157 Ibid.

158 Ibid.

159 Northrop Corp. v. Triad Intern. Marketing SA, 811 F. 2d 1265 - Court of Appeals, 9th Circuit 1987.

160 Ibid.

Yet foreign policy in the Kingdom basically includes anything that is not compliant with Shari'a law.¹⁶¹ This effectively renders all non-Shari'a law-compliant awards non-enforceable in the Kingdom.¹⁶² In fact, there are many such issues to be encountered in the process of arbitration. While the grounds for exception are generally narrowly construed as set out in the NYC's Article V, the manner in which they are interpreted has effectively been construed to mean a variety of other issues which were possibly not intended to be covered in the first place; or which were never foreseen. For instance, the ambiguity in the definition of public policy in effect allows for this particular ground of exception to be so widely construed and so to water down what was a genuine desire to have the sovereignty of nations being respected.¹⁶³

The issue of sovereignty is in itself a cause of the porosity inherent in the NYC as in a number of other multilateral treaties on arbitration.¹⁶⁴ It is in order to allow nations their sovereign rights that exceptions in the NYC were laid out. Through such exceptions, nations would be able to ratify the treaty without fear of losing their sovereignty.¹⁶⁵ Yet with these exceptions, a new door was opened for recalcitrant behaviour where nations, though signatories, can effectively and successfully (but legally) refuse to recognize and enforce any foreign awards as the case of KSA illustrates.¹⁶⁶ The interpretational challenges that come with Article V of the NYC,¹⁶⁷ are not supposed to be viewed as the Convention's weakness as an international law instrument because provisions such as Art V are supposed to enhance and reinforce the aspect of sovereignty. The fact that most nations including the Kingdom of Saudi Arabia signed up for it should be enough proof to indicate the significance of NYC.

4.4 Shari'a Law's Impediment to the Application of the New York Convention in KSA

161 Ibid.

162 M Alhoslan 'The Symposium of European-Arabian Arbitration' cited in El-Ahdab, *Arbitration in Arab Countries*, v 2, 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 97.

163 Ibid.

164 Mistelis Loukas and Brekoulakis Stavross, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009).

165 Ibid.

166 Ibid 23.

167 M Alhoslan 'The Symposium of European-Arabian Arbitration' cited in El-Ahdab, *Arbitration in Arab Countries*, v 2, 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91.

Ibid.

Although the NYC is regarded as the most successful Convention in terms of international arbitration,¹⁶⁸ Saudi Arabia's strict adherence to Islamic Shari'ah law has hindered the effective application of this arbitration treaty in the country (as are other treaties that are generally viewed and considered as being inappropriate if not anti-Islamic).¹⁶⁹ This state of affairs has been one of the main causes of the failure by KSA to fully adhere to international law provisions as far as recognition and enforcement awards granted in a foreign country is concerned.¹⁷⁰ Aside from the general attitude that Saudi Arabia has for foreign awards in particular and international arbitration in general, it is the manner in which the Kingdom has been able to successfully invoke certain provisions of international law, notably Article V of the NYC, to legally resist recognition and enforcement of these awards, that has made international arbitration in general and enforcement of internal arbitration awards in the Kingdom, very difficult.¹⁷¹ In essence, it argues in the chapter on 'Article V of the NYC and its receipt by KSA', that there exists not only a legal vacuum but also a policy one in the application of NYC in KSA (see the aforementioned chapter for a definition of these legal and policy parameters). These policy and legal vacuums have been created largely because of the domestic legal regime's perceptions towards the exception grounds for enforcement and recognition of awards as provided for, under Article V.¹⁷² The main arbitration law in KSA, the Arbitration Act, allows parties in the Kingdom to resort to arbitration.

The laws of KSA regarding arbitrability on the basis of public policy are very clear; that any award granted will not be enforced if it contravenes any or part of, or all of Shari'ah law.¹⁷³ Therefore, those awards granted in foreign nations that are either signatories to the NYC or members of the Arab League Convention are thoroughly checked and subjected to scrutiny to ensure that they adhere to the laws of the Kingdom in their entirety; and that none of the provisions of Islamic Shari'ah law have been circumvented, breached or offended, in which case

168 Ibid.

169 Habib Mohd and Sharif Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab State' (1999) 14/1 *35 Arab Law Quarterly* .

170 Fry Jason ., *Recognition And Enforcement Of Foreign Arbitral Awards: A Global Commentary On The New York Convention Foreword* in Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds. (Sage 2010).

171 Ibid.

172 Mistelis Loukas and Brekoulakis Stavross , *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

173 Fry Jason, *Recognition And Enforcement Of Foreign Arbitral Awards: A Global Commentary On The New York Convention Foreword* in Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port eds. (Sage 2010).

those parts of the awards or the entire award will not be enforced in KSA.¹⁷⁴ Both Saudi law and the Shari'a require that only specific issues – those that do not involve or entail the charging of excessive interest (as is determined by the Board of Grievances on a case-by-case basis) – be committed to arbitration

The wide scope which is covered by public policy has made it very difficult for foreign awards to be recognized and enforced in KSA. This has in turn led to a state of affairs where international players are less willing to invest in the Kingdom, fearing that awards rendered elsewhere may not be recognized and enforced in KSA. Government entities are also forbidden from submitting to arbitration (with only minimal exceptions as determined by the Board of Grievances).¹⁷⁵ In essence, government entities may only submit to arbitration after application and determination by the Board of Grievances (BG) that the matter(s) involved may not be resolved amicably using other means such as conciliation and litigation.¹⁷⁶ By extension, no foreign law may also be selected to govern disputes involving the Kingdom.

Furthermore, the Kingdom has in place the Board of Grievances which effectively acts as the final decision-making organ regarding arbitration and related disputes.¹⁷⁷ Any issue regarding arbitration, especially where a non-Saudi national is involved, has to be reviewed by the BG.¹⁷⁸ This basically means a retrial of the concerned parties, which in turn amounts to double jeopardy.¹⁷⁹ The BG makes its decisions subjectively and allows no right for appeal.¹⁸⁰ The bottom-line has been that all disputes and issues regarding enforcement of foreign awards are

174 Habib Mohd and Sharif Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab State' (1999) 14/1 54 Arab Law Quarterly

175 El Rahman , *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003) .

176 Ibid.

177 Habib Mohd and Sharif Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab State' (1999) 14/4 52 Arab Law Quarterly.

178 El Rahman , *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003) ; Thomas Childs, 'Enforcement of foreign Arbitral awards in Egypt, Syria, and Saudi Arabia', *Arbitration Newsletter* 2011 at 72.

179 Ibid.

180 Habib Mohd and Sharif Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab State' (1999) 14/1 33 Arab Law Quarterly.

determined after they are scrutinized for strict compliance with Shari'a law.¹⁸¹ This state of affairs has not only been time-consuming but also deliberately designed to ensure that Saudi interests are safeguarded as much as possible. As a result, only a single foreign award has been enforced in KSA. In the 1997 case, which was between a Dutch firm and a Saudi *public University*,¹⁸² the Saudi enforcing court (the 9th Administrative Panel) rendered a landmark decision which enforced an award to the Dutch firm. The Saudi court refused the defence that the agreement was invalid on the basis that the University lacked the capacity to resort to arbitration based on the Council of Ministers Resolution No. 58 (1973), which disallows government entities from entering arbitration. From the start, the court considered the contract as involving administrative or governmental activities since the contract is included for a public service.

This decision by the Saudi court is a milestone in the pro-enforcement bias of the NYC. It builds a very contemporary approach when speaking of the issue of a state capacity to arbitration and state immunity from suit and enforcement. This is mainly because, the doctrine of disregarding national prohibitions over state bodies or the waiver of state immunity from execution by submission to arbitration is considered only for cases where the state may be considered as a private person representing a commercial entity.¹⁸³ In this action by the Saudi court, it surpassed what was written in the doctrine and provided the enforcement of the award against the Saudi state agency even though it is considered to be public entity acting for government activities (*acta jure imperil*). Moreover, the court's reliance on the *Shari'a* principles which permit enforcement against state agencies instead of the Saudi laws which do not permit such enforcement created a practical example for the standard of more-favourable provision enforcement mandated in Article VII(1) of the NYC.

While clear details about decisions rendered by the BG are not often published and finding accurate information about the number of foreign awards that have been enforced is at best difficult,¹⁸⁴ it is worth arguing, with regard to this case at least, that the application of NYC through the restrictive and narrow interpretation of Article V results in protectionism, despite the conditionality of Saudi WTO accession on ratification and implementation of NYC 1958.

181 Ibid.

182 The 9th Administrative Panel, decision No 32/D/A/9 dated 1918 H (1997).

183 See, *supra* para 3.8.5.

184 See Mainwaring-Taylor Christopher, 'Areas of Expertise'; Allen & Overy (2009)
<<http://www.allenoverly.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=53656&prefLangID=410>>.

4.5 Washington Convention on the Settlement of Investment Disputes **between** States and Nationals of Other States (1965)

The formulation and enactment of the Washington Convention, which is commonly referred to as the International Centre for the Settlement of Investment Disputes (ICSID) Convention¹⁸⁵, was as a result of the realization of the growing need to ensure that there was a harmonious way of resolving disputes arising from the increased cooperation among nations in a wide range of areas, including trade and general investments especially on the international level. It was also realized that international cooperation was critical if sustainable economic development was to be achieved; and such cooperation could be enhanced through, among other ways, cooperation in resolution of disputes among investors from different nations.¹⁸⁶ Through the treaty, it was hoped that investment disputes would be resolved amicably and expediently using either arbitration and/or conciliation.¹⁸⁷ The importance of the Washington Convention (WC) in investment dispute resolution in particular lies in the fact that it not only focuses on international investment treaties but also on agencies entitled to operate or transact business on behalf of the entities covered by the treaty.¹⁸⁸ Parties to the Washington Convention are under obligation to, among other requirements; carry out speedy resolution of emerging disputes on the basis of either arbitration or conciliation.¹⁸⁹ Once again, this Convention underscores the core principles of WTO of liberalizing trade. A major hindrance to international trade has for a long time been the inability for investment disputes to be resolved amicably, speedily, and at limited costs. However, the Convention sets up the International Centre for the Settlement of Investment Disputes (ICSID) under the auspices of the World Bank to act as the sole agency responsible for the resolution of disputes emerging in the field of investment between nationals of different states. Therefore, state parties to the Convention have to refer all their investment disputes to the ICSID for resolution.¹⁹⁰

185 Kurt Nadelmann and Von Mehren, Athur, 'The Extraordinary Session of the Hague Conference on Private International Law' (1966) 60 *American Journal of International Law* 803.

186 Homburger Adolf, 'Recognition and enforcement of foreign judgments. A New Yorker reflects on uniform acts' (1970) 18 *American Journal of Comparative Law* 365.

187 Alan Redfern and Martin Hunter; Blackaby Nigel & Partasides Constantine, 'Redfern And Hunter On International Arbitration' (2009) 1(197) 45.

188 Ibid.

189 Michaels Rothschild, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgments Conventions' (2007) 3 *Conflict of Laws in a Globalized World* 29.

190 IBA Guidelines for Drafting International Arbitration Clauses
<http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx> accessed 04 November 2012.

In May 1980 KSA officially ratified the WC and as such, it is a contracting state. To show its compliance with the Convention, the Kingdom, pursuant to Article 54(2) of the Convention, put in place the Court of Grievances and designated it competent for the recognition and enforcement of ICSID awards. Furthermore, and pursuant to Article 69 of the Convention, the Kingdom enacted *Royal Decree No. M/8, 22/3/1394 A.H.* and the *Council of Ministers Resolution No. 372, 15/3/1394 A.H.* so as to ensure that the Convention was effective within its jurisdiction. Nonetheless, the Kingdom's ratification of the ICSID Convention came with the reservation: "KSA reserve[s] the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty to the International Centre for the Settlement of Commercial Disputes whether by way of conciliation or arbitration."¹⁹¹ This reservation underscores the rather common approach that the Kingdom has taken towards major international arbitration instruments; the need to protect its trade and ensure that non-Saudi nationals do not benefit from trade with KSA at the expense of Saudi nationals and companies. To this end, KSA has been eager to keep certain sectors of its economy out of the reach and influence of international stakeholders or non-nationals.¹⁹² To a large extent, and in view of this, KSA has kept its oil sector in particular and energy industry in general under the care of mainly state agencies, barring 'outsiders' from any engagements in this area of operation. The same has been extended to investments in the oil sector where emerging disputes are generally not under Saudi law. In essence, issues regarding oil are expressly exempted from arbitration and conciliation as per the Washington Convention, and this it attributes to the need for contracting states to maintain their sovereignty by having areas of great national importance or interest not being subject to the control of foreign agencies or individuals.¹⁹³

In addition to excluding the oil sector from ICSID, KSA has also excluded 'acts of sovereignty'; and this is in order to preserve the sovereignty of the nation. Excluding 'acts of sovereignty' was acceptable under the WC and so by the international community.¹⁹⁴ To date, there has been no express meaning of 'acts of sovereignty'; and it has been left to the courts to interpret it on a case-by-case basis. However, the general meaning of 'acts of sovereignty' has been taken to be *actions which are executive and discretionary, and which may not be put to*

191 Mustill Michael, 'Arbitration History and Background' (1989) 6 (2) J Intl Arb 43 at 40.

192 Ibid.

193 Kurt Nadelmann and Von Mehren Athur, 'The Extraordinary Session of the Hague Conference on Private International Law' (1966) 60 American Journal of International Law 803.

194 Ibid.

judicial review.¹⁹⁵ This is the French equivalent of “actes de gouvernement”; and acts which may not be arbitrated due to this, include territorial disputes.¹⁹⁶ While the ratification of the Washington Convention was a step in the right direction as far as WTO trade liberalization requirements are concerned, the reservations have been a cause for constant concern for the WTO.¹⁹⁷ While WTO takes into consideration the need to have nations keeping certain critical sectors of their economies away from intense competition and foreign interference that could lead to dominance of these sectors by foreign entities,¹⁹⁸ it also strives to ensure that trade and investment are enhanced through mainly economic and trade reform and liberalization.¹⁹⁹

The reservation by KSA entails a prohibitive measure which ultimately bars international players from freely investing in the oil sector and the so-called ‘acts of sovereignty’.²⁰⁰ This is in turn attributable to the existing fear that disputes arising from these ‘exclusive areas’ would be referred to the ICSID for hearing and resolution, yet they are areas of great significance for KSA.²⁰¹ As justification for its actions, KSA has been reiterating that it is sovereign and ought to maintain its sovereignty. Further justification is discussed below.

4.6 Justification for Excluding Oil from ICSID

A critical area of concern for KSA as far as international arbitration is concerned has been oil.²⁰² Oil is by far KSA’s leading source of revenue and the government has been trying to as much as possible to keep the oil sector out of reach of international players (save for a few key

195 Lew Julian and Mistelis Loukas and Kreoll Stephane, *Comparative International Commercial Arbitration* (1st ed, Kluwer Law International 2003) p v and para 2,14 paras 18.

196 Rothschild Micahel, ‘Some Fundamental Jurisdictional Conceptions as Applied in Judgments Conventions’ (2007) 3(2007) 29.

197 Rahman El, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003).

198 Ibid.

199 Kershaw Newman, ‘The Eleventh Session of the Hague Conference on Private International Law. Recommendation II. The enforcement of foreign judgments’ (1969) 1International and Comparative Law Quarterly 652.

200 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003) .

201 De Winter Leon, ‘Excessive jurisdictions in private international law’ (1968) 5 International and Comparative Law Quarterly 706.

202 Ibid.

players such as ARAMCO). Nonetheless, given the many disputes that are common in the sector, it has been imperative that ICSID be involved in their resolution. As per the Washington Convention, states may submit to the ICSID only those disputes which are contained in their investment contracts. This explains why KSA has excluded ‘acts of sovereignty’ and oil from arbitration under ICSID (the two are often not contained in the Kingdom’s investment contracts).²⁰³ In essence, the Kingdom can simply prevent any other matters of great national importance to it from going to ICSID arbitration by simply failing to include them in its investment contracts.²⁰⁴ Furthermore, the ICSID only has power to preside over matters that directly arise out of some form of investment between two parties. This means that mere engagement in trade cannot be basis for reference of disputes to the ICSID. This, in essence, means that the reservation by KSA to the Washington Convention is by itself of less consequence to international arbitration.²⁰⁵ In general, KSA’s exclusion of its all-important oil sector from ICSID arbitration is comparable to NYC’s exception on the basis of public policy.²⁰⁶ Though not expressly provided for in its national laws, KSA places a lot of value to its oil sector; and failure to adhere to the general directives regarding the sector – that oil may not be submitted to arbitration – is tantamount to breaching public policy. In view of this, KSA still applies protectionist measures especially with regard to its oil sector.²⁰⁷

That KSA ratified the WC in 1980 and the NYC in 1994 is very important. First, the latter was supposed to improve on the areas where the former had failed, especially with respect to the oil sector and ‘acts of sovereignty’.²⁰⁸ Indeed the NYC covers both areas and is generally considered to be a more comprehensive treaty than the WC. However, as shown in the chapter on ‘A critical analysis of the NYC’ as well as the chapter on ‘Grounds of exception to the NYC found in Article V’, KSA has managed to avoid enforcement of foreign award under NYC just as it did under WC.²⁰⁹ Therefore, the WC is in many ways an instrument of no consequence when

203 Nadelmann Kurt and Von Mehren Athur, ‘Equivalences in treaties in the conflicts field’ (1967) 15 American Journal of Comparative Law 195.

204 Habib Mohd and Sharif Al Mulla, ‘Conventions of Enforcement of Foreign Judgments in the Arab State’ (1999) 14/1 Arab Law Quarterly 37.

205 De Winter Leon, ‘Excessive jurisdictions in private international law’ (1968) 5 International and Comparative Law Quarterly 706.

206 Ibid.

207 Habib Mohd and Sharif Al Mulla, ‘Conventions of Enforcement of Foreign Judgments in the Arab State’, Arab Law Quarterly, 14/1(1999) 37.

208 Ibid.

209 Ibid.

applied in the context of KSA because the reservation and exceptions made therein mean that arbitration disputes ultimately get channelled to the NYC. Yet the NYC is even a lot easier for KSA to get around by citing the public policy exception. In the end, KSA gets to benefit (it protects its trade either way) even though it has ratified both the WC and the NYC. In many ways, therefore, the WC, just like the NYC, is used to achieve protectionist aims by KSA. Both treaties are accorded almost similar treatment by Saudi arbitration law, especially with regard to selective interpretation and choice of issues or parties subject to arbitration. In the case of the WC as is the NYC, all disputes are to be referred to the BG for determination. The BG's decision is always final and irrevocable.²¹⁰ Generally, KSA thus prefers participating in international treaties in which it can circumvent thereby allowing it to achieve protectionist aims.²¹¹

4.6.1 Convention of June 30 2005 on Choice of Court Agreements

In many ways, the Convention of June 30 2005 on choice of court agreements was adopted as a way of strengthening the NYC in order to make international trade more liberal and open through enhanced dispute resolution processes.²¹² The international community was struggling to match new developments in trade with existing law owing to the advent and growth of electronic commerce around the world.²¹³ Yet, in spite of these new and rapid developments, there remained only one major law (the NYC) which governed arbitration in general and the recognition and enforcement of foreign judgments and awards in particular.²¹⁴ While the NYC served the great purpose of guiding parties regarding the recognition and enforcement of foreign awards, there remained no clear procedure to be followed when parties were choosing their preferred courts through which to arbitrate their disputes. In essence, there kept occurring challenges with respect to the chosen courts even when parties had expressly agreed on certain courts to be their preferred choice when dealing with matters of arbitration.²¹⁵ Furthermore, there was need to have the instruments for recognition and enforcement of foreign awards and judgments, as well as those regarding the rules of jurisdiction being harmonized. International

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Mistelis Loukas and Brekoulakis Stavross, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

²¹³ Grenville Ashley, *The Major International Treaties, 1914-1945: A History and Guide with Texts* (Methuen 1987).

²¹⁴ Sherby Eric, 'A Different Type of International Arbitration Clause' (2005) Int'l Law News, American Bar Association 22.

²¹⁵ Shabtai Rosenne. 'The Hague Peace Conferences Of 1899 And 1907 And International Arbitration' (2001) Reports And Documents xxi 1.

trade had become more advanced,²¹⁶ and there was therefore the need for a mixed convention; one that would offer flexibility for jurisdiction rules of nations and assure parties that recognition and enforcement would be done as required and the Choice of Court Agreements came as a fulfilment of these needs.

Nevertheless, it was the development in electronic commerce (e-commerce) that effectively brought about the need for legislation governing electronically-executable contracts.²¹⁷ The need for including intellectual property rights in commercial transactions also meant that a convention that was all-inclusive was needed.²¹⁸ In the modern world, investors were more concerned about the need to legally protect their inventions and copyrights especially when dealing with nations that lacked the appropriate laws to govern intellectual property. Though WTO, through GATS (the services/intellectual rights equivalent of GATT), has ensured that services and intellectual property rights are protected by agreements just as is the case in trade in goods.²¹⁹ Therefore, the 2005 Convention was not in any way meant to supersede the NYC 1958. It instead just supports its remit through the explicit inclusion of recognising and enforcing awards arising from electronic commerce disputes. This leaves the NYC in a rather precarious position where it is a less effective instrument that cannot function effectively on its own but must be supported on every side by other instruments; a shortcoming that is not tied to the NYC, but one that is common to international legal instruments.²²⁰

According to Article 1 of the WC, the provisions of the Convention may only be limited to the “exclusive choice of court agreements concluded in civil or commercial matters.”²²¹ Article 2 provides that there is an option for extending the chapter regarding enforcement and recognition to other judgments which are issued or presided over by courts that are designated in choice of court agreements which are non-exclusive.²²² Though it is Article 3 (paragraph C) that lays out the specific meaning of an exclusive choice of court agreement, stating that the exclusive choice of court agreement ought to be “entered into or documented (*i*) in writing; or

216Gatto Alexandria, *Multinational Enterprises and Human Rights: Obligations Under Eu Law and International Law* (Edward Elgar Publishing 2011).

217 Ibid.

218Friedland Daniel, *Arbitration Clauses For International Contracts* (2nd ed, Pearson 2007).

219 Homburger Adolf, ‘Recognition and enforcement of foreign judgments. A New Yorker reflects on uniform acts’ (1970) 18 American Journal of Comparative Law 365.

220 Ibid.

221 Art I of the Convention Of June 30 2005 on Choice of Court Agreements.

222 Art II of the Convention Of June 30 2005 on Choice of Court Agreements.

(ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference”.²²³ Therefore, for any exclusive choice of court agreement to actually fall within the provisions of the Convention of June 30 2005 on choice of court agreements, it has to be concluded by either two or more parties in accordance with or in adhering to the provisions of Article 3 (paragraph C).²²⁴ As such, employment and consumer contracts are excluded. However, most of the exclusions are as result of the fact that they have been covered by other international arbitration instruments which are deemed to be more relevant in governing those areas than is the Convention of June 30 2005 on choice of court agreements. Different courts have been addressed by the three main rules that are contained in the Convention. These are:

1. The *chosen court* must hear the case if the choice of court agreement is valid according to the standards established by the Convention (in particular there is no discretion / *forum non convenient* in favour of courts of another State).²²⁵

2. Any *court seized but not chosen* must dismiss the case unless one of the exceptions established by the Convention applies.²²⁶

3. Any judgment rendered by the court of a Contracting State which was designated in an exclusive choice of court agreement that is valid according to the standards established by the Convention must be *recognized and enforced in other Contracting States*²²⁷ unless one of the exceptions established by the Convention applies.²²⁸

Although this Convention is an improvement on the NYC with regard to issues of electronic commerce, it is a far-cry from what could be required to achieve full compliance by states such as KSA. In essence, the Convention is not a catch-all treaty for intellectual property and GATS as would have been expected to make it an effective instrument. Instead, there is room for evasion and general recalcitrant behaviour. The exclusion of consumer and

223 Art 3 of the Convention Of June 30 2005 on Choice of Court Agreements

224 IBA Guidelines for Drafting International Arbitration Clauses,
http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx Accessed 04/11/2012

225 Art 5 of the Convention of June 30 2005 on choice of court agreements

226 Art 6 of the Convention of June 30 2005 on choice of court agreements

227 Article 8 of the Convention of June 30 2005 on choice of court agreements

228 Article 9 of the Convention of June 30 2005 on choice of court agreements

employment contracts is more of a loophole where nations like KSA can cite the exceptions to let issues of intellectual property and GATS to flow to other treaties where it is better prepared to avoid them.²²⁹ To KSA, therefore, there is express permission to refer to other treaties when matters of contracts are being dealt with. In fact, the reason for excluding employment and consumer contracts was because they were deemed to be covered by other treaties such as the NYC and the WC. Since KSA has not been a signatory of many other treaties; and the ones it has signed are not catch-all, the 2005 Convention is still ineffective when it comes to KSA. Being a relatively new Convention, the Convention of June 30 2005 on choice of court agreements has been signed by KSA; but it has not been any more successful than the NYC in helping grant foreign awards. The same lacklustre approach taken by KSA on the NYC has been replicated on this Convention.

4.6.2 The 1995 GCC Convention on the Enforcement of Judgments, Judicial Designation and Notices (the “GCC Convention”)

Since KSA has ratified the Gulf Cooperation Council (GCC) Convention, it has been largely possible for arbitration to be used as a method of dispute resolution within its territories particularly in the area of trade and investment.²³⁰ Since this Convention is aimed at helping nations which are member states of the GCC to expedite the process of dispute resolution by having the relevant judicial designations, judgments, and notices enforced in other states of the GCC other than those where they were issued or passed, the move by KSA to accede to it was a step in the right direction as, if followed through, it would make arbitration in general and recognition and enforcement of foreign awards in particular more successful in the Kingdom. KSA, by virtue of its ratification of the Convention, placed itself under duress to adhere to a number of provisions (see below) which jointly facilitate arbitration as they go a long way in compelling signatory states to recognize and enforce foreign awards.

The GCC Convention has brought together the member states of the GCC into the dispute resolution equivalent of a free trade area;²³¹ and this is largely because member states of the GCC are expected to treat each other in accordance with the international doctrine of the *Most Favoured Nation* in the area of enforcement of judgments, notices, and judicial designations. The Most Favoured Nation (MFN) principle requires that a party treats all its trade partners in an

229 Solanes Miguel and Jouravlev Andrei, *Revisiting Privatization, Foreign Investment, International Arbitration, and Water* (United Nations Publications, 2007).

230 Ibid.

231 Nadelmann Kurt, ‘The outer world and the Common Market experts’ draft of a convention on recognition of judgments’ (1968) 2 Common Market Law Review 409.

equal manner and without any form of discrimination.²³² In essence, members states are expected to extend national treatment to foreign investments as well as other facets of corporate life as though they were their own. Since there ought not to be any discrimination whatsoever, cooperation is a key aim of the GCC.²³³ In fact Article 4 of the GCC's articles of association requires, among other things, that GCC member states co-operate in as many areas as possible, including; judicial, commercial, and religious affairs.²³⁴ In view of this co-operation, and owing to the fact that all GCC member states are also Islamic states which are privy to the basic teachings of Islam (and to some extent Shari'a), it has been hard for KSA to refuse to recognize and enforce awards from GCC member states.^{235, 236}

As noted in the preceding paragraph, the most important aspect of the GCC Convention and one that underscores the significant progress so far made by KSA (since the Convention's ratification) towards recognition and enforcement of foreign awards is that it brings together nations that are strict adherents of Islamic Shari'a law, making it rather easy for them to reciprocate the treatment they get from one another.²³⁷ By extension, the common religious grounds shared by the GCC nations make each one of them less suspicious (and less cautious) of the arbitration laws of other GCC states; and so generally more inclined towards recognizing and enforcing GCC-wide awards.²³⁸ As noted in the preceding paragraph, KSA is a nation whose basic commercial and investment laws are founded on the principles of Shari'a law. This has been a major stumbling block in the face of nations that do not adhere to Islamic law as contravening Shari'a law is equal to breaching the Kingdom's public policy (which is illegal). Although within the GCC, KSA has been able to engage in trade on an almost level playing field as it has been possible, even easy, for GCC judgments, notices, and designations to be enforced

232 Muchlinski Peter, *Multinational enterprises and the law* (Oxford University Press 2007).

233 Mistelis Loukas and Brekoulakis Starvross, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

234 Article 4 of the GCC's Articles of Association.

235 Mistelis Loukas and Brekoulakis Starvross, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

236 Ibid.

237 Wallace CynthiaDay, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (Martinus Nijhoff Publishers 2002).

238 Beaumont John, 'Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia'
<http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93>

in the Kingdom without the risk of breaching public policy (all GCC member states have Shari'a as their basic law).²³⁹

Yet there are exceptions to enforcement of foreign awards even under the GCC Convention as is the norm with all other multilateral international treaties on arbitration; and these provide the room for refusal to recognize and enforce foreign awards within KSA. These grounds are:²⁴⁰

Where the judgment is contrary to Islamic law or the Constitution or public order of the Recipient State;

Where the judgment is a default judgment and the defendant was not properly notified of the case or the judgment;

Where the dispute in respect of which the judgment was issued:

Was previously finally adjudged in the Recipient State;

Was referred to the courts of the Recipient State before it was referred to the courts of the Originating State and is still before the courts of the Recipient State;

When the judgment is against the government of the Recipient State or an official of the Recipient State for acts arising out of the performance of his duties as an official of the Recipient State; or

If the enforcement or recognition of the judgment would be contrary to an international agreement or convention in force in the Recipient State,

As a result of the above exceptions, KSA may legally refuse to enforce foreign awards if doing so, among other reasons, would contravene another international treaty to which it is party.²⁴¹

239 Wallace Cynthia Day, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (Martinus Nijhoff Publishers 2002) .

240 Beaumont, John, Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia
<http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=9>

241 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003) .

To a large extent (as shown in the preceding section on the WC as well as on the chapter on “Article V of NYC and its receipt by KSA”), the NYC and the WC are in conformity with each other, their provisions being more or less the same.²⁴² It is worth noting here that non-conformity comes in a number of different ways; and it does not pre-emptively mean that there are no similarities between the GCC and the NYC or WC. In fact, there are a number of similarities, especially with regard to the grounds of exception. The grounds of exceptions found in the GCC are almost similar (in many ways, at least in their legal implications) with those of NYC and WC. Notable among these is the issue of public policy – no award that is opposed to public policy may be enforced.²⁴³ However, there are clear differences between the regional and international conventions. For instance, the GCC is clear that awards that are not in conformity with Islamic law will not be recognized. Yet, both NYC and WC require that signatory states must change their laws to accommodate the provisions of the treaties. This non-conformity between regional and global international treaties has also been utilized by KSA as a legal ground for refusing recognition and enforcement of foreign awards. Saudi government entities have never been covered by arbitration both on the regional and international arena because of the exceptions of such from engaging in arbitration.²⁴⁴ Generally, therefore, this Convention’s provisions (specifically the exceptions to enforcement) have been used to justify KSA’s refusal to enforce most foreign awards. Nonetheless, it has largely remained to be the reciprocity and consistency principles that have continued to push KSA into enforcing awards under the GCC Convention.²⁴⁵

4.6.3 The Riyadh Convention

From the very outset, it is worth noting that KSA is also a member of the Riyadh Arab Agreement on Judicial Cooperation (which is basically the GCC equivalent of the Arab League);²⁴⁶ and as a member, it has the responsibility of recognizing and enforcing all the judicial judgments of other Arab League nations in accordance with Article 25(b) that was signed and enforced by KSA in line with the WTO spirit and norm of liberalizing trade, which has been

242 Ibid.

243 Ibid.

244 Beaumont, John., *Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia*
<http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93>

245 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003).

246 Habib Mohd and Sharif Al Mulla, ‘Conventions of Enforcement of Foreign Judgments in the Arab State’ (1999) 14/1 Arab Law Quarterly 33.

instrumental in facilitating free trade between KSA and members of the Arab League.²⁴⁷ This is because, just as the GCC Convention, the Riyadh Convention is an Islamic-area treaty which effectively brings together states that adhere to Islamic practices. As such, issues with regards to Islamic (and to some extent Shari'a law) are covered fully in the Convention, making it fairly enforceable even in KSA.²⁴⁸

The Riyadh Convention was concluded in 1983, only three years after KSA ratified the WC.²⁴⁹ This was a time when there was increasing need for nations in the Arab world to liberalize their trade and participate more in international trade through treaties. With both the WC and the NYC in place, the Riyadh Convention was basically meant to provide a mechanism for the Arab states where they could recognize and enforce foreign judgments from Arab states in a similar way as afforded nations that had ratified the NYC. In essence, the Riyadh Convention was to be the NYC equivalent for the Arab League. It covers court judgments as well as awards, making it a more comprehensive instrument.²⁵⁰

Summarily, the basic provisions of the Riyadh Convention are found in Article 37, and require that all awards from *Originating States* are to be recognized and also enforced in all other *Recipient States* (including KSA).²⁵¹ However, there are exceptions to these provisions which are exactly the same as those set out by the GCC Convention; and these exceptions are set out in the Riyadh Convention's Article 28 and Article 30.²⁵² In addition to them, the following specific exceptions are applicable to the Riyadh Convention only:

If under the law of the Recipient State, the dispute that is the subject of the award from the Originating State is not;

If the arbitration agreement upon which the arbitration was based was void or had expired;

247 Beaumont, John, *Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia*
<http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93>

248 Ibid.

249 Habib Mohd and Sharif Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab State' (1999) 14/1 Arab Law Quarterly 34

250 Ibid 33.

251 Ibid.

252 Homburger Adolf, 'Recognition and enforcement of foreign judgments. A New Yorker reflects on uniform acts' (1970) 18 American Journal of Comparative Law 365.

If the arbitrator(s) was not competent under the terms of the arbitration agreement or the laws under which the award was made;

If both parties to the arbitration were not duly summoned to appear; or

If the terms of the award are such that the enforcement of the award would be against the public policy of the Recipient State,

These exceptions have been the only legal bases for refusal by KSA to recognize and enforce Arab League-wide awards.²⁵³ An examination of these exceptions reveals that most of them are similar to those laid out in the NYC, especially with regard to public policy, non-arbitrability of the dispute, incapacity and invalidity; and lack of adherence to due process of law. However, some of the exceptions found in the Riyadh Convention are not expressly provided for in both the NYC and the Washington Convention.²⁵⁴ The issues regarding conformity to Shari'a law are not expressly provided for in NYC and WC although they might be implied in the case of KSA because in the Kingdom, public policy is Islamic Shari'a.²⁵⁵ This means then that the extent to which enforcement of foreign awards under this Convention has been undertaken since KSA's accession has been nearly similar to that under the NYC.²⁵⁶ However, this does not annul the fact that the Riyadh Convention is more aligned with the GCC than either the NYC or the WC.

4.6.4 The Energy Charter Treaty (ECT)

The Energy Charter Treaty²⁵⁷ addresses four main areas of energy. The first area is the protection of foreign investments based on the MFN (Most Favoured Nation) principle which requires that a party treats all its trade partners in an equal manner and without any form of discrimination.²⁵⁸ Here, member states are expected to extend national treatment to foreign

253 Beaumont John, *Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia*
<http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93>

254 Ibid.

255 See, for more information, Yves Dzalay and Bryant Garth, 'Dealing In Virtue: International Commercial Arbitration And The Construction Of A Transnational Legal Order' (Kluwer Law International 1996) 9, 10, 124, 198.

256 Beaumont, John, *Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia*
<http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93>.

257 See full text at <<http://www.pca-cpa.org/upload/files/Energy%20Charter%20Treaty.pdf>>

258 Muchlinski Peter, *Multinational enterprises and the law* (Oxford University Press 2007).

investments as though they were their own. By extension, foreign investments are to be protected from risks which are not commercial.²⁵⁹ The second area involves non-discrimination in all forms of trade in energy products, materials, and other related equipment that can be applied to the energy sector as provided for by the rules of WTO.²⁶⁰ The third and most important area is dispute resolution where participating nations have a mechanism in place for resolving their investment disputes. The fourth area entails reduction of the negative environmental impacts.²⁶¹

In order to effectively analyze the position of KSA with respect to this treaty, it is imperative that the various participatory levels be understood. Generally, four levels of participation in the ECT are available. The first one is *member* or *observer* of the Organization of the Energy Charter Conference.²⁶² This in effect means that one is yet to become a party to the Energy Charter of 1991 (some states might be in the process of adopting the Energy Charter of 1991 but they are not yet through with it). The second level of participation is the *signatory* state of the Energy Charter²⁶³ of 1991 where some nations have begun the process of ratification of the Treaty and Protocol of 1994 but are not yet through with it. The third level of participation is the *ratification* of the Energy Charter Treaty of 1994²⁶⁴ and Protocol.²⁶⁵ Here, some nations have already embarked on the process of ratifying the Amendment of 1998 although they are not yet done with it. The final level of participation is the *ratification* of the Trade Amendment of 1998.²⁶⁶

4.7 KSA's Observer Status and Implications for Energy Issues

259 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003).

260 Thomas Roe and Hapold Mathew and Dingemans James, *Settlement of Investor-State Disputes under the Energy Charter Treaty* (Cambridge University Press 2011).

261 Yves Dzalay and Bryant Garth, 'Dealing In Virtue: International Commercial Arbitration And The Construction Of A Transnational Legal Order' (1996) 9,10, 124, 198

262 Organization of the Energy Charter Conference

263 1991 Energy Charter

264 1994 Energy Charter Treaty

265 Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA)

266 1998 Trade amendment to the 1994 Energy Charter Treaty

So far, KSA is an observer of the ECT.²⁶⁷ As an observer, KSA may only attend meetings of the Charter and receive the necessary documentation in terms of analyses and reports. It may also take part in the Charter's debates. The observation level is mainly intended to give KSA (just as other observers) the opportunity to acquaint itself with the Charter as well as its operations (functions) so that, after assessment of the benefits therein, it may move on to the next level or status.²⁶⁸ The observer status is therefore the very first or lowest level of participation that any state can ever take part in. Given that the ECT has over 51 participating nations most of which have ratified it, the level of participation of KSA leaves a lot to be desired.²⁶⁹ This is because KSA is the world's leading producer and exporter of oil; and as such most of the energy dealing on the international energy market involves it.²⁷⁰ This means that there is a lot that needs to be done in the Kingdom if trade and investment in its energy sector (particularly by foreigners) is to be made efficient and transparent. The decision by KSA to remain at the observer level points out the common trend so far identified where the Kingdom is always careful about which treaties to sign and when to do it. At the observation level, KSA is not under any obligations to do as it should in regards to its energy sector (as per international law). Furthermore, issues of transit and transportation cannot fully be addressed by the Energy Charter of 1991 which has been surpassed by three other newer changes or amendments. Although KSA showed goodwill by agreeing to be an observer of the ECT way back in 1991, it is way too long for it to remain in that position over 20 years later when other nations have moved on to fully ratify the 1998 Trade amendment.²⁷¹ This lacklustre approach to the ECT underscores KSA's protection tendencies. The Kingdom, by failing to fully participate in the treaty, allows it to avoid the duties it owes the international community as one of the world's leading energy producers and exporters. Following the examples of the NYC and WC where KSA has left oil issues out of reach of international players, it is clear that the same approach is taken here in order to continue keeping the lucrative and all-important oil sector out of the control of foreigners. Generally, KSA has therefore shown little commitment to the ECT even though it remains to be a leading oil exporter.

267 Beaumont John 'Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia'
http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93

268 Ibid.

269 Thomas Roe and Hapold Mathew and Dingemans James, *Settlement of Investor-State Disputes under the Energy Charter Treaty* (Cambridge University Press 2011).

270 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003).

271 Beaumont John., *Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia*
http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93

As far as dispute resolution is concerned, the ECT expressly lays out the ways through which disputes emerging between contracting states and other states as well as between a contracting state and investors can be resolved.²⁷² Disputes between two contracting states are resolved on the basis of Article 27 of ECT²⁷³ whereas those arising between a contracting state and investors are provided for under Article 26 of the ECT.²⁷⁴ By and large, arbitration rules to be chosen are from one of the following: UNICTRAL Ad hoc Rules; ICSID Additional Facilities Rules; The Arbitration Rules of the Stockholm Chamber of Commerce; or the ICSID.²⁷⁵ However, the manner in which the ECT is laid out and its role in dispute resolution is questionable. This is because the treaty is shrouded in ambiguity especially with regard to the settlement of disputes between states and investors.²⁷⁶ Many questions have arisen to the effect that the ECT is not explicit enough regarding several issues including: the level of protection that the treaty affords; the treaty's taxation provisions;²⁷⁷ the manner in which EU law impacts or will potentially impact on claims made under the treaty; and the responsibility that states have on the international level for failing to adhere to the provisions of the treaty (breaches). Furthermore, it has not been clear what conditions ought to be met prior to a claimant's being heard on the basis of merits; and the available procedures for rights vindication under the treaty.²⁷⁸

4.8 Conclusion

KSA's adoption and receipt of international and regional arbitration treaties is by and large predictable. The norm seems to be that as long as a treaty adheres to the fundamental principles of the Kingdom not only legally but also socially, economically, and politically, then it will be received fairly well; and enforcement of foreign awards will be relatively enhanced.²⁷⁹

272 El Rahman, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003).

273 See Article 27 of the ECT (full text at <http://www.pca-cpa.org/upload/files/Energy%20Charter%20Treaty.pdf>)

274 See Article 26 of the ECT (full text at <http://www.pca-cpa.org/upload/files/Energy%20Charter%20Treaty.pdf>)

275 See Article 12 ECT (full text at <http://www.pca-cpa.org/upload/files/Energy%20Charter%20Treaty.pdf>)

276 Ibid.

277 Thomas Roe and Happold Mathew and Dingemans James, *Settlement of Investor-State Disputes under the Energy Charter Treaty* (Cambridge University Press 2011).

278 Beaumont John, *Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia* <http://update.legal500.com/index.php?option=com_content&task=view&id=470&Itemid=93>

279 Alhoslan 'The Symposium of European-Arabian Arbitration' cited in El-Ahdab, *Arbitration in Arab Countries*, v 2, 242; El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 91.

However, few international treaties have been able to achieve these high standards, with the result that many foreign awards have not been enforced in KSA. Regionally, the GCC and the Riyadh Convention have played a very important part in enhancing KSA's ability to enforce foreign awards granted by states that are parties to both Conventions. This is because GCC and Arab states generally require that the Shari'a law aspect be incorporated into arbitration clauses. Since Shari'a law has been the major hindrance to enforcement of foreign awards in KSA; such regional treaties have tended to minimize non-enforcement.

Although KSA is an Islamic nation whose arbitration laws (based mainly on Islamic Shari'a) are often considered protectionist by the international community,²⁸⁰ its efforts to ratify and participate in a number of multilateral international treaties on arbitration has made it to be fairly attractive to foreign trade and investment. The Kingdom's accession into WTO has particularly enabled it to make headway in trade liberalization in keeping with the norm of WTO. This trend is expected to continue even as more multilateral treaties continue being made available for the Kingdom's ratification.²⁸¹ Though as of today, there remains to be little progress towards recognizing and enforcing foreign awards because of the porous nature of most international treaties on arbitration; and the many reservations made by the Kingdom in a number of treaties that it has acceded to. Protectionism remains to be a strategy employed by KSA to gain competitive edge; and by and large its ratification and participation in international treaties has not done much to compel it to adopt uniform laws on arbitration. Most of the treaties which KSA is party to have many exceptions, notable among them being the public policy issue. In many ways, public policy means Shari'a law in KSA. As such, KSA has had sufficient grounds to legally resist enforcement on foreign awards within its jurisdiction. In general, regional treaties on arbitration have been more successfully applied in KSA than multilateral ones (that have Western backing) largely because of the Shari'a provisions. This pattern is likely to persist in the future, with GCC and Arab League treaties being more successful in adoption by KSA.

Summarily, therefore, the predictable reaction of KSA to international treaties on arbitration is underpinned by the need to protect its trade. Both the NYC 1958 and the Washington Convention are restrictively received by KSA, using Article V (2) public policy and the explicit exceptions on oil and sovereign acts respectively. The Hague Convention has barely been registered in KSA. A convergence in legal treatment of public policy and trade competitive advantages emerges and points towards a policy gap between the WTO rhetoric and the current practice and behaviour of KSA as one of its signatories. By extension, the inconsistency between

280 Ibid.

281 Ibid.

the need to liberalize trade and investment as part of the WTO neo-classical remit and Shari' a law represents a conformity barrier despite the KSA commitments in favour of the former. Regional agreements on arbitration are preferentially treated over multilateral instruments on the grounds of religious orientation of the legal order of a signatory. Subsequently, KSA has shifted from the MFN paradigm towards preferential treatment.

CHAPTER FIVE

A CRITICAL ANALYSIS OF THE 1958 NEW YORK CONVENTION

5.0 Introduction

An explosion in commercial disputes across the world occasioned by the rise in commercial activities necessitated the formulation of a uniform law that could govern international commercial dispute resolution.²⁸² Such a uniform system of international dispute resolution was to be such that awards granted could be enforced without any undue restrictions.²⁸³ However, submitting disputes to international arbitration still proved a hurdle for many nations owing to the differences inherent in national laws.²⁸⁴ This led to the promulgation of the New York Convention (NYC) with a view to providing a uniform law for international dispute resolution through the arbitration.²⁸⁵ Initially, the NYC received significant opposition from a number of nations but it later become acceptable when most of these nations realised it was more beneficial to submit their disputes to international arbitration than to appearing before a court of another nation in which case chances of biased rulings were higher as happened in the case pitting ARAMCO and the Saudi government.²⁸⁶

Since its enactment in 1958, the NYC (or the Convention on the Recognition and Enforcement of Foreign Awards) has emerged as one of the most effective instruments in international commercial arbitration.²⁸⁷ This is especially with regard to its new provisions,

282 Robert Briner, 'Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards'

Under the New York Convention: Experience and Prospects 8,8 <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

283 Pieter Sanders, *The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects* 3, 4,5 <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

284 Weeramantry Christopher, *Islamic Jrisprudence: an International Perspective* 31 (Londn Macmillan1988).

285 Cohen SDtephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 47.

286 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) NYSBA *New York Dispute Resolution Lawyer* 1 49; see also SAUDI ARABIA v. ARABIAN AMERICAN OIL COMPANY (ARAMCO) ILR 1963, at 117 et seq.

287 Redfern, Alan. 'Having Confidence in International Arbitration' (2003) 57 *Disp. Resol. J.* 60, 6.

which are generally more comprehensive and of a wider scope compared to the predecessors of the NYC – the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927.²⁸⁸ Therefore, it makes the requirements for implementing foreign awards easier since it will only require that the party asking for the enforcement provide the court with a certified copy of the award and a certified copy of the arbitration agreement.²⁸⁹ Moreover, a certified translation of the award and agreement is necessary if the documents are not written in officially-accepted language of the country where the enforcement will take place.²⁹⁰ As soon as the above conditions are met, the NYC then calls for the court of member states to provide enforcement of the award except for cases wherein one or more of the basis for refusing enforcement set forth in Article V is existent.²⁹¹

This chapter covers the emergence of NYC and its function within international trade and commercial law; exploring in a critical capacity the structure of the convention and its acceptance by international actors in the form of state-signatories and private undertakings. It aims to ascertain effectiveness of the NYC in enhancing its two basic purposes for which it was formulated which are giving effect to private agreements to arbitrate; and recognizing and enforcing arbitration awards made in other contracting states.²⁹² Its main objective is to prove that although the NYC has generally been regarded as successful, it has actually been receiving mixed results as indicated not by the number of contracting states so far but by the level of success so far achieved in recognizing and enforcing foreign awards in individual states. As the case of the Kingdom of Saudi Arabia (KSA) illustrates, the mere ratification or signing of the NYC is no true indication of the Convention's success. Rather, it is the actual number of cases prosecuted successfully in every contracting state and the ability of these states to enact appropriate laws to make the implementation of the NYC within its jurisdiction possible that illustrates the true success of the Convention. For instance, KSA has only been able to successfully enforce one award since it ratified the NYC. Furthermore, success of the NYC is

288 Briner Robert, 'Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8' <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

289 NYC of 1985, Art. IV(1)

290 Ibid, Art. IV(2).

291 Sanders Pieter, The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5<<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 1998

292 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 48.

determined largely by the manner in which individual states interpret and apply the entire Convention, but especially the NYC's Article V which contains the grounds upon which a state may refuse to enforce an award granted in a foreign territory. As such, this chapter broadly argues that despite the proliferation of trade liberalization and market access measures which were conditions to the accession of the Kingdom of Saudi Arabia to the World Trade Organization (WTO), a significant void in both law and policy exists in the alignment and approximation of Shari'a law with normative rules of international trade as a result of the application of Article V of the 1958 New York Convention.

5.1 Justification for the New York Convention: Origin and Purpose

In order for a thorough understanding of the effectiveness or level of success of the NYC so far to be reached, it is important that its origin and purpose be known. The origin of the NYC is arguably a report and preliminary draft convention that was handed by the International Chamber of Commerce to the United Nations Economic and Social Council (ECOSOC) in 1953.²⁹³ This draft convention, it was hoped, would serve as a replacement of the earlier instruments used to govern international arbitration namely; the Geneva Convention on the Execution of Foreign Awards of 1927 (the Geneva Convention). Later on in a conference held in New York in 1958, ECOSOC managed to present the revised form of this draft convention. In the word of the US Supreme Court, "The goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it,²⁹⁴ was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and awards enforced in the signatory countries."²⁹⁵ In fact, it would have been absolutely unnecessary for a new convention on arbitration to be promulgated when there was another one still in place.²⁹⁶

294 Briner Robert, 'Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8' <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

294 Schaner Lawrence and John Schleppenbach John, ' Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S' (2008) 63 Disp. Resol. J. 80, 85.

295 See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15 (1974).

296 Redfern Alan, 'Having Confidence in International Arbitration' (2003) 57 Disp. Resol. J. 60, 61.

However, the flaws that were inherent in the Geneva Convention of 1927 were the major driving force behind the enactment and subsequent promulgation of the NYC.²⁹⁷ Specifically, the Geneva Convention was generally associated with cumbersome procedures popularly known as “double exequatur.” Owing to the fact that the Geneva Convention stipulated explicitly that the parties which were seeking enforcement of an award had to first offer proof of the *finality* of the award. It was not uncommon for a number of courts in many jurisdictions to interpret this requirement as asking parties to obtain leave for enforcement in the country where the award was granted before they could think of requiring that the award be enforced abroad. For instance, if an award had been granted by a French court and was to be enforced in the United Kingdom (UK), the common interpretation by courts was that the party seeking enforcement of the award in the UK should first seek and obtain leave in France prior to actually seeking enforcement in the UK. This procedural requirement was very tedious and caused many undue impediments to the enforcement of international arbitration awards, especially those that required enforcement abroad.²⁹⁸

The NYC was conceived with a view to, among other things, help overcome this difficulty.²⁹⁹ To achieve this, drafters of the NYC sought to substitute the word ‘binding’ with ‘final’ and so make it a requirement that parties seeking enforcement of an award abroad must offer proof that the award was binding (as opposed to final) in the awarding nation. Furthermore, the burden of making this proof was shifted from the courts and instead placed on the parties against whom the award was to be enforced. These are two significant issues which require a little attention. The first one has to do with the role of courts in enforcement; and the second is about the burden of proof.³⁰⁰ Now courts clearly played and continue to play a very significant

297 Sanders Pieter, ‘The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

299 Cohen Stephanie, ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 48.

299 Briner Robert, ‘Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

300 Sanders Pieter, ‘The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

role in the arbitration process because they interpret the statutes and render judgments. It is therefore important that their judgments be final. If the Geneva Convention was cumbersome because there was some sort of agreement (even if there was no consensus) that the word ‘final’ meant that leave had to be obtained from the nation granting an award in order for the award to be enforced abroad, then the new word ‘binding’, which took the place of ‘final’, ought to have actually brought about more ease in the arbitration procedures if the NYC is to be considered successful in that aspect.³⁰¹

A number of issues to do with the binding nature of arbitration awards rendered abroad have been addressed to a large extent by the NYC.³⁰² Among other requirements, the NYC has made it a requirement that contractual issues be handled with uttermost care because they ultimately determine the enforceability or lack thereof, of foreign awards as indeed are any other awards. However, the use of the term *binding* is still controversial in the NYC just as the word *final* was controversial in the Geneva Convention. Like *final* in the Geneva Convention, *binding* in the NYC is ambiguous to date. This is because there has not been as much as an attempt by the drafters to define it. As such, the interpretation of the word ‘binding’ has been left to national courts which, unfortunately, have been interpreting it in a very narrow way that has just served to reflect these courts’ desire to have foreign awards not enforced especially in cases where the parties against whom enforcement is sought are citizens of the nations where these courts are based. This shortcoming of the NYC is given more detailed attention in subsequent sections of this chapter.

On the issue of proof, having the burden of proof placed on the party against whom the award is enforced was an instrumental one.³⁰³ The NYC has in many ways seen parties successfully challenge the enforcement; and an equal number of others successfully get awards enforced.³⁰⁴ This is a milestone which the earlier convention hardly achieved with as much

302 Briner Robert, ‘Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8’<<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 2009

303 Pieter Sanders, ‘The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5’<<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

304 Pieter Sanders, ‘The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5’<<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

expediency. Finally, and arguably most important of all, the impetus behind the NYC was to ensure that the grounds upon which national courts could rely upon to legally refuse the enforcement of awards rendered abroad were limited as much as possible.³⁰⁵ Prior to the promulgation of the NYC, many legal grounds were in place and could be relied upon by courts to annul foreign awards. In fact so far one of the impediments to the enforcement of foreign awards by nations is this very issue of the legal grounds of exception.

5.2 General Reception of the NYC

From many quarters, the NYC has received praiseworthy reports for its role in not only enhancing commerce on the international level but also for helping expedite commercial international arbitration.³⁰⁶ It has, by and large, been widely regarded as the most successful convention in terms of international arbitration if not in international private law.³⁰⁷ For instance, Lord Mustill has said of the NYC that, “This convention has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instrument of international legislation in the entire history of commercial law.”³⁰⁸

305 Sanders Pieter, ‘The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

306 Briner Robert, ‘Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 8, 8’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

306 Cohen Stephanie, ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 (1) 49.

307 Redfern Alan and Hunter Michael, *Law and Practice of International Commerce Arbitration* (3rd edn, Sweet & Maxwell, London 1999); AJ van den Berg, ‘Striving for uniform interpretation’ (Enforcing Arbitration awards under the New York Convention: experience and prospects 1998) ; Merkin Robert, *Arbitration law* (Lloyd’s of London Press, London 2004) para 1-8; Mistelis Loukas and Brekoulakis Stavross, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) ; Garnett Richard and others, *A Practical Guide to International Commercial Arbitration* (Oceana Publications 2000); A Dicey, J Morris and L Collins, *Dicey and Morris on the Conflict of Laws* (13th edn, Sweet and Maxwell 2000); Born Gary, *International Commercial Arbitration : Commentary and Materials* (2nd edn, Transnational Publishers; Kluwer Law International 2001); Annan Kofi, ‘Opening address commemorating the successful conclusion of the 1958 United Nations Conference in International Commercial Arbitration’ (Enforcing arbitration awards under the New York Convention: experience and prospects 1998) 2; D Sutton and J Gill, *Russell on Arbitration* (22nd edn, Sweet & Maxwell 2003); Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) ; Philippe Fouchard, ‘Suggestions to Improve the International Efficacy of Arbitral Awards (ICCA Congress Series no 9 Paris 1998).

308 Mustill Michael, ‘Arbitration History and Background’ (1989) 6 (2) *J Intl Arb* 43 at 49.

Similarly, Lew, Mistellis and Kreoll have argued that, “the NYC is the backbone to the acceptance of international arbitration by the business world”.³⁰⁹

Since its 1958 promulgation followed by its coming into force a year later on 7 June 1959,³¹⁰ the NYC has drawn numerous countries to become member states (or what is generally referred to as *Contracting* states).³¹¹ And to date, many other states continue to join the growing list of contracting states to the NYC. So far, NYC is approved by more than 142 states, which include key trading countries as well as numerous developing countries over the globe.³¹² Specifically, by May 2012, a total of 146 of the 193 UN member states had had acceded to the NYC, leaving out only about 50 UN member states which are yet to accede to it.³¹³ The Cook Islands as well as the Holy See have also ratified the Convention. Taiwan and British Overseas Territories have also not adopted the NYC, but this is largely because Taiwan’s sovereignty is still disputed while the British Overseas Territories have not been presented with the option of ratifying the Convention (the NYC has not been extended to them by Order in Council). These include; Anguilla, British Virgin Islands, Falkland Islands, Turks and Caicos Islands, Montserrat, Saint Helena (including Ascension and Tristan da Cunha). From this list of states that have adopted the NYC, it is doubtless that the Convention has been very successful indeed (see appendix 1). This is because these parties are as divergent as it can possibly get, showing that the NYC has been able to appeal to all and sundry.³¹⁴

However, one wonders if success of the NYC is only measurable by the number of signatory states. If it were so, then the NYC would be successful.³¹⁵ However, as the rest of this chapter argues, although the NYC has been adopted by many nations and private undertakings, it

309 Mistellis Loukas and Brekoullakis Stavros, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009)

310 Cohen Stephanie, ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) *NYSBA New York Dispute Resolution Lawyer* 1 49.

312 Sanders Pieter, ‘The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

312 See, for the states parties to the NYC, UNCTIRAL, ‘Stratus; 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ <http://www.uncitral.org/uncitral_texts/arbitration/NYConvention_status.html>

313 Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement* (2007) 18 *ICC Bulletin* 1, 34.

314 Redfern Alan, ‘Having Confidence in International Arbitration’ (2003) 57 *Disp. Resol. J.* 60, 61.

315 Cohen Stephanie, ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) *NYSBA New York Dispute Resolution Lawyer* 1 49.

has had its own flaws especially as far as implementation is concerned.³¹⁶ This then begs the question of the success of the NYC relative to its intended purposes. In essence, the issue that needs investigation is the one regarding the general level of success of the NYC relative to other international instruments (treaties, conventions, and Model Laws) on arbitration. To rate the success (or lack thereof) of the NYC, it is imperative that its general reception by states around the world be critically analysed. In essence, it is worth exploring in a critical way the manner in which the NYC has been received around the world.

5.3 The Basic Actions Contemplated by the New York Convention

While the NYC generally sought to enhance international commercial arbitration, there are two basic actions that it actually contemplated,³¹⁷ and understanding each one of them is relevant for this thesis because it will help position Saudi Arabia with respect to the intention of the international community in promulgating the NYC in the first place and what it has achieved so far for Saudi Arabia.³¹⁸ In essence, this section is helpful in assessing whether or not what was contemplated by the NYC has been attained within KSA in comparison to other states in the world that have either signed or ratified the Convention (the US³¹⁹ is a typical example used in this chapter).

5.3.1 Action 1: Enforcement of Foreign Awards

The first action that was contemplated by the NYC and one that is closely associated with the convention (as suggested by its name) is foreign award enforcement.³²⁰ The issue that arises

316 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 49.

317 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 48

318 Briner Robert, 'Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8' <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 1998.

319 Schaner Lawrence and Schleppenbach John 'Schleppenbach, Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S' (2008) 63 *Disp. Resol. J.* 80, 85.

320 Briner Robert, 'Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8' <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 1998.

here is with regard to the actual meaning of ‘foreign’ awards. The generally accepted definition, which is also included in the NYC’s Article I, has been; *awards which are made in the territory of another state*.³²¹ In essence, every contracting state was expected, or actually obligated, to recognize awards rendered in another territory as *binding* and so enforce them just as the state would enforce an award arising from its own national courts based within its territory.³²²

The case of *Bergesen v Joseph Muller Corp.* not only underscores the broad interpretation of ‘foreign award’ by the NYC but also the good intentions and friendly approach that the US has adopted towards the treaty as whole in order to help realize its intended purposes.³²³ In this case, the court, having carefully reviewed the NYC’s legislative history, made the ruling that:³²⁴

Awards “not considered as domestic” denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g. pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

KSA is one of the countries where general reception of the NYC has been rather lacklustre (as shown by the very limited number of foreign awards so far enforced since 1994) in spite of the fact that the kingdom has ratified it. Generally, the provisions of the NYC in general and Article I in particular have been received in a rather hostile manner in KSA.³²⁵ KSA, not wishing to be left out of the modernization of the international community as far as embracing

321 Briner Robert, ‘Philosophy and Objectives of the Convention, in *Enforcing Arbitration Awards*

Under the New York Convention: Experience and Prospects 8, 8’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998.

323 Sanders Pieter, ‘The Making of the Convention, in *Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects* 3, 4,5’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 June 1998

323 Schaner Lawrence and John Schleppenbach John, ‘Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S’ (2008) 63 *Disp. Resol. J.* 80, 85.

324 710 F.2d 928 (2d Cir. 1983).

325 Cohen Stephanie, ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) *NYSBA New York Dispute Resolution Lawyer* 1 48

new legal frameworks (through multilateral treaties) is concerned and at the same time not wanting to let go of its historical past of being opposed to foreign arbitration, enacted laws in 1963 and then in 1983 that effectively barred public entities from submitting to arbitration, thereby hindering farther the process of arbitration within its territory. While private entities may submit to arbitration a limitless number of issues, this has to be done strictly within the provisions of Saudi law. This is a blow to the NYC which required that nations pass domestic laws that can allow for the effective implementation of the NYC within their territories. Unlike the US which has done just that (by enacting chapter two (specifically section 202) of the Federal Arbitration Act, KSA has done just the opposite by enacting laws that further impede arbitration in general and the enforcement of foreign awards within its territory in particular.

Why is this so? The answer lies with the history of KSA especially as it pertains to the role it plays in international affairs in general and international trade in particular. The Saudi Arbitration Law (SAL), which in effect guides all matters of arbitration within the kingdom, has been criticized for being sharply contrasted with international law, especially the NYC. The SAL, for instance, is not based on the UNCITRAL Model Laws,³²⁶ and this makes it out as an out-of-date law that ought not to be applied in the modern times. Basically, the fact that the NYC gives room for Contracting states to apply their own laws in interpreting and applying the NYC's provisions has rendered it largely ineffective. As the cases of KSA and the US illustrate, the NYC can only be successful if the Contracting states decide to make it so.³²⁷ Otherwise it might just remain to be another legal instrument that has no real implications for international commercial arbitration. This is especially so when compared to the Washington Convention and the ICSID Convention both of which have similar flaws that render their applicability and effectiveness wanting (for more details on these two Conventions, refer to the chapter on 'Multilateral Arbitration Treaties and their Receipt by KSA').

Article III of the NYC spells out the general obligation for states under the NYC;³²⁸ and adds the requirement that every Contracting state must enforce such awards in accordance with

326 'United Nations Commission on International Trade Law ('UNCITRAL'), Status Table for the Convention' <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>

327 Schaner Lawrence and John Schleppenbach John, ' Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S' (2008) 63 *Disp. Resol. J.* 80, 85.

328 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) *NYSBA New York Dispute Resolution Lawyer* 1 47

its own rules of procedure.³²⁹ This is the point that has rather led to KSA's lacklustre approach to the NYC. The failure by the international community (specifically the drafters of the Convention) to lay out specific laws that would be followed when implementing the NYC in Contracting states has no doubt caused implementation challenges. While it was right to require that Contracting nations use or apply their own laws when enforcing foreign awards, it would have been more prudent to require that every Contracting state follow a certain law or laws. This is because different nations around the world have different laws and legal regimes some of which are not in agreement with international law. For instance, Saudi Arabian law is solely based on Islamic religious principles; and it is known that Islamic principles, as indeed are other religious principles/teachings, are not part of international law. This presents an implementation hurdle for the international community. In essence, KSA, as are indeed other nations using Islamic law as the basis of their national law, find it hard to embrace the NYC because the NYC does not recognize Islamic law. This issue is given more consideration in subsequent sections of this chapter.

5.3.2 Action 2: Reference by Courts to Arbitration

The second action contemplated by the NYC is the need by courts to make reference to arbitration as long as a party or both parties have made an arbitration agreement on a matter, which the court is seized of.³³⁰ This requirement is entrenched in Article III of the NYC. However, while this Article is in itself without so many implications for the successful application of the NYC by contracting states, it is a condition that has to be made before any of these actions are undertaken. This has implications for the successful and effective implementation of the NYC. This condition, contained in Article II (1) and II (2), is that in order for any of the two actions (just mentioned above) to be undertaken, the arbitration agreement has to be in *writing* (see text at section 5.5, 5.6 and 6.1.8 and accompanying notes). While this requirement might have been tenable, even understandable, at the time of the promulgation of the NYC in the late 1950s,³³¹ it makes little sense in the 21st century when electronic commerce (that

330 Sanders Pieter, 'The Making of the Convention, in Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4,5' <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>>

330 Briner Robert, 'Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8' <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 1998.

331 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 50

commerce that is undertaken without ‘writing’) is the order of the day.³³² Writing as was contemplated by the 1958 NYC might not be possible today; and this requirement has been an impediment to the implementation of the NYC in the modern era. Once again this writing delimitation of the NYC is considered in greater detail in subsequent sections of this chapter.

The Need for Action 1: Enforcing an Award

The question that begs when enforcement of foreign awards is mentioned or discussed is with regard to the need for enforcing an award in the first place; and why it is so important an issue for commerce (especially on the international level). While most awards are complied voluntarily and thus do not require any form of judicial enforcement, adequate enforcement is requirement, nonetheless, if a claimant is to be assured of recovering damages due to that award.³³³ In essence, unless an award is enforced adequately, the claimant might not benefit from the damages that are due to that award. A domestic award might be easily enforced because the claimant and the losing party (the party that is compelled to pay for the damages) are based in the same territory or judicial system. Although where foreign awards are involved, there is a difference in not only nationalities of the parties to the dispute but also in the laws and rules of engagement. Whereas most arbitration agreements (entered at the time of forming a contract) do contain an arbitration clause that, among other things, defines the law that is to be used in the event of arbitration, the differences in legal systems often act as an impediment to expedient dispute resolution. In fact, that is the reason why the NYC was put in place to serve as a common law for parties seeking to resolve their commercial disputes through ensuring that foreign awards are enforced with much ease similar to domestic awards.³³⁴

The manner in which individual Contracting states approach the NYC has made this difficult, even impossible in certain circumstances.³³⁵ While some Contracting states have made it easy for enforcement of foreign awards to be undertaken, others have made it very difficult,

332 Cohen Stephanie, ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 49

333) Redfern Alan, ‘Having Confidence in International Arbitration’ (2003) 57 *Disp. Resol. J.* 60, 61.

335 Briner Robert, ‘Philosophy and Objectives of the Convention, in *Enforcing Arbitration Awards*

Under the New York Convention: Experience and Prospects 8, 8’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 1998.

335 Van den Berg Albert Jan, *New York Convention of 1958: Refusals of Enforcement*, (2007) 18 *ICC Bulletin* 1, 34,35.

and KSA is a notable example. KSA has had a long history of refusing to recognize foreign awards because it deems them to be contrary to its own laws. Yet the Kingdom's laws are not in subordination to the international normative rules, making the problem even more complicated. This is because Saudi laws are purely based on Islamic principles, which do not form part of international law. So for KSA, Shari'a law is regarded as public policy and this is in gross opposition to international law, which is not based on religious laws. There are a number of disincentives that discourage investment in the Kingdom. For instance, the government of Saudi Arabia has been working tirelessly to force employers in the nation to hire only Saudi nationals. Foreign workers also find it hard when it comes to obtaining Visas. The Visa policies are just too restrictive especially towards foreign employees. It is also notable that most business settings lack a favourable environment that accommodates people from all sexes. Women are largely discriminated upon in the business and social setting. The men are the ones in charge in almost all business settings. On the contrary, nations like Kuwait and the US have been readily enforcing foreign awards,³³⁶ with the US particularly interpreting its laws in such a manner that it is possible for as many foreign awards as possible to be enforcement within its territory.³³⁷

5.4 Specific Delimitations of the NYC

While the general consensus has been that the NYC has been a successful tool in international arbitration for the over 50 years that it has been in place owing to the large number of states and private undertakings that have adopted it, the Convention has not been without its own flaws which have effectively made it unsuccessful in specific contexts, especially in KSA.³³⁸ These delimitations include the following:

5.5 The Writing Requirement is both Outdated and Strict

Article II (1) of the NYC is a significant facet to this thesis since it shades more light on the intricacies revolving around the enforcement of foreign awards in the Kingdom of Saudi Arabia with particular emphasis to the 'writing requirement'. Just like Article V, this article also shades light on the grounds for refusal and the impact of such refusal. Article II (1) of the NYC generates a lot of controversy and ambiguity because it requires, in an express manner, that an

336 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 47.

337 Lawrence and John Schleppenbach John, ' Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S' (2008) 63 *Disp. Resol. J.* 80, 85.

338 Cohen Stephanie, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA *New York Dispute Resolution Lawyer* 1 48.

agreement to arbitrate shall be “in writing”.³³⁹ It further specifies that “each Contracting State shall recognize an agreement *in writing* under which the parties undertake to submit to arbitration, all or any differences” (with emphasis).³⁴⁰ This way, it can be considerably examined that the general ground regarding the invalidity of the arbitration agreement invoked in practice at the stage of enforcement of the award is that the agreement does not conform to the formal requirement mentioned in Article II. Consequently, the main issue that needs to be addressed now is with regard to what can be considered as an agreement *in writing*.³⁴¹ While there is a general consensus³⁴² that Article II(2) provides a uniform of a maximum requirement which surpasses any other more demanding formal requirement under the national laws, different views regarding whether the definition of *written* arbitration agreement provided in Article II(2) could be deemed a uniform of a minimum formal requirement as well.³⁴³ The old established view is that Article II (2) creates a maximum as well as a minimum international uniform rule for the formal validity of the arbitration agreement which succeeds over any provision of any national law thereon. Prof. Sanders and Prof. van den Berg earlier stressed that, “Article II(2) must in principle be considered to be both maximum and a minimum requirement: a court may not require more, but may also not accept less than is provided by Article II(2) for the form of the arbitration agreement.”³⁴⁴

Therefore, no enforcement can be sought under the application of the NYC if the arbitration agreement is not in compliance with the written form as required by Article II (2) such as the implied or oral agreement.³⁴⁵ In support of this view, it is deemed that since the text

340 Kaplan Neil ‘Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice’ (1996) 12 Arb. Int’l 28, 43.

340 NYC of 1958, Art II (1).

341 Briner Robert, ‘Philosophy and Objectives of the Convention, in Enforcing Arbitration Awards

Under the New York Convention: Experience and Prospects 8, 8’ <<http://www.uncitral.org/uncitral/search.html?q=new+york+convention>> accessed 10 1998.

342 However, the Italian Courts used to rely on the Italian Civil Code (Arts. 1342 and 1342) which requires more restrict requirements for the formal validity than those laid down in Article II (2). See, for more details, van den Berg, ‘Consolidated Commentary’ (2003) 591.

343 Kaplan Neil ‘Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice’ (1996) 12 Arb. Int’l 28, 43.

344 van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 178, 179; Sanders, ‘Consolidated Commentary’ (1981) 221.

345 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 178, 196; van den Berg, ‘Consolidated Commentary’ (2003) 589; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) .

of Article II(2) seems to be comprehensive and does not provide any room for the application of national law, the uniform rule character would apply to its fullest. In addition, this approach can achieve further support from the legislation history of the NYC. The legislation history shows what the drafters of the Convention had in mind regarding the definition of the agreement in 'writing' clause of Article II (2) that it is to be interpreted as all-inclusive, not only for the reason that they declined the suggestion of scrapping Article II (2) as a whole, but also because they refused the proposal to add the non-objection to a confirmation including a clause (i.e. tacit agreement) to the definition of the arbitration agreement in writing.³⁴⁶ Basically, therefore, rather than seeking to amend Article II(2) which appears to be quite difficult, its requirement of *written* form needs to be interpreted in a liberal manner as opposed to in a literal manner in order to meet the demands of current practice and the needs of the international trade communication. Unless this is done, the NYC will remain by and large an inappropriate tool for contemporary international commercial arbitration.

Furthermore, there is no valid reason to submit an arbitration agreement to stricter form requirement aside from contractual provision since submitting to arbitration has become the natural norm for international commercial disputes instead of a risky waiver of the primary right of litigation at the national court. Without a doubt, restricted form requirements may seem like a source of additional disputes instead of encouraging legal certainty. Consequently, the written agreement requirement clause of Article II (2) has to be liberally construed in the light of modern channels of communications if the NYC is to be of any worth today.³⁴⁷ How possible this is, however, remains to be a subject of debate.

A close examination of the general structure of Article II(2) reveals another important matter that needs to be considered which is, what constitutes an agreement in writing under Article II. One may view that the judicial interpretations vary at a greater degree regarding some aspect of the written agreement requirement under Article II(2) as a result of the difference in national laws regarding what meets the criteria of a writing requirement and as a manifestation of different attitudes of the national court towards arbitration.³⁴⁸ Nonetheless, Article II (1) generally necessitates that the arbitration in agreement be in writing; and Article II (2) consequently comes to offer an identification of the principle of the writing requirement. It is stated as follows:

346 See, van den Berg, *The New York Arbitration Convention of 1958 : Toward a Uniform Judicial Interpretation* 179.

347 See, Lew Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* paras 7-9.

348 See, Lew Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* paras 7-19, 7-20; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 170.

The term “agreement” in writing shall include a clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

Therefore, Article II (2) provides two alternatives or possibilities. The first is an arbitration clause in a contract or a separate arbitration agreement signed by both parties.³⁴⁹ The second alternative is an arbitration clause in a contract or a separate arbitration agreement contained in exchange letters or telegrams possibly not having signatures. In this context, the Swiss Supreme Court in the case *Compagnie de Navigation v MSC* has emphasized the definition of agreement in writing under Article II(2) thus:

According to the formal requirements applicable in the case, valid arbitration clauses are those either contained in a signed contract or in an exchange of letters, telegrams, telexes and other means of communication. In other words, a distinction should be made between agreements resulting from a document, which must in principle be signed, and agreements resulting from an exchange of written declarations, which are not necessarily signed.³⁵⁰

Hence, the main issues that need to be considered are the identity of the documents that have to be signed; the kind of exchanges that are satisfied, and whether or not the modern means of communication can be engaged under “an exchange of letters or telegrams”.

5.6 Signatures’ Legal Challenge

In the age of rapidly changing technology, it is becoming imperative for the definition of a signature to be made in terms that are not only clear but also conclusive and universal. The NYC is not a new convention, having come into force over fifty-three years ago.³⁵¹ Whatever it envisaged as a signature at that time might not be inclusive of the signatures that are currently applicable (and acceptable) in the modern, 21st century world. For instance, the NYC requires that there be written consent. Generally, at least within the revised, broader meaning, a signature ought to be any mark that is used to make a document authentic. Rather, authentication of

349 Kaplan Neil ‘Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice’ (1996) 12 Arb. Int’l 28, 43.

350 *Compagnie de Navigation et Transports v MSC – Mediterranean Shipping Company SA* 697.

351 Kaplan Neil ‘Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice’ (1996) 12 Arb. Int’l 28, 43.

documents by use of a special mark is sufficient to pass as a signature. This means that signatures are both electronic and hand-written. However, the challenge comes when this issue is applied in the international arena where different nations and states treat signatures differently and define them differently in diverse contexts.

5.7 Conclusion: The Ambiguous Nature of Article II (1) and II (2)

To require that an arbitration agreement must be in writing is not only an outdated one but also one that is too strict especially given the changes in technology which have resulted in new forms of transacting business not just in KSA but all around the world. Unlike in the past when contracts and agreements were actually written using ink and paper, today's transactions can be and have actually been taking place through electronic media.³⁵² This has then made the writing requirement unnecessary. Otherwise there is need for reviewing the actual meaning of 'writing' because in electronic contracts and agreements, there is the use of electronic documents and not necessarily ink and paper. In essence, the writing requirement contained in Article II (2) is in all ways out of step with electronic commerce and is therefore a hindrance to commerce rather than a facilitator. The only remedy that this particular requirement (or Article II) has is that there is no definition of the words, 'writing' or 'written'. This then has been a matter that is left to courts to interpret; and once again it is a subjective issue. Some courts have taken on a broadly construed interpretation while others define the term narrowly depending on the general approach that the Contracting state has taken on the entire treaty.

Nonetheless, the interpretation of Article II (2) has caused inconsistencies in the application of the NYC. For instance, some states have relied on national laws to determine the meaning of this Article while others have not. Depending on whether or not the concerned country has a comprehensive electronic commerce law in place, this article has been defined exhaustively or has been left with interpretational limitations and flaws. For instance, in a country like the US where there is in place a comprehensive electronic commerce and electronic signature law, the term *written* has been interpreted to include electronic documents and signatures and generally all contracts that can be concluded electronically.³⁵³

352 Kaplan Neil 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice' (1996) 12 Arb. Int'l 28, 43.

353 Karmanian Susan, 'The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts (2002) 34 Geo. Wash. Int'l L. Rev. 17, 67.

On the contrary, nations which have no comprehensive electronic commerce law in place as yet such as KSA and Kuwait, have tended to interpret Article II(2) narrowly.³⁵⁴ Unlike Kuwait which has generally adopted a softer and friendlier stance towards the NYC, KSA has typically failed to enforce foreign awards on the basis that the contracts have not been entered into by *writing* and so are contrary to Article II(2).³⁵⁵ In relation, the huge discrepancy in the level of acceptance and employment of new technology between major world markets, particularly of the west and their eastern counterparts remains a challenge. For example, e-procurement in Saudi Arabia is largely still in its infancy, with its application being in only a handful of its municipalities. This implies that it will take a considerably long time for such countries to embrace technology and be at par with their more developed and liberal trade partners, This ultimately raises the question of what was intended by ‘written’ agreement. Unless it is clear, the NYC will remain to be applied disproportionately. Although KSA purports to be keen on enforcing foreign awards,³⁵⁶ the fact that it has failed to comprehensively ensure enforcement of its arbitration laws as based on the UNCITRAL Model Law means that even the recommendations by UNCITRAL (in 2006) that the application of Article II (2) be done with the knowledge that its provisions are not exhaustive are of no significance.³⁵⁷

5.7.1 The Unforeseen Barriers in National Procedural Rules

While appreciating the desire by the treaty to respect the sovereignty and territorial integrity of nations and so requiring that each Contracting state will be required to enforce foreign awards in line with their own national laws or national rules of procedure, this requirement, entrenched in Article III, sets the stage for one of the most common (yet subtle) ways for these states to effectively fail to honour their obligations under the Convention. All a Contracting state needs to do is set its rules of procedure in such a way that it is not possible for foreign awards to be enforced within its territory. KSA best exemplifies this approach to the

354 Roy Kristin, ‘The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ (1994) 18 (3) Fordham International Law Journal 18(3) 920.

355 Kaplan Neil ‘Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?’ (1996) 12 Arb. Int’l 28, 43.

356 Roy Kristin, ‘The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ (1994) 18 (3) Fordham International Law Journal 18(3).

357 UNCITRAL, ‘Recommendation Regarding the Interpretation of Article II(2) and VII(1)’ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html>; Ashman Vivienne, UNCITRAL Initiatives to Further Harmonize and Modernize Arbitration Laws, Rules and Practices, in Practising Law Institute, Litigation and Administrative Practice Course Handbook Series 635 (2000).

Convention.³⁵⁸ It appears that KSA wanted to please the international community but at the same time offer protection to its trade. So it chose to reach a compromise, arguably, by acceding to the NYC in 1994 but used a number of possible flaws therein to circumvent.³⁵⁹ That is why eighteen years after accession KSA has not changed its hostile approach towards international arbitration.³⁶⁰ Nevertheless it has made significant strides towards assimilating into the Western world and the benefits that it has to offer through treaties and WTO.³⁶¹

In order to understand the position of KSA with respect to implementation of the NYC, it is imperative that the kingdom's history regarding implementation of international laws domestically is unearthed. KSA has for the most part of its existence remained hostile towards foreign awards and has been reluctant to recognize and enforce them largely because of the notion that these awards are contrary to Saudi public policy and instead were formulated to serve the interests of the western world as opposed to those of Saudis.^{362,363} In fact the kingdom generally rejects any dispute resolution methods that are foreign to it. By extension, it has in place a legal regime that either restricts or prohibits most of the modern forms of international dispute resolution, including arbitration.³⁶⁴ The decision by the kingdom to accede to the NYC, in view of this historical opposition to international arbitration, was at best unexpected, even surprising. However, the approach taken after accession might just explain why this decision was made in the first place: the kingdom wanted to move in step with the international community in matters of commerce and so reasoned that acceding to the NYC was sufficient indication to the international community of this desire.³⁶⁵

358 Roy Kristin, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 (3) *Fordham International Law Journal* 18(3).

359 Roy Kristin, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 (3) *Fordham International Law Journal* 18(3).

360 Brand Joseph, 'Aspects of Saudi Arabian Law & Practice' (1986) 9 *B.C. INT'L & Comp. L. REV.* 1, 2.

361 Roy Kristin, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 (3) *Fordham International Law Journal* 18(3).

362 Pompeo Paul, 'East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems' (1992) 14 *Loy. L A, INT'L & CoMP. LJ.* 815, 840.

363 Westbrook David, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 819 *VA.J. INT'L L.*

364 Brand Joseph, 'Aspects of Saudi Arabian Law & Practice' (1986) 9 *B.C. INT'L & Comp. L. REV.* 1, 2.

365 Pompeo Paul, 'East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems' (1992) 14 *Loy. L A, INT'L & CoMP. LJ.* 815, 840.

Instead, opposing laws were enacted, and they were supplemented by the general public policy of the kingdom which stipulates that anything that is contrary to Islamic Shari'a would not be enforced in the kingdom. Basically, it can be argued that KSA decided to accede to the NYC just as a way of helping it join the WTO, but once this was achieved, it did nothing more to enhance the enforcement of foreign awards.³⁶⁶ This tactical move has paid off heavily for the kingdom because although it has access to a number of international markets for its products, it has remained intolerant of foreign awards and would not facilitate their enforcement within its territory.³⁶⁷ Nonetheless, since the NYC specifically requires that Contracting states use their own laws to enforce foreign awards; KSA finds itself with a legal basis not to enforce any awards courtesy of the restrictive nature of its domestic legal procedures.³⁶⁸

KSA's laws are such that Islam is the basic law upon which all other laws are founded.³⁶⁹ Unlike most nations around the world,³⁷⁰ Islam offers KSA both the legal and administrative (governance) frameworks, aside from being the religion for Saudis. As such, the legal system of the kingdom places a lot of emphasis on the enforcement of the values and cultures of Islam.³⁷¹ Compared to the contemporary Western law (which includes the NYC), this emphasis is out of place.³⁷² Western law mainly focuses on economic gain; and while it accords issues of morality the attention they deserve, it is not expressly based on any religious fundamentals. In fact Islamic law goes farther and effectively illegalizes dealings in any activities that emphasize profit or *Riba*; and this provision basically sets it up against modern laws, which govern commercial

366 Kristin Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?* *Fordham International Law Journal* 18(3) 1994: pp.941.

367 Joseph L. Brand, *Aspects of Saudi Arabian Law & Practice*, 9 B.C. INT'L & Comp. L. REv. 1, 2 (1986).

369 Hoppe John, *Saudi Arabia, in Legal aspects of doing Business in the Middle East* 157, 192 (Dennis Cambeli ed. 1986).

369 Westbrook David, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 VA.J. INT'L L. 823.

370 Pompeo Paul, 'East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems' (1992) 14 Loy. L A, INT'L & CoMP. LJ. 815, 840.

371 Pompeo Paul, 'East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems' (1992) 14 Loy. L A, INT'L & CoMP. LJ. 815, 840.

372 Westbrook David, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 VA.J. INT'L L. 848.

activities.³⁷³ Interestingly, the kingdom will therefore, on the basis of this law, not entertain any contracts entered into and which charge interest rates that are unusually high.³⁷⁴

Another Islamic concept that is sharply in contradiction with western law is risk or *Gharar*.³⁷⁵³⁷⁶ *Gharar* effectively forbids all forms of gambling or speculative trading; and this means that insurance (which is by nature speculative because there are no benefits to policyholders unless a loss is made) is forbidden. Any contracts that are based on insurance are declared null on the basis of *Gharar*.³⁷⁷ Historically, KSA has frowned upon insurance; and firms dealing in insurance have not been welcome in the country.³⁷⁸ Realizing the importance of these firms in its economic growth, KSA has revised its policy on insurance; and thus parties might invest in insurance.³⁷⁹ Still, this investment has to be done within strict limitations requiring that all profits accrued from investments of this kind must not be invested outside the country. Now that is quite interesting especially considering that among the purposes of the NYC is to enhance trade liberalization and overcome unnecessary barriers to trade. It actually defeats logic for any investor to be asked to invest in a venture where investment profits might not be enjoyed as one desires. Requiring that investment profits stemming from insurance-related commercial activities be invested only in KSA,³⁸⁰ the kingdom effectively proves that regardless of acceding to the NYC and other international treaties, it is still keen on protecting its own trade and cares less about the implications this might have on the investors.³⁸¹ However, few, if any,

373 Bassam Tint, *Islam and the Cultural Accommodation of Social Change* 57 (Clare Krojzl trans., 1990).

374 Lamm Carolyn, 'Recent Developments in International Arbitration' (1989) 36 FED. B. NEWS & J. 276.

375 Weeramantry Gary, 'Islamic Jurisprudence: an International Perspective' (1998) 31 at 13.

376 Westbrook David, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 VA.J. INT'L L. 828.

377 Roy Kristin, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 (3) Fordham International Law Journal 948.

379 Hoppe John, *Saudi Arabia, in Legal aspects of doing Business in the Middle*

East 157, 192 (Dennis Cambeli ed. 1986).

379 Westbrook David, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 VA.J. INT'L L. 845.

380 Brand Joseph, 'Aspects of Saudi Arabian Law & Practice' (1986) 9 B.C. INT'L & Comp. L. REV. 1, 2.

381 Hoppe John, *Saudi Arabia, in Legal aspects of doing Business in the Middle*

East 157, 192 (Dennis Cambeli ed. 1986).

investors would be willing to invest in insurance as that would basically mean that they will never get to enjoy their profits outside KSA – at least not in the short-term.³⁸²

5.7.2 The Legal Grounds for Refusal of Enforcement: Article V (1) and V (2)

Perhaps the most limiting aspects about the NYC are with regard to the legal grounds of exception, which might be cited by a Contracting state to reject the enforcement of a foreign award.³⁸³ Although this subject matter is exhaustively dealt with in the chapter: “The Grounds Of Exception To Recognition And Enforcement of Awards Laid Down In Article V (1) NYC 1958 And Their Legal Function In The Kingdom Of Saudi Arabia”, it is nonetheless worthy discussing some of them here as well because these grounds, which constitute Article V, form an integral part of the NYC.³⁸⁴

5.7.3 Confusion over the meaning of ‘Binding’

To start with, there is an interpretational challenge with Article V (1)(e) which basically allows Contracting states to refuse enforcement of awards that have not become *binding* on the feuding parties.³⁸⁵ Beyond that, there is no elaboration or explanation of the meaning of ‘binding’. As noted earlier, the term ‘binding’ was a replacement for the more confusing word ‘final’ that was found in the Geneva Convention.

The most controversial thing is to consider any award that has not been suspended or set aside as being binding on the parties.³⁸⁶ Both these approaches, though helpful to some extent, are nonetheless of no much help as they are too subjective. As such, the NYC is by and large limited in this aspect.

382 Roy Kristin, ‘The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ (1994) 18 (3) Fordham International Law Journal 948.

383 Sheppard Audley, ‘Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards’ (2003) 19 Arb. Int’l 217, 220, 247.

384 Sheppard Audley, ‘Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards’ (2003) 19 Arb. Int’l 217, 220.

385 Ibid 247

386 Dana Freyer and Hamid Gharavi, ‘Finality and Enforceability of Foreign Arbitral Awards: From “Double Exequatur” to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity’ 91998) 13(1) ICSID Rev. 101.

5.7.4 The Absence of an International Standard for Public Policy

The NYC expressly provides that contracting parties may refuse to enforce foreign awards if doing so would be contrary to their public policy.³⁸⁷ The exception, set forth in Article V(2)(b), sets forth the most far-reaching excuse cited by KSA for refusing to enforce foreign awards. This is because public policy is subjective and varies from one nation to another.³⁸⁸ Public policy is not the same even for two states that are closely linked or related in many ways such as; culturally, politically and religiously.³⁸⁹ That is why a country like KSA has a public policy different from a nation like Syria or Kuwait (both of which have interpreted the public policy requirements restrictively) yet both are Arab-speaking, Islamic religious states found in the Middle East.³⁹⁰ Public policy basically entails what a country considers to be an issue or issues of great importance; and as such, it treats these issues as forming part of its own laws. Every nation has its own unique public policy or policies because these are basically government actions which are principled guides to be undertaken or executed by executive and/or administrative branches of the government(s) concerned.³⁹¹ Therefore, public policy applies to certain issues and this application is in such a manner that it is only consistent with the laws and customs of the concerned country.³⁹² Thus, it is impossible that two nations could have the same public policy unless they have the same set of laws and customs. One wonders, then, why the NYC never envisaged having a common definition or interpretation of public policy even as it sought to limit possible restrictions that could stop nations from ratifying the convention.³⁹³

Once again, KSA comes in handy to illustrate just how the concept of public policy has been misused by contracting states in order to justify their refusal to enforce foreign awards.³⁹⁴ The question that begs is with regard to what actually constitutes public policy. Under normal

387 Sheppard Audley, 'Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arb. Int'l* 217, 220.

388 *Ibid.*

389 Hoppe John, *Saudi Arabia, in Legal aspects of doing Business in the Middle East 157, 192* (Dennis Cambeli ed. 1986).

390 *Ibid* 157, 192

391 *Ibid.*

392 *Ibid.*

393 Sheppard Audley, 'Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards, 19 (2003) *Arb. Int'l* 217, 222.

394 Hoppe John, *Saudi Arabia, in Legal aspects of doing Business in the Middle East 157, 192* (Dennis Cambeli ed. 1986).

circumstances, there is supposed to be a public policy for international relations and a public policy for domestic or national relations.³⁹⁵ The failure by the NYC to clearly and distinctly set apart these two types of policies and to make reference to one of them is a major delimitation indeed. Since the NYC is applicable as a part of or with respect to international law, the issue of domestic public policy of the Contracting state ought not to arise whatsoever. Instead, the NYC would have been a more effective tool in enhancing international arbitration and general international commerce if it referred specifically to international public policy. This would not only have prevented Contracting states from using the public policy ground to protect their own domestic trade, but from unduly creating an issue and branding it public policy as well.³⁹⁶

In addition, international public policy is almost commonly known, and among other issues, it requires that international peace and coexistence arise from the mutual understanding and acceptance of differing beliefs and philosophies. While it is true that a number of national courts, notably those in the US,³⁹⁷ have from time to time applied themselves to the use of a more restrictive international public policy concept,³⁹⁸ others like KSA have shown reluctance to use this restrictive concept, instead taking on an unrestricted approach where public policy entails almost anything that is common practice in the country (such as religion and culture). Clearly, a culture of a nation cannot be expected to form part of international public policy even if it could possibly form part of the nation's national policy. Losing parties are especially likely to take advantage of this public policy ambiguity, to resist the enforcement of foreign awards and therefore benefit at the expense of the party which to whom the award was due.³⁹⁹

As noted earlier, there is nothing as Islamic international law; and as such there can be nothing such as international public policy, which is based on Islamic principles such as Shari' a, as KSA purports the case to be.⁴⁰⁰ By purporting to have in place an international Islamic public

395 Westbrook David, 'Islamic International Law and Public International Law: Separate Expressions of World Order' (1993) 33 VA.J. INT'L L. 834.

396 Hoppe John, *Saudi Arabia, in Legal aspects of doing Business in the Middle East 157, 192* (Dennis Cambeli ed. 1986).157, 192

397 Karmanian Susan, 'The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts, 34 Geo' (2002) Wash. Int'l L. Rev. 17, 69 .

398 Lawrence S. Schaner, John R. Schleppenbach, *Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S.*, 63 Disp. Resol. J. 85 (2008) at 87.

399 Sheppard Audley, Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards' (2003) 19 Arb. Int'l 217, 225.

400 Hoppe John, *Saudi Arabia, in Legal aspects of doing Business in the Middle East 157, 192* (Dennis Cambeli ed. 1986).

policy, KSA is effectively trying to bring into being a global community of Islam where everyone shares in Islam as his/her law and the religion.⁴⁰¹ This, clearly, is not possible. In summary, therefore, the public policy ground makes it possible for any nation to circumvent the main purpose for which the Convention was promulgated: ensuring the uniform enforcement or foreign awards.⁴⁰² In view of this, one wonders why, in the very first place, this limiting article had to be included in the Convention. If anything, it only serves to depict the ineffective nature of most international instruments, which is in turn a common feature in international normative procedures. Surely, it defeats logic for a Convention to be passed with a certain motive and then for the same Convention to be framed in such a way that it allows virtually all would-be parties, to opt out if they find it inappropriate or unfavourable.

5.7.5 Article V (1)(e) and Article VII (1) are Potentially Contradictory

If an international treaty is to be acceptable to all, then it has to, among other requirements, steer clear of any contradictions in its provisions.⁴⁰³ Unfortunately, the NYC has at least one such contradiction, and it is found in Article V (1) (e) and Article VII (1). While Article V(1)(e) uses the word ‘may’, Article VII(1) uses the word ‘shall’. There is a likelihood that these two words can cause the setting up of disparate national rules regarding enforcement; as well as conflicting judgments concerning the same kind of dispute.⁴⁰⁴ The use of the word ‘may’ has the potential of causing courts to believe that they [courts] have the power to decide to enforce awards that have previously been suspended in their original countries. On the other hand, the use of ‘shall’ forces courts to enforce awards that might not have been enforceable, as long as domestic laws do permit for the use of favourable rights.⁴⁰⁵

This is a tricky situation in that the interplay between these two different provisions, set out in the different Articles of the Convention, bring about different possibilities which stem from the fact that the Convention itself does not offer any explanation (is silent) regarding when and if annulments of awards ought to have effects extending beyond the concerned territories, or

401 Ibid.

402 Sheppard Audley, ‘Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards’ (2003) 19 *Arb. Int’l* 217, 228.

403 Davis Kenneth, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Tex. Int’l L.J.* 43, 57.

404 Ibid.

405 Davis Kenneth, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Tex. Int’l L.J.* 43, 57.

which standard are required for any such annulments to be done in the first place.⁴⁰⁶ The first possibility brought about by this situation is that national rules of enforcement could become so disparate that it would be almost impossible to talk about uniform rules. Secondly, there is the possibility of courts reaching conflicting decisions regarding the same dispute as a result of enforcing awards that have been suspended.⁴⁰⁷

The *Chromalloy* case in the US best illustrates the flaws of the NYC with respect to this particular issue.⁴⁰⁸ Chromalloy (known in full as Chromalloy Aero services Inc.), an American company, entered into a four-year contract on June 16, 1988 with the Egyptian Air Force to provide maintenance and support for a fleet of helicopters. However, on December 2, 1991, the Egyptian Air Force issued a notice to Chromalloy to the effect that it considered the contract terminated owing to the expiry of the agreement and so expected Chromalloy to leave the premises. On December 15, 1991, Chromalloy notified the Egyptian Air Force that, “it did not accept the notice of cancellation” and commenced arbitration proceedings.⁴⁰⁹ As soon as the award was made, the Egyptian Air Force applied to have the vacation of the award done in Egypt because it was the *situs*. This application was granted on April 4, 1995 by the Egyptian Court of Appeal on the basis that the arbitration panel improperly “applied the rules of the Egyptian Civil Code to the exclusion of the administrative law” of Egypt. The ‘parties’ agreement that the award was not subject to appeal did not preclude the action to vacate the award in Egypt because under Egyptian law, the grounds for vacating awards are mandatory rules.⁴¹⁰

In the meantime, Chromalloy applied to have the same award enforced in the United States and France and succeeded in the courts of both countries. The French approach is that the arbitration award vacated by the *situs* can nonetheless be enforced in the state if it satisfies the nation’s standards for enforcing awards. The theory of the French approach is stated in the *Chromalloy* opinion of the Paris Court of Appeal: “The award made in Egypt is an international award which, by definition, is not integrated in the legal order of that State so that its existence

406 Davis Kenneth, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Tex. Int’l L.J.* 43, 57.

407 See *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt* [939 F. Supp. 907 (D.D.C.1996)]; *Omnium de Traitement et de Valorisation v. Hilmarton*, reported in *Y.B. Comm. Arb.* XXII (1997), 696–701 (France No. 45).

408 Karmanian Susan, *The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts*, 34 *Geo. Wash. Int’l L. Rev.* 17, 68 (2002).

409 *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt* [939 F. Supp. 907 (D.D.C.1996)]

410 *Ibid.*

remains established despite its being annulled and its recognition in France not in violation of international public policy.”⁴¹¹ Nevertheless, a District Court of Columbia court, arguing that the award could not have been annulled under the domestic arbitration law of the US,⁴¹² used Article VII to enforce an Egyptian award, which had been suspended in Egypt.⁴¹³ In essence, the US court was able to enforce the vacated award based on the language in the arbitration clause providing that any award “cannot be made subject to any appeal or other recourse,” concluding that in having the award vacated, “Egypt sought to repudiate its solemn promise to abide by the results of the arbitration”.

In spite of the risk of this case setting the precedent, most US courts have been keen to grant comity to foreign judgments,⁴¹⁴ setting aside *Chromalloy*. In a different move that reiterates the US’s desire to enhance international arbitration through enforcement of foreign awards,⁴¹⁵ a court of appeals in D.C. argued that in the absence of proof that the proceedings of a foreign court were fatally flawed as to procedure, or that the judgment was not authentic, there is need for respect to be accorded award annulments by foreign courts.⁴¹⁶ These two cases offer evidence of the flawed nature of the NYC. As a tool seeking to unify foreign awards, it is saddening when it in fact results into very disparate and divergent outcomes with similarly disparity procedures of enforcement of foreign awards.

5.7.6 The Status of Pre-Award Judgments and Interim Measures

Another shortcoming of the NYC which has rendered it rather ineffective as a tool for enhancing uniform enforcement of foreign awards is that it is silent on the issue of the judicial authority by courts to grant pre-award attachments as well as other interim measures. This has left this issue open to national courts, which now have to determine on their own merit, whether or not they have the competence of granting such interim measures. This is because the main

411 *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt* [939 F. Supp. 907 (D.D.C.1996)]

412 Karmanian Susan, ‘The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts, 34 *Geo’* (2002) 67 *Wash. Int’l L. Rev.* 17

413 *Ibid.*

414 Lawrence Schaner and Schleppenbach John, ‘Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S.’ (2008) 63 *Disp. Resol. J.* 80, 85.

415 Karmanian Susan, ‘*The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts*, 34 *Geo’* (2002) 17 *Wash. Int’l L. Rev.* 67, 74.

416 *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.* 191 F.3d 194(2d Cir. 1999); *Spier v. Calzaturifl cio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (SDNY 1999).

purpose of Article VI is to ensure that there is a balance between an application to have an award set aside with the intension of delaying the enforcement proceedings; and the right for a party (bona fide) to challenge the validity of the award in the country from where it originated.⁴¹⁷

5.7.7 Ambiguity Regarding Reciprocity

Articles X, XI, XIV are not really clear on what reciprocity is supposed to mean. For instance, Article XIV was aimed at supporting Article XI regarding reciprocity between Contracting states and their constituent states, yet both seem to contradict Article X. Generally, the term reciprocity is not clearly defined with regards to which form of reciprocity is to be granted a Contracting state by another state or a Contracting state to a constituent state. Furthermore, it is unclear whether or not such reciprocity is to be undertaken based on equal terms and privileges. Although Article XIV seeks to generalize the reciprocity provisions, it nonetheless remains silent on the specifics of the provisions.

5.7.8 The Coming into Force and Denunciation of the NYC

While the issues with regard to making the NYC available for ratification, the process of ratification, and the official entering into force as provided for in Articles VIII, IX, and XII respectively do not present any controversies but are in fact commendable, there are bound to emerge some logistical issues regarding pulling out of the Convention as provided for in Article XIII, which provides that a Contracting State may choose to denounce the Convention through a written notification; and this will become effective a year after this notification is tendered to the UN Secretary-General.⁴¹⁸ This is a very delicate issue that has the potential of reversing all gains made by the Convention. On its own, Article XIII can render the entire Convention irrelevant by depicting it as non-binding.⁴¹⁹ Even if rejoining is not allowed, the mere fact that contracting states can pull out of the NYC with a lot of ease renders it a weak instrument at best.⁴²⁰

The NYC would have been more binding of these two last Articles, specifically Article XVI which stated how the UN Secretary-General or some other UN agencies and secretariats would help ensure the Convention was more binding to all Contracting parties. This would really

417 Ibid.

418 Albert Jan van den Berg, *The New York Convention of 1958: An Overview* 1, 17 (June 6, 2008), <http://www.arbitration-icca.org/>

419 Ibid.

420 Ibid.

make each one of them to feel bound to the NYC and so compelled to enforce foreign awards thereof. As it is, enforcement of foreign awards under the Convention is still a matter that depends on the goodwill of nations and not any form of legal (through the NYC) compulsion.

5.7.9 Conclusion

While the NYC was promulgated with the sole purpose of enhancing international arbitration by helping national courts to enforce foreign awards, the flaws found within its structure has rendered it ineffective in many ways. While this argument appears to contradict the often-cited success of the NYC as discussed in the introductory chapter of this thesis, it is nonetheless true and valid because the argument that the NYC has been successful has only been based on the number of state and non-state players that have adopted it. Whilst there is no doubt that the NYC is one of most widely accepted multilateral treaties on arbitration ever owing to the many signatories it has received from across the world, rating its success on this basis alone is misleading. Instead, the true success of the NYC, as is indeed of any other treaty, ought to be measured by its successful implementation by the Contracting states especially those like KSA which have a long history of resisting enforcement of foreign awards.

Clearly, a number of nations have been very instrumental in putting into practice what the NYC requires by specifically enhancing the enforcement of foreign award. Notable among these are the US, Syria, and Kuwait. However, a closer examination of the legal background of these nations reveals that their success in enforcing foreign awards has more to do with their willingness to enhance international arbitration and not necessarily because of the potent nature of the NYC. For instance, Syria and Kuwait, have moved away from the common situation in most Islamic states that seek to approach every international law on the basis of Islamic principles; and have instead embraced international law because of their realization that doing so is more to their own advantage than to any other nation's advantage. Both these nations have the right to, for instance, interpret the public policy provision of the NYC more broadly and in an unrestricted manner as is done by KSA. In fact doing so might allow them to circumvent their obligations to the international community under the Convention. However, they have chosen to do otherwise so that international arbitration is enhanced for the mutual benefit of all NYC Contracting States. On the contrary, nations like KSA have illustrated how flawed the NYC is by the way they have successfully used a number of its provisions to legally hinder, even prohibit, the enforcement of foreign awards in spite of being contracting states. Among other flaws, the legal grounds of exception found in Article V effectively allow Contracting States to legally fail to enforce any foreign awards.

CHAPTER SIX

THE GROUNDS OF EXCEPTION TO RECOGNITION AND ENFORCEMENT OF AWARDS LAID DOWN IN ARTICLE V (1) NYC 1958 AND THEIR LEGAL FUNCTION IN THE KINGDOM OF SAUDI ARABIA

6.0 Introduction

Exceptions to the enforcement of awards are set out in Article V of the NYC. Even then, they are divided into two, the first three being those exceptions that are contained in the first part (Article V (1)) and the other two are contained in the second part (Article V (2)) of the NYC. This chapter is dedicated to offering an in-depth and critical analysis of the grounds of exception to the recognition and enforcement of awards as laid down in Article V (1) NYC. From the very onset, it is worth exploring how the grounds laid out in Article V (1) of the NYC have impacted the enforcement of international awards particularly in the context of the laws and legislations of the Kingdom of Saudi Arabia. From the very outset, the goal and aim of the NYC has been to ensure that free trade is enhanced internationally by putting in place appropriate mechanism for the resolution of disputes through arbitration. The fundamental objective of the convention is to make foreign awards more simply and extensively enforceable worldwide and less subject to challenges based on national law. This explains to a very large extent why it is important to narrow down on the exceptions on which enforcement of foreign award may be refused as listed exclusively in its Article V.

In spite of the proliferation of trade liberalization and market access measures which were conditions for the accession of the Kingdom of Saudi Arabia into the World Trade Organization, a significant void in both law and policy exists in the alignment and approximation of Shari'ah law with normative rules of international trade as a result of the application of Article V of the 1958 New York Convention.

6.1 Refusal of Recognition and Enforcement of Awards on Grounds of Incapacity and/or Invalidity

The first ground for rejecting recognition and enforcement of foreign awards is incapacity and invalidity of the award. Although these two concepts are closely related, validity and capacity are distinct terms and apply differently when used with respect to arbitration. Therefore, considering each one in its entirety, distinct from the other, is critically important.

Refusal of Enforcement on Grounds of Invalidity of the Arbitration Agreement

Validity of the Arbitration Agreement: the Applicable Legislation

Substantive Validity of the Arbitration Agreement: the Applicable Legislation

The Lack of Expressed Choice and the Challenges of Implied Choice

The Law

The Law of the Main Contract

The Substantive Rule Method and the Approach of the French

Although the preceding two viewpoints have been commonly canvassed, there are other approaches on the issue of the law which are applicable to the validity of the arbitration agreement. The French approach is worth dwelling on. This approach, also known as the substantive rule method, was created by the French Supreme Court in the case of *Comitepopulaire de la municipalite de Khoms El Mergeb v Dalico Contractors of 1993*.⁴²¹ The Supreme Court stood by the decision of the Court of Appeal which refused the argument raised by a Libyan respondent that Libyan law governed the contract hence making the arbitration agreement invalid. Parties did not choose the law governing the arbitration agreement.⁴²² Other French Courts have since followed the decision. It also garnered support from numerous legal writers.

It has been argued that applying a choice of law approach to identify the applicable law is not helpful in resolving the matter as there must be great uncertainty in establishing the relative significance of each of the numerous connecting factors.⁴²³ This uncertainty⁴²⁴ is undoubtedly one of the bases why the conventional choice of law method has taken the place of the substantive rules method in France.⁴²⁵ Moreover, it has been argued that the principle of the

421 See *Comitepopulaire de la municipalite de Khoms El Mergeb v Dalico Contractors* (France Supreme Court 20 Dec 1993), cited in Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 437.

422 *Comitepopulaire de la municipalite de Khoms El Mergeb v Dalico Contractors* (France Supreme Court 20 Dec 1993), cited in Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 437.

423 *Ibid* para 426.

424 David Karl, *Arbitration in International Trade* 219.

425 See, Gaillard Emmanuel and Savage John (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer 1999).

autonomy of the arbitration agreement should not be bound to autonomy from the main contract. It should be extended to indicate independence from all national laws.⁴²⁶

6.1.1 Formal Validity of the Arbitration Agreement: the Applicable Law

6.1.2 The Applicability of Article II to Formal Validity

The first point of view is that the formal validity of the arbitration agreement is to be determined based on the requirement of Article II at both stages of the enforcement of the agreement and the award. This approach has garnered great support from Prof. van den Berg and is accepted by several authors⁴²⁷ and just about every court.⁴²⁸ This approach is founded on the basis that there is a specific reference in the beginning of Article V (1)(a) to Article II which makes note of a uniform rule pertaining to the formal requirements of arbitration agreement. As a result, this reference specifies that matters of the formal validity of the arbitration agreement exempted from the rule of the provision of Article V(1)(a), are in reality only governed by the formal requirement of Article II(2).^{429,430}

6.1.3 Justification for the Applicability of Article V (1)(a) Alone

426 *Gatoil v National Iranian Oil Co* (Paris Court of Appeal 17 Dec 1991), cited in David, *Arbitration in International Trade* 229 fn 140. See also, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 419.

427 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 284; P Sanders, 'Consolidated Commentary' (1981) V YBCA 202 at 206, 211; Garnett and others, *International Commercial Arbitration* 104, See also, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' at 166.

428 See, eg, *PAG (Zurich) v (Vienna)* (1976) I YBCA 183 (Austria Supreme Court 1971)3; *Czechoslovakian Export Organization v Greek Shipping Co* (1989) XIV YBCA 636 (Greece Court of Appeal 1982) ; *Isaac Glycer v Moses Israel Glycer&EsteraNottman*524; *Charterer (Norway) v Shipowner (Russian Federation)*(2002) XXVII YBCA 519 (Norway Court of Appeal 16 Aug 1999) 522; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* (2004) XXIX YBCA 687 (Germany Court of Appeal 24 Jan 1999) 690; *De Maio Giuseppe e Fratellisnc v Interskins Ltd* pp497-99; *Austin John Montague v Commonwealth Development Corporation* (2001) XXVI YBCA 744 (Queensland Supreme Court 2000); *Smita Conductors Ltd v. Euro Alloys Ltd* (2002) XXIX YBCA 747 (Germany Court of Appeal 13 Jan 2002) 750; *Pulsarr Industrial Research BV v Nils H. Nilsen AS* (2003) XXVIII YBCA 821 (Norway Enforcement Court 10 July 2002) 824; *Empresa Colombiana de Vias Ferreas v Drummond Ltd* (2004) XXIX YBCA 643 (Colombia Council of State 2004).

429 See, *Forwarding agent v Dealer* (Germany Court of Appeal 2002) ; Sanders Peyton, 'Consolidated Commentary' (1981) VI YBCA 202211; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 287; van den Berg, 'Consolidated Commentary' (Kluwer 2003).

430 Sanders, 'Consolidated Commentary' (1981)' 211. See also, Kroll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany' 166.

The second view holds that the formal validity at the implementation stage is overruled by Article II. It is governed only by the applicable law as specified in Article V(1)(a). This view has received support from several authors⁴³¹ and a number of Italian Courts.⁴³² To support this stand, it is deemed that Article V(1)(a) clearly states that the validity of the arbitration agreement at the post-award stage is to be ruled over by the law chosen (expressly or implicitly) by the parties or, falling such choice, by the law of the arbitration seat, and by nothing else.⁴³³

6.1.4 The Binding Nature of Article VII (1) of the NYC

Having presented both viewpoints, it is important to mention that whatever the that law rules over the validity of the arbitration agreement under Article V (1) (a) might be, Article VII (1)⁴³⁴ of the Convention permits the party seeking enforcement of award to invoke a favourable provision provided by the national laws and treaties available in the country, where the award will be enforced. This is a very critical aspect of the Convention which puts great emphasis on the pro-enforcement bias of the NYC. Consequently, if an arbitration agreement is deemed to be invalid under the applicable law as stated in Article V (1)(a) or Article II but is considered as valid under the law of the enforcing, the award would still be legally enforceable.

6.1.5 Bases for Invalidity: A Critical Analysis

The NYC, like most other conventions and national laws, requires certain conditions for the formal validity of the arbitration agreement. Particularly, the arbitration agreement shall be in writing. Logically, this is the case because unlike the jurisdiction of national courts, referring any dispute to arbitration can only be accomplished if there is an explicit written consent by the parties to do such.

In this case, the parties have to agree at the time of the disputes on the methods to be used. However, where the contract specifies arbitration, then there is no way the parties can change to another method of dispute resolution. Instead, the manner in which this contract was

431 Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) ; Mistelis Loukas and Brekoulakis Stavross , *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

432 *Lanificio Walter Banci S.a.S v Bobbie Brooks Inc*(1981) VI YBCA 233 (Italy Supreme Court 1980); *X v X* (Germany Court of Appeal 17 Sep 1998).

433 Mistelis Loukas and Brekoulakis Stavross, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

434 NYC of 1958, Art VII (1).

entered into and approved will actually determine whether or not the outcome of the arbitration will be recognized and enforced by the court in the respective country.

Article II (1) of the NYC necessitates that an agreement to arbitrate shall be “in writing.” It indicates that: “Each Contracting State shall recognize an *agreement in writing* under which the parties undertake to submit arbitration all or any differences” (emphasis added).⁴³⁵ In this way, it can be considerably examined that general ground regarding the invalidity of the arbitration agreement invoked in practice at the stage of enforcement of the award where the agreement does not conform to the formal required mention in Article II. Consequently, the main issue that needs to be addressed now is what can be considered as an agreement in writing.

6.1.6 Article II (2): Uniform Rule or Maximum Requirement?

While there is a general consensus⁴³⁶ that Article II (2) provides a uniform of a maximum requirement which surpasses any more demanding formal requirement under the national laws, different views regarding whether the definition of what can be considered a written arbitration agreement provided in Article II(2) could be deemed a uniform of a minimum formal requirement as well. The old established view is that Article II (2) creates a maximum as well as a minimum international uniform rule for the formal validity of the arbitration agreement which succeeds over any provision of any national law thereon. Prof. Sanders and Prof. van den Berg earlier stressed that “Article II(2) must in principle be considered to be both a maximum and minimum requirement: a court may not require more, but may also not accept less than is provided by Article II(2) for the form of the arbitration agreement.”⁴³⁷

Therefore, no enforcement can be sought under the application of the NYC if the arbitration agreement is not in compliance with the written form as required by Article II(2) such as the implied or oral agreement.⁴³⁸ In support of this view, it is deemed that since the text of Article II(2) seems to be comprehensive and does not provide any room for the application of

435 NYC of 1958, Art II (1).

436 However, the Italian Courts used to rely on the Italian Civil Code (Arts. 1342 and 1342) which requires more restrict requirements for the formal validity than those laid down in Article II (2). See, for more details, van den Berg, *Consolidated Commentary* (Kluwer 2003).

437 Van den Berg Albert Jan, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 178,179; Sanders Peter, *Consolidated Commentary* (Kluwer 1981).

438 Van den Berg Albert Jan, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (Kluwer 2003); Van den Berg, *Consolidated Commentary* (Kluwer 2003) ; Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) .

national law, the uniform rule character would apply to its fullest extent. In addition, this approach can achieve further support from the legislation history of the NYC. The legislation history shows what the drafters of the Convention had in mind regarding the definition of the “agreement in writing” clause of Article II(2) that it is to be interpreted as all-inclusive, not only for the reason that they declined the suggestion of scrapping Article II(2) as a whole, but also because they refused the proposal to add the non-objection to a confirmation including a clause (i.e. tacit agreement) to the definition of the arbitration agreement in writing.⁴³⁹ Instead of amending Article II(2) which appears to be quite difficult, its requirement of the written form needs to be interpreted in a liberal manner as opposed to in a literal manner, in order to meet the demands of current practice and the needs of international trade communication.

6.1.7 Implementation of the Formal Requirements of Article II (2)

There remains only one important question that needs to be emphasized – how exactly or up to what extent can a liberal interpretation for Article II (2) be utilized to be consistent with the current practice of international trade? Various approaches have been taken up regarding the question.⁴⁴⁰ First, the modern correspondence by means not specified in Article II (2) can be allowed in the light of an expansive interpretation of Article II(2) for the rationalization mentioned above and especially since the English text of Article II(2) uses the word “shall include” which means “shall include, but not limited to”. Accordingly, an implicit acceptance of a contract including clause can be considered to be in accordance with the writing requirement.⁴⁴¹

Additionally, there is no valid reason to submit an arbitration agreement to stricter form requirement aside from contractual provision since pertaining to arbitration has become the natural forum for international commercial disputes instead of a risky waiver of the primary right of litigation at the national court. Without a doubt, restrictor form requirements may seem like a source of additional disputes, instead of encouraging legal certainty. Consequently, the written

439 See, Van den Berg Albert Jan, *The New York Arbitration Convention of 1958: toward a Uniform Judicial Interpretation* (Kluwer 2003).

440 See, for more details regarding these approaches, van den Berg, ‘Consolidated Commentary’ (2003)’ 584,87; T Landau, ‘The Requirement of a Written Form for an Arbitration Agreement: When “Written” Means “Oral” (ICC Congress Series no 11 2002) .

441 See, Landau Ebenberg, ‘The Requirement of a Written Form’ 68; van den Berg, *Consolidated Commentary*’ (Kluwer 2003).

agreement requirement clause of Article II (2) should be liberally be construed in the light of modern channels of communications.⁴⁴²

6.1.8 Agreements in Writing: Issues and Controversies

After a close examination of the general character of Article II (2), the important matter that needs to be considered is what constitutes agreement in writing under Article II. One may view that the judicial interpretations vary at a great degree regarding some aspect of the written agreement requirement under Article II(2) as a result of the difference in national laws regarding what meets the criteria of a writing requirement and as a manifestation of different attitudes of the national court towards arbitration.⁴⁴³ Nonetheless, Article II(1) generally necessitates that the arbitration in agreement be in writing and Article II(2) consequently comes to offer an identification of the principle of the writing requirement. It is stated as follows:

Article II(2) provides two alternative form requirements. The first of which is an arbitration clause in a contract or a separate arbitration agreement signed by both parties. The second alternative is an arbitration clause in contract or a separate arbitration agreement contained in exchange letters or telegrams possibly not having signatures. In this context, the Swiss Supreme Court in the case of *Compagnie de Navigation v MSC* has emphasized the definition of agreement in writing under Article II(2) to be:

According to the formal requirements applicable in case, valid arbitration clauses are either those contained in a signed contract or in an exchange of letters, telegrams, telexes and other means of communication. In other words, a distinction should be made between agreements resulting from a document, which must in principle be signed, and agreements resulting from an exchange of written declarations, which are not necessarily signed.⁴⁴⁴

Hence, the main issues that need to be considered are; (1) what documents have to be signed, (2) what kind of exchanges are satisfied, and (3) if the modern means of communication can be engaged under “an exchange of letters or telegrams.”

6.1.8[A] The Legal Challenges with Regard to Signatures

⁴⁴² See, Lew, Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* paras 7-9, 7-10.

⁴⁴³ See, Lew Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* paras 7-19, 7-20; Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 2003)..

⁴⁴⁴ *Compagnie de Navigation et Transports v MSC – Mediterranean Shipping Company SA* 697.

In the age of rapidly changing technology, it is becoming imperative for the definition of a signature to be made in terms that are not only clear but also conclusive and universal. The NYC is not a new convention, having come into force over fifty years ago. Whatever it envisaged as a signature at that time might not be inclusive of the signatures that are currently applicable (and acceptable) in a modern, 21st century world. For instance, the NYC requires that there be written consent. Generally, at least within the revised, broader meaning of signature, a signature ought to be any mark that is used to make a document authentic. Rather, authentication of documents by use of a special mark is sufficient to pass as a signature. This means that signatures are both electronic and hand-written. Nevertheless, the challenge comes when this issue is applied on the international arena where different nations and states treat signatures differently and define them differently in diverse contexts. In addition, there are still no well established frameworks across many countries and on the international arena that can govern e-signatures, leave alone e-arbitration. Another challenge in relation to signatures, particularly electronic signatures is the lack of technical capacity by many countries to manage the same. Such technical concerns pertain to issues of expertise, compatibility across platforms, security, data integrity and confidentiality.

6.1.8[B] The ‘Exchange of Documents’: What it Entails Legally

Since the signatures of the parties are not mandatory when it comes to the exchange of documents, the next question that comes to mind is what form of exchange of documents can be deemed to be in accordance with Article II(2). The term “Exchange of documents” may be taken to suggest in general that there must be a written offer by one party including a clause, and a written succeeding acceptance by the other party as well.⁴⁴⁵ Still, this question remains a subject of great debate and controversy. Some hold the view that the documents itself should be returned back by the receiving party to the sender.⁴⁴⁶ This view has been followed in the past such as the case of an Italian court of appeal.⁴⁴⁷

6.1.8[C] Reference to the Arbitration Clause in Standard Conditions

The next complex matter that needs to be addressed pertaining to the exchange of documents is that regardless of the reference to standard terms and conditions, the containing

445 Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) .

446 Van den Berg Albert Jan, *Consolidated Commentary* (Kluwer 2003).

447 *Ditte Frey Milota Seitelberger v Ditte F Cuccaro e figli* (1976) I YBCA 193 (Italy Court of Appeal 1974).

arbitration clause is sufficient. Arbitration clauses are regularly used in the practice of business as a clause printed with other conditions on the back of a standard contract or in a separate document which the contract refers to. Going by the existing trend of interpreting Article II(2) generally to meet the need of international commercial practices, it may generally regard such a reference as sufficient as long as the other party appears to be able to check the existence of the arbitration clause.⁴⁴⁸ Still, this issue may vary on a case to case basis depending on a number of connecting factors which can specify whether the parties had been aware that they were engaging in an arbitration agreement.⁴⁴⁹

6.1.8[D] Emerging Technology and New Ways of Communication

Bearing in mind the fact that the Convention was instituted in 1985, then it is clear that Article II(2) sets down means of communication that were commonly used. Hence, the definition of written agreement under Article II (2) provides tangible and significant obstacles when considering these modern means of communications. Subsequently, some Italian courts regarded arbitrations agreements reached by an exchange of faxes as null and void before the enforcement of Italian Law No 25 of 5 January 1994.⁴⁵⁰ Nonetheless, based on the prevailing trend as seen in the case above, it is generally accepted that the new means of correspondent would be regarded as having met the requirement of writing stated in Article II(2).⁴⁵¹

6.1.8[E] How to Deal with Electronic Contracts

The issue as to whether an arbitration agreement concluded via E-mail, or more specifically through electronic digital contract, accomplishes the requirement of Article II(2) is very much alike the question of new means of communication previously discussed. However, the issue of e-contract would seem to be critical and more important compared to other new means of communication since the e-contract is regarded as the most modern communication channel and its importance in the essence of the constant growth of international trade.⁴⁵²

448 *Tradax Export SA v Amoco Iran Oil Co.*

449 Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) ; van den Berg Albert Jan, *Consolidated Commentary* (Kluwer 2003) .

450 Mistelis Loukas and Brekoulakis Stavross, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International 2009) .

451 Edie Lee, *Encyclopedia of international commercial arbitration* (Lloyd's of London Press 1986) 27; Veeder, 'Summary of Discussion' 44.

452 See UN Doc. A/CN.9/468 para 101.

6.1.9 Arbitration Agreement not in Writing

Having noted that, roughly all means of written communication are regarded to be consistent with the formal writing requirement of Article II(2). The next important issue, which may be considered more difficult, is if an arbitration agreement concluded tacitly or orally can be sufficiently valid in the light of the above liberal and broader interpretation of Article II(2).

6.1.10 Tacit Agreements and their Challenges

With respect to the issue of tacit agreement, the common view is that a tacit acceptance is not sufficient for one to enter into a valid arbitration agreement,⁴⁵³ even as such acceptance is normally enough to enter into a normal contract, for the reason that it fails to accomplish the written requirement of Article II(2) of the Convention. Interestingly, this is the other side of the principle of separation of the arbitration clause from the main contract of which it forms part.⁴⁵⁴

6.1.11 Agreements Made by Mouth: Valid or Invalid?

Based on the existing view, Article II(2) of the NYC does not extend to the oral acceptance⁴⁵⁵ for the same reasons of excluding the implicit acceptance as addressed in the previous section. In this context, van den Berg states that:

It is essential for the exchange requirement that both the proposal to arbitrate and the acceptance thereof are communicated between the parties. The text of article II (2) does not leave any doubt on this point either: an exchange of letters or telegrams cannot mean anything else than that they are forwarded and replied to in written form. It means that an arbitration agreement which is proposed in writing and acceptance orally or tacitly does not constitute an exchange of letters or telegrams.⁴⁵⁶

453 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 196. van den Berg, 'Consolidated Commentary' (2003) 589, 591; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 76; Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?'.

454 See, Kaplan Neil, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?* 29; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) .

455 Ibid 196; Kaplan Neil, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?* 32; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) .

456 Van den Berg Albert Jan, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (Kluwer 1998).

In contrast, there is strong support on the view that an oral arbitration agreement should be sufficient for Article II (2).

6.1.12 Substantial Grounds of Invalidity

The substantial validity of the arbitration agreement when it comes to enforcement of the award, unlike formal validity, is not ruled over by the provision of Article II. The law chosen by the parties, whether explicitly or implicitly, will have jurisdiction. If no law is indicated, it shall be governed by the law of the country where the award was made according to the provision of Article V (1) (a).⁴⁵⁷ Article V (1) (a) provides no guidance regarding what makes an arbitration agreement invalid. Instead, it only refers to the governing law for the arbitration agreement. Hence, it may be generally submitted that as the arbitration agreement has the contractual nature, its substantial grounds of invalidity are the same as those invalidating the contract in general.

6.1.13 A Critical Look at the Saudi Position Regarding the Aspect of Invalidity

Saudi Legislation Regarding Validity of Arbitration Agreements

While it ought to be the goal of nations to make sure that they have in place appropriate laws and legislations to make the application of international law within their jurisdictions both expedient and easy, KSA has generally failed to do this so that uncertainty and ambiguity is left to prevail.⁴⁵⁸ Having such laws in place is the hallmark of international cooperation which is the very core of international relations. With globalization virtually turning the world into a small global village where national economies are merged into international ones, failure by nations to adhere to the international rule of law by aligning their own domestic legal regime to the international standard might pose many challenges not only to that specific country but also to other international players who inevitably engage in one way or another with the country under question.⁴⁵⁹ This largely explains why KSA has often found itself embroiled in controversies

457 See, eg. *Insurance Company (Sweden) v Reinsurance Company (Switzerland)* (Switzerland Supreme Court 21 Mar 1995) 804 “although substantive validity is not regulated by the New York Convention, the issue should be examined by applying the conflict rules of Article V(1)(a), in order to avoid conflicting decisions in the referral and enforcement phases”; *Della Samara v Fallimento Cap Giovanni Coppola srl* (1992) XVII YBCA 542 (Italy Court of Appeal 1990) 543. See also, van den Berg, ‘Consolidated Commentary’ (2003) pp ‘as regards the exception ‘null and void, inoperative or incapable of being performed’ in Article II(3), most courts apply by analogy the conflict rules contained in Article V(1)(a)’; Lew, Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 6-55.

458 El-Ahdab Abdul Hamid, ‘General Introduction on Arbitration in Arab Countries’ in *P Sanders and AJ van den Berg (eds) International Handbook on Commercial Arbitration* (Kluwer, 1998).

459 Lew Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 6-55.

with the international community because of its failure to deliberately align its domestic laws to international ones. The NYC in general and Article V in particular remains largely unheeded by KSA because most of the kingdom's domestic laws are Islamic and so offer the country a chance to legally avoid most of the arbitration obligations provided for under the NYC. KSA has laws that are either indifferent to the provisions of the NYC or which offer no explicit way of approaching international arbitration law as stipulated in the NYC.

As far as validity of an arbitration agreement is concerned, for instance, there is total silence on the part of Saudi Arbitration Law (SAL). Neither legislation nor case law has been made available to govern this issue of critical international importance.⁴⁶⁰ This just goes to tell how unprepared KSA is as far as fully implementing the NYC is concerned.⁴⁶¹ As noted before, where such ambiguity exists, every arbitration dispute that touches on foreign parties is referred to the BG for evaluation and determination. Of critical importance here is the fact that the process of review of every case is entirely exhaustive, meaning that every issue is examined in its entirety from the start to the very end.⁴⁶² Otherwise the country's legal regime is hostile and opposed to international arbitration law, particularly the provisions of Article V. Actually, the SAL offers no guidance regarding the issue of the law governing the validity of the arbitration in the international setting, nor has such an issue been dealt with by any Saudi court. However, it was stated that the Saudi Court would relate only the Saudi laws and the *Shari'ah* rules to oversee the various aspects of arbitration since the Kingdom firmly applies the provision of the *Shari'ah*. The Implementation Rules of 1985,⁴⁶³ in particular, require that the award shall be handed under international cases.⁴⁶⁴ Hence, it may be presumed that the Saudi Courts will apply the law of arbitrations seat. Whatever the applicable law will be, it is critical to learn if the Saudi Courts would support a more favourable provision than the applicable law as mandated by Article VII(1).

Notwithstanding the fact that KSA has adhered to the NYC and even successfully managed to join the WTO, the country's approach to the grounds of exception to the recognition and enforcement of awards is rather unsatisfactory to the rest of the arbitration community

460 Lew Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 6-55.

461 Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' (Symposium of Arbitration in Islamic Shari'ah. Dubi 2001 'in Arabic') 15

462 Lew Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 6-55.

463 IRSAL of 1985, Art 39.

464 The 4th Review Committee, Decision No. 155/T/4 dated 1415 H (1994).

around the world. The country's lack of appropriate domestic laws to reinforce internationally-accredited laws is in itself worrisome. One only needs to consider the general historical approach that KSA has taken in dealing with international arbitration cases in order to understand the void that has been created between the two sets of laws, making it difficult for international arbitration law to be enforced fully in the kingdom. A positive answer can be seen in a case⁴⁶⁵⁴⁶⁶ where a Saudi state agency appealed against an award in favour of a foreign company on the grounds that the arbitration agreement was invalid under the applicable law. An interesting yet worrisome occurrence took place. The case, contrary to what could be expected, was determined in favour of the foreign firm and the award was granted. This ruling was largely based on the Saudi law which effectively forbids government agencies from resorting to arbitration without the consent of the President of the Council of Ministers.⁴⁶⁷ Based on this law, the Saudi court (The 9th Administrative Panel) at outset decided that the arbitration agreement is invalid under the Saudi law.

Nonetheless, the Court verified the validity of the arbitration agreement for the reason that the *Shari'ah* provision which is more favourable compared to the Saudi laws as the former emphatically maintains the moral obligation to accomplish one's contracts and undertakings since the Qur'an and the prophet Mohamed also mandates such. Additionally, the standard adopted by most Muslim scholars is that the award is binding in such a case. Consequently, the Court approved the foreign company's petition to enforce the award against the state's public body.⁴⁶⁸ This case clearly shows that the Saudi enforcing Court utilizes a friendly attitude in dealing with award enforcements. This is because international law, specifically the grounds for exception to the recognition and enforcement of awards, requires that no award that is contrary to or interferes with the policy of the general public, ought to be recognized and/or enforced. The ruling of the court was clearly not informed by the general law but rather by the need to ensure that Shari'ah law was upheld. The winning party in this case might have been lucky to have the award enforced in KSA but that might never be the same for many others that will seek the same in the days to come. A critical examination of this ruling shows that the law of the land forbids state agencies from engaging in arbitration; and in view of this the Saudi firm – a state agency –

465 *Insurance Company (Sweden) v Reinsurance Company (Switzerland)* (Switzerland Supreme Court 21 Mar 1995) 804

466 See also *Union de Cooperativas Agriocolas Epis Centre v La Palentina SA* (2002) XXVII YBCA 533

467 The 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

468 The 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

contravened this law by arbitrating.⁴⁶⁹ In this instance, the correct and legal position of the Saudi Court ought to have been that the arbitration contract entered into by the parties was invalid.⁴⁷⁰

6.1.14 The Formal Grounds of Invalidity

It is worth exploring how KSA has generally approached the issue of invalidity and specifically how this has been entrenched in law. Generally, the issue of invalidity of arbitration contracts is one of international concern.⁴⁷¹ There is no-way Saudi Arabia, as are other nations, can be compelled to enforce an award if a contesting party cites invalidity of the arbitration agreement and offers sufficient proof to that effect. It may be deemed relevant to address the Saudi position concerning the formal requirements for the validity of the arbitration agreement not only for the reason that the Saudi laws may be chosen by the parties to be applicable, but also because these laws may be applied as a more favourable provision compared to the formal provision of Article II (2) of the NYC.⁴⁷²

6.1.15 Justification for the Writing Requirement

Notwithstanding the manner and nature in which writings can be made, the requirement that arbitration agreements ought to be in writing in order for them to be recognizable and enforceable is no doubt a significant and justifiable requirement.⁴⁷³ From time immemorial, the writing requirement has formed the backbone of both national and international contracts. Where dispute resolution is part of the provisions of the contract, then the more important and significant this provision becomes. Therefore, it is generally agreeable that contracts, arbitration ones to be specific, have to be in writing because this is the norm the world over. Whenever a nation's legal regime fails to adhere to such a basic legal requirement of international law, then it is clearly not working in the interests of the rule of international law of which it is supposed to be part. Saudi Arabia has, to a very extent, moved significantly in this direction, and has demonstrated to be hindering rather than enhancing the rule of law as far as international arbitration is concerned. The main question that needs to be answered is whether the SAL

469 *Union de Cooperativas Agricolas Epis Centre v La Palentina SA* (2002) XXVII YBCA 533

470 A El-Ahdab, 'General Introduction on Arbitration in Arab Countries' in P Sanders and AJ van den Berg (eds) *International Handbook on Commercial Arbitration* (Kluwer, 1998).

471 Lew, Mistellis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 6-55.

472 A Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' (Symposium of Arbitration in Islamic Shari'ah. Dubi 2001 'in Arabic') 15

473 A Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' (Symposium of Arbitration in Islamic Shari'ah. Dubi 2001 'in Arabic') 15

requires the arbitration agreement to be in writing. Unlike the NYC and most of national and international arbitration laws, the SAL does not explicitly require the arbitration agreement to be in writing for it to be considered valid.⁴⁷⁴ Still, Article 5 of the SAL states some ambiguous provisions such as:

The parties to the dispute, file the arbitration instrument with the authority originally competent to hear the dispute. The instrument shall be signed by the parties or their authorized attorneys, and by the arbitrators, and it must state the details of the dispute, the names of the arbitrators and their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached. This text has directed many commentators to arrive at differing conclusions. Some commentators believed that the SAL requires all kinds of arbitration agreements to be in writing and signed by all parties in for them to be valid and binding.⁴⁷⁵

On the other hand, other commentators regard that the formal written requirement is only relevant to the submission agreement but not to the arbitration clause.⁴⁷⁶ This shows that there is no clarity whatsoever as far as the writing issue is concerned, and there is no telling, therefore, what the courts in the country might decide when faced with such a case. To a large extent, the BG has been left to pass the final judgment, a move tantamount to having the entire arbitration process repeated.⁴⁷⁷

6.1.16 How Arbitration Agreements can be Legally Concluded in KSA

Another critical issue that needs critical assessment and analysis is with regard to how the arbitration agreement can validly be concluded under Saudi Arabian law. Given that the SAL entails no specific formality to conclude an arbitration agreement; shows that the Saudi legislators intended to leave this question to be resolved by the power of the *Shari'ah* rules under the judgments of the BG. Generally, the Saudi courts follow the view that the *Shari'ah* requires no special formality for an expression of offer and acceptance to be deemed valid and binding.⁴⁷⁸

474 See, Lew, 'The Recognition and Enforcement of Arbitration Agreement and Awards in the Middle East' 174.

475 See, eg, S Saleh, *Commercial arbitration in the Arab Middle East: a study in Sharai'a and statute law* (Graham, & Trotman, London 1984) pp 304-7; Sayen, 'Arbitration' 218.

476 See, Turck, 'Arbitration in Saudi Arabia' pp 287-88; Turck, 'Saudi Arabia' pp 6-7; El-Ahdab, *Arbitration in Arab Countries* vol 2 pp 200-202.

477 A Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' (Symposium of Arbitration in Islamic Shari'ah. Dubi 2001 'in Arabic') 15

478 A Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' (Symposium of Arbitration in Islamic Shari'ah. Dubi 2001 'in Arabic') 15

Hence, the arbitration agreement may be as simple as just any other contract formed by the linking of an offer and acceptance is binding, the moment that it is accepted. These can normally be created either in writing or orally or to be implied by conduct and other acceptable means of correspondence.⁴⁷⁹ This is clearly not in line with internationally acceptable arbitration standards where the writing agreements have to be formal in order to be binding.

6.1.17 The Challenge Posed by Contemporary Means of Communication

Having noted that written, implied, and oral arbitration agreements are sufficient based on the *Shari'ah*; the same should be the case in Saudi laws. One important matter to address is if one can presume whether the arbitration agreement can also be legally created through modern means of communication such as fax and email under Saudi law. In the context of the aforementioned principle that no certain formality is required to constitute arbitration and that it is dependent on the applied costume, the answer would be in the affirmative.⁴⁸⁰ In particular, it is generally difficult for foreign parties to have their disputes determined in their favour because they follow international standards where contemporary means of communication have to be accommodated within the meaning of written agreements.

6.1.18 KSA's Standpoint on Significant Grounds of Invalidity

With respect to substantial grounds of invalidity of the arbitration agreement, the SAL, similar to other arbitration laws, once again gives no details about such, but remains to be governed by the general rules of the *Shari'ah*. The arbitration agreement based on the *Shari'ah* law will not be deemed binding if there are factors that affect its validity. Such flaws include; duress, misrepresentation, mistake, incapacity, and undue influence. However, the Saudi courts seem to narrow the effectiveness of such bases in the context of the emphatic policy of the *Shari'ah* when accomplishing all obligations in general.⁴⁸¹ Even as the Court agreed to the objection that the arbitration agreement was invalid under the SAL which prohibits local state entities from entering into an arbitration agreement without prior consent from the Council of

479 See, A Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' (Symposium of Arbitration in Islamic Shari'ah. Dubi 2001 'in Arabic') 15; S Rashid, 'Alternative Dispute Resolution in the Context of Islamic Law' (2004) 8 Vindobona J IntkComm L & Arb 95 at 105; N Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah (2004) 20 Arbitration International 97 at 109 fn 22; C Childress, 'Saudi-Arabian Contract Law: A Comparative Perspective' (1990) 2 St. Thomas L F 69 at 80-81.

480 See, A Al-Ssalmi, 'Theory of the Contract' (Session of the Shari'ah and law Principles of Arbitration, Riyadh 2002 in Arabic) pp 18-19; Al-Qaradaghi, 'The General Principles of Arbitration in Islamic Fiqh' 15.

481 See for example *Union de CooperativasAgriocolasEpis Centre v La Palentina SA* (2002) XXVII YBCA 533

Ministers, the Court utilized the more lenient provisions of the *Shari'ah* over the applicable law supportive of binding arbitration agreement and award.⁴⁸² The Court supported this approach with three grounds, namely (1) the Qur'an mandates that "O you who believe! Fulfil (your) obligation"⁴⁸³, (2) the Prophet Mohamed stressed that the Muslims are bound by their stipulations",⁴⁸⁴ and (3) the concept taken up by most Muslims scholars is that the award will remain binding.⁴⁸⁵ This shows that there is room for the law to be interpreted differently depending on whether or not a foreign party or a Saudi one is challenging the award, with the latter generally being favoured. This has made the enforcement of foreign awards in KSA very difficult.

6.1.19 Exceptions to Enforcement on Grounds of Incapacity

Prima facie, the main defence to implementation stated under Article V(1) of the NYC reads:

The parties to the agreement (of arbitration) ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made.⁴⁸⁶

While it is clear that this stipulation creates two distinct bases, the first one being that a party to arbitration agreement was controlled by some incapacity while the second deals with the invalidity of the actual argument for arbitration,⁴⁸⁷ it can also be noted that inability of a party to enter into an arbitration agreement is classified as one basis for an agreement being deemed invalid.⁴⁸⁸ In view of this, it is critically important to examine the aspect of incapacity of one or more parties to an arbitration agreement and how such incapacity can form the legal basis for

482 *Union de Cooperativas Agriocolas Epis Centre v La Palentina SA* (2002) XXVII YBCA 533

483 *The Qur'an, Al-Ma'idah*[5:1].

484 Narrated by Al-Tirmidhi, *Sunan Al-Tirmidhi* No. 1403; Abu Daoud, *Sunan* No. 3596; Maalik ibn Anas, *Al Muwatta* No. 1447; Al-Hakem, *Al-Hakem, Al-Mustadrak* No. 2269; and others.

485 The 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

486 NYC of 1958, Art V (1)(a).

487 Davidson, *Arbitration* 199

488 L Hu, 'Setting an Arbitral Award in the People's Republic of China' (2001) 12 (1) *Am Rev Intl Arb* 1 at 9.

refusal by Saudi Arabia, recognize and enforce an award that has been granted abroad. In doing, it is important to first and foremost pay attention to the general considerations and the effectiveness of incapacity defence before the capacity of a person to resort to arbitration is considered. The capacity of the Juristic person; the authority to arbitrate; the most significant concern of state and state agencies' capacity to resort to arbitration; and the position of the Kingdom of Saudi Arabia on this matter are also other critically important issues worth examining in a crucial way.

Basic Considerations and Requirements for Legal Contractual Agreements

As a standard, parties to a contract or an agreement must be legally able to enter into such. Hence, the contract will be deemed null and void if one of the parties has no legal capacity to engage in a contract or agreement. The same applies to arbitration agreements.⁴⁸⁹ Thus, the NYC considers this basis and grants the court the capacity to refuse enforcement of a foreign award if the party contesting the award can confirm that a party to the arbitration agreement was bound by some form of incapacity. Additionally, it is generally-accepted that any person who has no capacity to engage into a valid contract also has no legal capacity to enter into an arbitration agreement.⁴⁹⁰

Defence on Grounds of Efficacy of Incapacity

The question that needs to be identified is if the party who has come in an arbitration agreement could depend on his inability as ground for refusing enforcement. For some, "a party may rely on his own lack of capacity, even if he has entered into the contract and participated in the proceeding in full knowledge but without mentioning this disability".⁴⁹¹ However, this is not always applicable if it is deemed a breach of the principle of good faith. Hence, a number of pertinent rules exist to safeguard a party who is in good faith and believed that the entity came into a contract with a person with the capacity to do so.⁴⁹² Hence, the ruling court should consider the principle of good faith when they analyze the defence of incapacity of the parties.

489 Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 144; D Wedam-Lukic, 'The Jurisdictional Problems of Arbitration (with special regards to the regulation in Slovenia and Croatia)'(1994) 1 Croatian Arb YB 51 at 57.

490 Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 144.

491 Davidson, *Arbitration* 392.

492 See for instance the Rome Convention on the Law Applicable to Contractual Obligation of 1980, Article 11. Available at <http://www.rome-convention.org/instruments/i_conv_orig_en.htm> (10 August 2004).

Legislation Applicable to Parties' Capacity

The NYC discusses the issue of 'law applicable to parties' capacity in Article V (1)(a), "to the law applicable to them" in order to identify their ability to enter into an arbitration agreement.⁴⁹³ The next issue that arises regards which law is applicable to parties in order to determine their capacity but the NYC fails to provide what this applicable law is. Hence, there are two different considerable interpretations. The most common interpretation under Article (1)(a) which states that, "under the law applicable to them" which is interpreted as the party's capacity is mandated by the personal law which necessitates to be determined by reference to the conflict of law rules of the place or arbitration⁴⁹⁴ or enforcement.⁴⁹⁵ The conflict in law rules can commonly be located under the law of contract.⁴⁹⁶ However, these conflicts differ depending on the country and the nature of the involved party such as the law of residence, law of place of incorporation or the law which regulates the state's activities.⁴⁹⁷

6.1.20 The Capacity of Natural Persons

As stated under the traditional and common interpretations of Article V (2)(a) of the convention⁴⁹⁸ and the established principles of the conflict of laws rules, the capability of a natural person who wants to finish an arbitration agreement, is normally governed by the personal law of the involved party.⁴⁹⁹ In civil law countries like Germany and France, the personal law that will apply in arbitration will be the law of the person's nationality. If this person is stateless or whose status is a refugee, the applicable law will be that of his domicile or

493 NYC of 1958, Art V (1)(a).

494 See, Davidson, *Arbitration* 393.

495 See, *Union de Cooperativas Agricolas Epis Centre v La Palentina SA* (2002) XXVII YBCA 533 (Spain Supreme Court 1998) 535; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 454.

496 See, Sutton and Gill, *Russell on Arbitration* 81; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 144.

497 See, van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 276.

498 NYC of 1958, Article V (1)(a) states that "The parties to the agreement ... were under the law applicable to them under some incapacity".

499 See, *Union de Cooperativas Agricolas Epis Centre v La Paletina SA* 535; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 461.

normal residence.⁵⁰⁰ Whereas in a common law country, the applicable law in such a case will be his domicile or normal residence.⁵⁰¹ Additionally, some US courts answer the issue of a party's capacity by utilizing the applicable law in the country where the agreement came to a conclusion.⁵⁰² In this perspective, Redfern and Hunter iterate that, in an international contract, the factors to be considered are not only the location of domicile and residence in determining if the person is capable of entering into arbitration. The law of contract should likewise be considered.⁵⁰³

6.1.21 The Capacity of Juristic Person

The ability of a juristic person, a corporation for instance, entails a plethora of related factors which is dependent on the conflict of law rules in question. For instance, a number of common law countries entail that the capacity of a juristic person to enter into an arbitration agreements is dependent on the country's constitution and the binding law in the place of incorporation.⁵⁰⁴ . On the other hand, other legal systems, particularly in civil law countries like France; the issue of the ability of a juristic person to engage in arbitration is based on the law of the country where the juristic person's headquarters is located⁵⁰⁵ or in some cases where the office is registered.⁵⁰⁶ Nonetheless, as already specified with individual, it is regarded that it is

500 See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 457; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276.

501 See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276; Dicey, Morris and Collins, *Conflict of Laws* vol 1, pp 1011-3.

502 See, American Law Institute, *Restatement of the law second : conflict of laws* (American Law Institute Publishers, Minnesota 1971) 198; See also, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 457; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276-277.

503 Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145.

504 See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 457; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276.

505 See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 457

506 See, J-L Delvovac, J Rouche and GH Pointon, *French arbitration law and practice* (Kluwer Law International, The Hague; London 2003) 59.

essential to consider the law with jurisdiction over the agreements in the case of an international commercial argument.⁵⁰⁷

The Confusion between Capacity and Authority

While it is immediately understood that the juristic person is run by its directors and officers based on its constitution and its governing law,⁵⁰⁸ it has been noted that confusion occurs in terms of legal language between the capacity of a party and the authority to contract. However, the two are quite different. The issue of capacity would only be raised when an agreement is settled in a person's own name and in his personal interest while the issue of authority would only be applicable when an agreement is entered into is not in the person's interest but satisfies the interest of a different person, be it juristic or natural.⁵⁰⁹ Moreover, a corporation may, for instance, have the capacity to engage in an arbitration agreement through an authorized agent as allowed by its governing law. However, if an agreement is engaged by an agent who is not authorized to do such, the authority may be questioned when a dispute arises.

The Capacity of State and State Entities

Compared to natural and juristic person, the state being involved in an arbitration agreement with a foreign private party is a common problem in international trade.⁵¹⁰

The important issue that needs to be identified in this case is whether a state or state agency has the capacity to agree in referring a dispute for arbitration. Generally, the answer is dependent on three factors. Primarily, it is dependent on the constitution or the law of the state.⁵¹¹ Additionally, it may nonetheless depend on the law of forum where the state is being

507 See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145.

508 See, *ibid* 145.

509 See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 453.

510 See, van den Berg, *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation* 278; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 38.

511 See, Sutton and Gill, *Russell on Arbitration* 89; , van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 278; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 138.

charged. Consequently, the question of the state's capacity to engage into arbitration may be dependent on applicable international standards that have been approved by the State.⁵¹²

6.1.22 Diversity of National Laws

Countries resolve the question of the capacity of the state or its agencies in a different manner.⁵¹³ A number of common law countries such as; England,⁵¹⁴ some Latin American countries such as; Bolivia and Chile and some civil law countries like Germany and Switzerland,⁵¹⁵ do not set up limitations for states entering into arbitration. Moreover, Belgium has eliminated prohibitions that prevent public entities from considering arbitration.⁵¹⁶

Inversely, other countries still have restrictions on the state and public authorities entering into arbitration. Peru is one country that practices such. Article 2 of its General Arbitration Law stipulates that "Peruvian public agencies do not need government approval for domestic arbitration."⁵¹⁷ Hence, it was perceived that Peruvian public agencies are barred from engaging in arbitration outside the state.⁵¹⁸ Nonetheless, one may infer that the Peruvian state and its public agencies are allowed to forward its dispute to arbitration held in foreign land as long as prior authorization is granted. Likewise, some countries like Oman,⁵¹⁹ Argentina, and

512 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 278; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 138.

513 See, in general, R David, *Arbitration on International Trade* (Kluwer Law and Taxation Publications, Deventer 1985) 177.

514 See, Sutton and Gill, *Russell on Arbitration* 89. See also, eg, English Arbitration Act of 1996, s.106 which provides that the Crown has the capacity to be a party to an arbitration agreement.

515 Swiss Private International Law of 1987 Article 177(2) which states that "A state, or an enterprise held by an organization controlled by a state, which is a party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement".

516 Belgian Judicial Code of 1998, Art 1676.2. see also Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 145 fn 53.

517 Peru General Arbitration Law No. 26572 of 20th December 1995, cited in J Tieder, 'Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration' (2003) 20 (4) J Intl Arb 393 at 402.

518 See, *ibid.*

519 Omani Board for Settlement of Commercial Disputes of 1984, Art 59.

Venezuela⁵²⁰ require that state bodies acquire a particular permeation before engaging in arbitration.

6.1.23 Efficacy of State Incapacity Defence

Since some states or state agencies are barred by their respective laws to engage in foreign arbitration, a critical issue comes to mind. It is whether a state or state agency should be allowed to rely on its inability under its own law to engage in an arbitration agreement. Most commentators⁵²¹ and court⁵²² point to the negative. There are two approaches in this aspect, the old approach, and the new approach. The old approach utilized the notion that a state and its agencies can depend on its incapacity under the applicable law. It was adopted by the Syrian Administrative Court in *Fougerolle*.⁵²³ In this scenario, the court dismissed the application of implementing two awards handed by the ICC arbitration in Geneva in opposition to the Syrian Ministry of Defence. The court noted that the decision was made on the basis of the law of the Council of State since the Syrian party had no capacity to sign the arbitration agreement without prior approval by the Committee of the Council of State.

On the other hand, the new approach, directs that a state or state bodies may not be permitted to rely on their inability under their state laws to deny arbitration agreement in an international transaction. This approach was derived based on the existing differences between domestic and international contracts. This new approach assumes that even as these public agencies are disallowed from engaging in arbitration based on their state laws, they are still bound by a clause in international commercial transaction.

6.1.25 Incapacity or Arbitrability: The Legal Confusion between the Two

⁵²⁰ See, Davidson, *Arbitration* 177.

⁵²¹ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 276; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 146; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 139.

⁵²² See, *SocieteArabe des Engrais Phosphates v Germancosrl*(1997) XXII YBCA 737 (Italy Supreme Court 1996); *SocieteTunisienned'Elctricitee et de Gas v SocieteEntrepose*(1978) III YBCA 283 (Tunisia Court of firs instance 1976); *TheGov of Greece v Foreign Shipowner-charterer* (1989) XIV YBCA 634 (Greece Court of Appeal 1976).

⁵²³ *Fougerolle SA v Ministry of Defence of the Syrian Arab Republic* (1990) XV YBCA 515 (Syria Administrative Court 1988).

It may be important to note that restrictions enforced upon a state's capacity to include an arbitration agreement should be considered as an issue of arbitrability rather than that of capacity. This is mainly because restriction is not a real limitation on capacity, such as mental disability. In reality, it is self-inflicted since the state in question can waive it at any time. Additionally, it has been recommended that the concept of arbitrability and capacity may merge at some point since the Swiss Law, Article 177(2),⁵²⁴ mentions the two concepts in the same section. Nonetheless, providing some description between the concept of arbitrability and capacity may help clear some grey areas on the issue. Capacity can be described as relating to the parties whether they have the ability to engage in arbitration. On the other hand, arbitrability deals with the content of the disputes and whether it may possibly be settled through arbitration. Because of this difference, one may concur that the restriction imposed by a state on its ability to engage in arbitration should be considered as an issue of capacity since it is more concerned with the ability of the parties to enter arbitration.

6.1.25 Exemption of the State

While the defence of a state immunity from the enforcing power of the body may be analyzed under public policy defence,⁵²⁵ it deems it more appropriate to discuss the issue under the state capacity. This is the case since the question of state immunity usually regards with the question of state capacity by both courts and authors.⁵²⁶ In addition, a state may argue that it is not bound by an agreement even in cases where the state confirmed otherwise. However, they have no capacity to declare state immunity from the implementation of an award.

6.1.26 Applicability of the NYC to a State Dispute with a Private Party

The approach of restricted immunity may be supported from the legislative background of the convention since an ECOSOC report notes that:

Article I provides that the Convention would apply to awards arising out of differences "between persons, whether physical or legal". The Representative of Belgium had proposed that the article should expressly provide that public enterprises and public utilities should be deemed legal persons for purposes of this article, since their activities were governed by private law. The

⁵²⁴ Swiss Private International Law of 1987 Art 1772(2).

⁵²⁵ Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 190.

⁵²⁶ See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 147; van den Berg, *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation* 280.

Committee was of the opinion that such a provision would be superfluous and that a reference in the present report would suffice.⁵²⁷

From this report, one may conclude that the drafters of the Convention undoubtedly intended to consider state bodies as legal persons. This interpretation has been commonly accepted in the context of states commercial activities.⁵²⁸

The Extent of Non-Exemption; Limited to Suit only to the Enforcement as well?

It is critical to note that while it is generally accepted that based on the doctrine of restricted immunity, a state is giving up its immunity from jurisdiction when it submits itself to arbitration proceedings, this is hardly the case when speaking of immunity from execution. It is submitted that a state's immunity from execution of arbitration should be considered as absolute for the purpose of avoiding precarious political scenarios.⁵²⁹ As such, the Washington Convention of 1965 maintains this outlook. Article 55 of the Convention states that:

Nothing in Article 53 (which concerns the enforcement of an award) shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution.⁵³⁰

Inversely, some courts have only just applied the doctrine of restricted immunity from execution,⁵³¹ such as the case of *Creighton Ltd v Qatar* in 2000 wherein the state (Qatar) implied the intention of waiving its immunity from execution seeing as the mandates of the ICC simply

527 UN Doc. E/2704: UN Doc E/AC. 42/4/Rev.1, para 24 p.7.

528 See, Cappeli-Perciballi, 'The Application of the New York Convention to Disputes Between States and Between Entities and Private Individuals: The Problem of Sovereign Immunity' 198; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 279. P Contini, 'International Commercial Arbitration: The United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 8 (3) Am J Comp L 283 at 294.

529 See, Davidson, Arbitration 177; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 279; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 139.

530 Washington Convention of 1965, Art 55.

531 See, *Ipitrade International SA v Nigeria* 826; *Creighton Ltd v Qatar* (2000) XXV YBCA 458 (France Supreme Court 2000) See also, Turuck, 'French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards' 327.

indicates that by forwarding their disputes to ICC arbitration, the parties undertake to enforce the award without interruption and that the award is absolute.⁵³²

A Critique of the Position Held by Saudi Arabia

The Capacity of a Natural Person

From a historical point of view, it can be ascertained that a significant majority of the arbitration cases that have been filed before Saudi courts are often contesting awards granted to Saudi nationals or parties. In view of this, it would have been important, even imperative, for the law of the country to be framed in such a way that such dispute are determined in the best possible way as per the law of the land and international law. It is therefore critically important to know the Saudi position regarding the capacity of a natural person to resort to arbitration since a great majority of foreign awards raised at a Saudi court for enforcement are against Saudi parties. Hence, the Saudi laws are being applied to verify the Saudi parties' capacity if they attempt to reject the enforcement on the basis of lack of capacity to conclude the arbitration agreement. Based on the governing law in the Kingdom of Saudi Arabia, an arbitration agreement can only become valid if the parties have full legal capacity. The SAL states that, "an agreement to arbitrate may not be made except by those who have capacity to act".⁵³³ This provision was also affirmed by the IRSAL which specifies that, "The agreement to arbitrate shall only be valid if entered into by persons of full legal capacity to act."⁵³⁴

The Capacity of Juristic Person in the Context of Saudi Law

It is generally recognized that the capability of a juristic person in Saudi Arabia is mainly affected by its constitution and the law recognized in the area of its headquarters.⁵³⁵ However, it is raised that the location of the headquarters is the same as the area of incorporation or business for the law to be applicable on the legal capacity of the juristic person as stated on Article 14 of the Saudi Regulation of Companies of 1965.⁵³⁶ As a rule, companies have the option to bind

⁵³² *Creighton Ltd v Qatar* 459.

⁵³³ SAL of 1983, Art 2.

⁵³⁴ IRSAL of 1985, Art 2.

⁵³⁵ See, M Al-Jaber, *Saudi Commercial Law* (4 edn, 1996 'in Arabic') pp 213-214.

⁵³⁶ See, A Salamah, *Intermediate in Saudi International Private Law* (King Saud University, Riyadh 1998 'in Arabic') pp 440, 444.

themselves to arbitration agreement, except when the constitution provides otherwise. Moreover, a company is held by an arbitration agreement concluded by the company director.⁵³⁷

The Express Ban of State and State Entities from Directly Arbitrating

According to the SAL, all state entities and public authorities in the kingdom are barred from resorting directly to arbitration procedures unless it is approved by the President of the Council of Ministers. Article 3 of the SAL specifically states that:

Government Agencies are not allowed to resort to arbitration for settlement of their disputes with third parties except after having obtained the consent of the president of the Council of Ministers.⁵³⁸

In view of this, it is critically important to outline the background of the provision to facilitate better understanding of the reasons for including Article 3.

The Present Position of Saudi Entities

Generally, it can be concluded that there is no definite position regarding the capacity of state agencies in the Kingdom of Saudi Arabia to arbitrate abroad. Hence, the restriction is deemed to be the rule and arbitration is the exception as to national arbitration. On the other hand, the inverse may be deemed true in the context of international arbitration such as the restriction imposed on international arbitration. However, the Kingdom must identify the significance of international arbitration and must take measures to categorize the capacity of its state entities to enter into arbitration. It must also limit the restrictions set forth under Article 3 of the Saudi Arbitration Law to state bodies that deal with sensitive and important public concerns.

A Critical Look at Case Law Regarding State Parties and Arbitration

In international commercial arbitration, the main issue that needs to be addressed is whether a Saudi state agency can depend on its incapacity based on its national laws or rely on its immunity to shun enforcement of an award. In light of the aforementioned conclusion, they may not have the capacity to do such. This approach was verified by the Saudi enforcing court (the 9th Administrative Panel) in a recent case in 1997 between a Dutch and a Saudi public

⁵³⁷ Saudi Companies Law of 1965. Art 29.

⁵³⁸ SAL of 1983, Art 3.

university.⁵³⁹ In this specific case, the Saudi court declined the defence that the agreement was invalid on the basis that the University lacks the capacity to resort to arbitration based on the Council of Ministers Resolution No. 58 (1973), which disallows government entities from entering arbitration. From the start, the court considered the contract as involving administrative or governmental activities since the contract is included for a public service.⁵⁴⁰ The Court continued to affirm that while a state body resorting to arbitration is prohibited under national law, the validity of the argument needs to be granted despite the prohibition as the parties reached a consensus to submit any dispute to binding arbitration as stated in Article 9 of the contract. The court stated that its decision was based on the *Shari'ah* to achieve an impartial result. First, the *Shari'ah* vigorously maintains that one must accomplish its moral obligation to perform any contract or undertaking. The Qur'an states that: "O you who believe! Fulfil all obligations."⁵⁴¹

This decision by the Saudi court is a milestone in the pro-enforcement bias of the NYC. It builds a very contemporary approach when speaking of the issue of a state capacity to arbitration and state immunity from suit and enforcement. This is mainly because the doctrine of disregarding national prohibitions over state bodies or the waiver of state immunity from execution by submission to arbitration is considered only for cases wherein the state may be considered as a private person representing a commercial entity.⁵⁴²

6.2 Refusal of Recognition and Enforcement of Awards on Grounds of Non-Adherence To The Due Process of Law

The due process of law must be adhered to fully if any arbitration process is to be deemed valid and any award thereof enforced. Therefore, the extent to which a country upholds the rule of law, and seeks to embrace international legal instruments, will considerably determine the efficiency and speed at which the arbitration process in the country will be handled. It also determines how awards granted in foreign countries will be handled in that country – whether they will be generally recognized and enforced or will be rejected. Article V (1)(b) of the NYC lays out the basis upon which the enforcement of foreign awards may be blocked. It states that the enforcement of a foreign award may be declined when:

⁵³⁹ The 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

⁵⁴⁰ The 9th Administrative Panel, decision No. 32/D/A/9 dated 1918 H (1997).

⁵⁴¹ The Qur'an, Al-Ma'idah[5:1].

⁵⁴² See, supra para 3.8.5.

“The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”⁵⁴³

This ground is regarded as the most important ground for refusing implementation of an award under Article V of the NYC for the reason that specific fundamental standards of “due process” or fair trial are observed all through the arbitration.⁵⁴⁴

Here the concept of due process encompasses two different aspects: (1) the party’s right to be given proper notice of the time and place of proceedings and (2) the right to be given a proper chance to present his case. Non-compliance of the due process may result in the enforcement of the award being refused under the grounds of Article V (1)(b) of the Convention. As such, it is important to discuss the primary issues herein, including the law with jurisdiction over violation of due process, and the relation between Article V(1)(b) (violation of due process) and Article V(2)(b) (i.e. breach of public policy). It will also be necessary to address issues regarding the absence of proper notice, issues regarding inability to present one’s case, issues of estoppels and waivers and violation of due process and the Kingdom’s position on the matter.

6.2.1 Legislation Governing Violation of Due Process

Another critical issue has been to determine whether when violation of due process is cited as a basis for refusing enforcement of a foreign award will be ruled over by the law of the arbitration seat, the law of the enforcement court, or only by the provision of Article V (1)(b). While the NYC presents little or no guidance for the manner in which arbitration should be conducted to adhere to the requirement of due process, some commentators cite that Article V (1) (b) is a genuinely international substantive rule on violation of due process, which surpasses any domestic law thereon.⁵⁴⁵ Nonetheless, the common opinion of commentators⁵⁴⁶ and courts⁵⁴⁷

543 NYC of 1985, Art V(1)(b).

544 See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 463.

545 See, van den Berg, ‘Consolidated Commentary’ (2003) at 654-55; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 299-300; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1697; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-82; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 149.

546 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 298; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-81; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 46; Dicey, Morris and Collins, *Conflict of Laws* 639.

appears to be that Article V(1)(b) institutes no international rule or standard due process.⁵⁴⁸ Under this view, different approaches surface as to the law ruling over the benchmark of due process including the law selected by the parties to rule over the arbitration⁵⁴⁹ or the law of the arbitration seat,⁵⁵⁰ or the law applied in the enforcing court.⁵⁵¹

6.2.2 The Failure to Provide/Issue Proper Notice

It is critical that all parties involved in arbitration must be given proper notice of the appointment of the arbitrator and of the arbitration proceedings. Hence, enforcement of the award may be refused if proper notice is not provided, or in case the notice of the proceeding was received after the award has been submitted. One can identify that the party's lack of knowledge of the appointment of the arbitrator or of the arbitration proceedings is regarded as a separate matter of inability to present the case in Article V(2)(b), even though it is one of the circumstances in which a party is "unable to present their case".⁵⁵² Certainly, this separation exhibits the significance of proper notice in arbitration. In addition, it is regarded that there is historic reason for this separation since it can be seen in the Geneva Convention of 1927,⁵⁵³ and the framers of the NYC refused to leave it out.⁵⁵⁴

6.2.3 Proper Notice: the Legal Standards

⁵⁴⁷ See, eg, *Parsons &Whitewore Overseas Co v RAKTA* 975; *Paklito Investment Ltd v Klockner East Asia Ltd* 47.

⁵⁴⁸ See, eg, *Presse Office SA v Centro Editorial Hoy SA* pp 301-2; *Malden Mills Inc v Hilaturas Lourdes SA* pp303-4; *Saint Gobain v Fertilizer Corp of India Ltd* (1976) I YBCA 184 (France Court of Appeal 1971) 185; *Biotronik Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Co ;X (Syria) v X* (2004) XXIX YBCA 663 (Germany Court of Appeal 1998) 668.

⁵⁴⁹ Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-81

⁵⁵⁰ See, *ibid* para 28-81; *Minmetals Germany GmbH v Ferco Steel Ltd*, "were the court held that "By agreeing the place of a foreign arbitration, a party not only agreed to submit all contractual disputes to arbitration but also agreed that the conduct of the arbitration should be subject to the supervisory jurisdiction of the courts of that place."

⁵⁵¹ See, Gaja, *International Commercial Arbitration* vol 1 pt I.C.4; van den Berg, *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation* 298.

⁵⁵² See, UN Doc. E/CONF.26/SR.17 pp 9, 14. See also, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 303.

⁵⁵³ Geneva Convention of 1927, Art 2(b).

⁵⁵⁴ See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1696.

One important matter to discuss in terms of proper notice is when the notice of the appointment of the arbitrator and the proceedings can be regarded as a “proper notice.” It is important to note that it is generally-accepted that the notice must achieve a particular form as a requirement under domestic arbitration laws or civil procedure,⁵⁵⁵ since international arbitration is a private method of resolving disputes.⁵⁵⁶ This interpretation has been affirmed by national courts⁵⁵⁷ and commentators.⁵⁵⁸

6.2.4 Limitations Occasioned by Time

Yet another critical issue is whether a notice was sent in a timely manner. This issue includes the shortness of time limits for appointing the arbitrators and preparing defences, and the notice period to appear at hearings. It seems that the issue of whether such time limits or notice periods granted to parties did actually impede a party from appointing its arbitrator, preparing its defence, or appearing for hearing is an issue that should be considered by enforcing courts. However, the courts have generally considered that the plain shortness of time is not to be considered in itself a violation of due process under Article V(1)(b). This is because short time limits are deemed as a common facet of arbitration proceeding and the speed of the arbitration playing a major role in the effectiveness of international arbitration.⁵⁵⁹

555 However, in order to avoid the risk of claiming that no notice was received, it may be recommended to send notices by registered mail or return receipt service which provides a mailer with evidence of delivery (to whom the mail was delivered and date of delivery), and after delivery, the return receipt is mailed back to the sender. See, van den Berg, ‘Consolidated Commentary’ (2003) 655.

556 See, *Italian Party v Swiss Company* (2004) XXIX YBCA 819 (Switzerland Court of First Instance 2003) 827.

557 See, eg, *Generica Ltd v Pharmaceutical Basics Inc* 1130; *KarahaBodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negarapp* 299-300; *Consortio Rive SA de CV v Briggs of Cancun Inc* 796; *Presse Office SA v Centro Editorial Hoy SApp* 30-12; *Malden Mills Inc v Hilaturas Lourdes SA* 304; *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 292; *Trans Chemical Ltd v China National Machinery Import and Export Corp* 978 F Supp 266 (US District Court SD Texas 1997) 310.

558 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 303; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-84

559 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 304; van den Berg, ‘Consolidated Commentary’ (2003)’ at 655 Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 150; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-83; Garnett and others, *International Commercial Arbitration* 105; *Dutch Seller v Swiss Buyer* (Switzerland Court of Appeal 1971) 310; *Carters Ltd v Francesco Ferraro* 276; *SpANosegno e Morando v Bohne Friedrich & Co* 280; *Renault Jacquient v Sicea* 286.

6.2.5 Exposition of the Arbitrator's Name

The issue of proper notice is not confined to just the issue of a lack of notice and untimely notice. It also concerns a matter of disclosure of the names of arbitrators.⁵⁶⁰ For instance, the German Court of Appeal discovered a lack of notice in the failure of disclosing the name of the actual arbitrators to be serious enough to justify refusal or enforcement of an award under Article V (1) (b). In this case, the award was made under the Arbitration Rules of Copenhagen Grain and Food Stuff Trade Association, which prohibited the disclosure of the names of actual arbitrators to the parties, instead giving them the liberty of deleting undesirable names from the list of arbitrators presented by the institution in advance. Since the award was ratified only by the president of the institution's arbitration committee, the parties were not given the opportunity to clarify if undesirable people were appointed as arbitrators. The basis for this provision was that the people on the list were members of a small group of professionals acting in the same trade who frequently do business with each other. If the name of the arbitrator is known by a party in the same trade, the party may be tempted to persuade the arbitrator in his favour.⁵⁶¹

6.2.6 The Language of Notice: The Legal Requirements

The notion of a "proper notice" may also include the matter of the language of the notice such as when the request for arbitration proceeding is drafted in a language foreign/alien to a party. In one case, a Japanese defendant claimed that the notice sent to him was written in Chinese characters with no available Japanese translation. CIETAC (i.e. the Chinese Arbitration Commission) had never made plans of providing Chinese legal attorneys to the defendants. Subsequently, the defendant claimed that the award should be refused in violation of Article V (1)(b). The Japanese District Court however denied this protest claiming that the parties had agreed to CIETAC arbitration, and Article 75(10) of the Arbitration Rules specified that the language of the arbitration should be Chinese unless specified otherwise. Since there was no clear evidence that the parties explicitly agreed to a language or arbitration other than Chinese, and depending on the fact that the contract was written in Chinese and English, the court concluded that the parties had agreed to conduct the proceedings in Chinese.⁵⁶² Similarly, the

⁵⁶⁰ See, P Sanders, 'Consolidated Commentary' (1979) IV YBCA 231 at 248; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 205; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 151-152; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-85.

⁵⁶¹ Danish Buyer v German Seller (1979) IV YBCA 258 (Germany Court of Appeal 1976) pp 259-260.

⁵⁶² Seller (China) v Buyer (Japan) (Japan District Court 1999) pp 517-18.

Swiss Court of Appeals has initiated that drafting a request for arbitration in a foreign language does not translate to a breach of due process.⁵⁶³

6.2.7 Incapacity to Present One's Case

The broad wording “...or was otherwise unable to present his case” laid down in Article V (1)(b) was taken up by the drafters of the NYC upon a proposal of the Dutch delegate (Prof. P Sanders).⁵⁶⁴ Essentially, this provision seeks to cover any serious unfairness in the proceedings other than lack of proper notice, and to create the principle of an equal right to be heard, considering the possibility that even as notice has been given in adequate time, the respondent might not make it to the tribunal for reasons beyond his control or he might have not been given an adequate opportunity to present his case when appearing in front of the tribunal.⁵⁶⁵

6.2.8 Default by a Party: Consequences

If a party refuses to be present before the tribunal, after being given proper notice, or if he refuses to participate or remains inactive in the arbitration procedures after being provided equal opportunity to present their side, they are basically regarded to have deliberately forfeited the opportunity. Definitely, a party cannot simply refuse to participate in proceedings so as to hamper the arbitration. Hence, the inability to present ones case under Article V (1) (b) cannot in general result from a party's own conduct.⁵⁶⁶

6.2.9 Denial of the Right to Introduce Evidence

⁵⁶³ *NZ v I* (1992) XVII YBCA 581 (Switzerland Court of Appeal) 583.

⁵⁶⁴ UN Doc. E/CONF. 26/SR.23 at 15.

⁵⁶⁵ P Sanders ‘The New York Convention’ in P Sanders (ed) *International Commercial Arbitration* (the Hague 1960) vol II, 292 at 315, cited in van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 306.

⁵⁶⁶ See, eg, Dicey, Morris and Collins, *Conflict of Laws* 639; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 16; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 306; Garnett and others, *International Commercial Arbitration* 105; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-88; G Soo, ‘International Enforcement of Arbitral Awards’ (2000) 11 Intl Comp & Comm L Rev 253 at 255; *Biotronik Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Copp* 140-141; *German Buyer v English Seller* (Germany Court of Appeal 27 Jul 1978) 267; *GeotechLizenz AG v Evergreen Systems Inc* 697 Fsupp 1248 (US District Court ED NY 1988) 1253; *Fitzroy Engineering Ltd v Flame Engineering Inc* 1994 WL 700173 (US District Court ND Illinois 1994) pp 5-6.

Based on the concept of due process, each party must be accorded reasonable opportunity to argue his case by adducing evidence on fact and law. Hence, it might be considered a basis for challenging the enforcement of an award for the reason of denial of due process, if the arbitrator did not provide a party enough of a chance to prove their evidence to the tribunal. Still, such a defence has had little success in actual practice.⁵⁶⁷

6.2.10 Denial of the Right to Hear the Other Party's Argument or Evidence

Based on the concept of due process, each party must be provided a reasonable opportunity to heed the argument and evidence of his opponent. Inability to comply with this requirement may consider the enforcement of the award subject to challenge under Article V (1)(b).⁵⁶⁸

6.2.11 Denial to the Right to Controvert Other Party's Argument for Evidence

The inability of a party to present their case also includes the fact that they have been deprived of the right to controvert or comment on the other party's argument or evidence. Like the previous case, such a defence is seldom successful in practice. For instance, in confirming the enforcement of an ICC award given in Zurich, a German appellate court has refused an objection that the defendant was provided no opportunity to respond to a claim for compensation for the period subsequent to 29 October 1992, which the claim was made for the first time in a late-filed statement by the claimant on 31 October 1995. The Court dismissed a charge from the defendant of breach of due process, discovering that it was apparent that the matter referred to in the statement was examined in the course of the proceedings, and the defendant has undoubtedly been provided the opportunity to comment on the late-filed statement and thus requiring the tribunal to examine the prospect of a new hearing.⁵⁶⁹

6.2.12 Adjournment to Introduce Evidence

An accusation that the tribunal has refused to defer the arbitration hearing for the reason that a witness for the respondent failed to appear at the given time has generally been recognized

⁵⁶⁷ See Garnett and others, *International Commercial Arbitration* 105; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-88.

⁵⁶⁸ Hebei Import & Export Corp v Polytek Engineering Co Ltd 300.

⁵⁶⁹ X (Syria) v X (Germany Court of Appeal 1998) 668.

as not to be a violation of the principle of due process.⁵⁷⁰ For instance, in the prominent case of *Parson's and Whittemore Overseas Co INC v Societe Generale de L'industrie du Papier (Rakta)*, the losing party argued that a violation of due process was existent in the tribunal and therefore denying the party an adequate opportunity to present its case, particularly, by refusing to hold the proceeding in order that one of its witnesses who was currently unavailable, could be heard. The United States Court of Appeal snubbed the argument claiming that the inability of a party to produce its witness in time for the tribunal is a risk which is inherent to the arbitration process. By submitting to arbitration, a party surrenders his courtroom rights, including witness summons. Hence, the supposed impediment that the losing party's main witness was prevented from attending the hearing before the tribunal due to an earlier commitment to lecture at an American university cannot be a justified reason to postpone the arbitration proceedings as an issue of fundamental fairness to the losing party. The court also claimed that the losing party cannot dispute that the tribunal reached its decision without considering its critical witness since the tribunal had already heard before them an affidavit from the witness in question. The Court ended that:

The arbitration tribunal acted within its discretion in declining to reschedule a hearing for the convenience of an overseas (respondent) witness. Overseas' due process rights under American law, right entitled to full force under the Convention as a defence to enforcement, were in no way infringed by the tribunal's decision.⁵⁷¹

Likewise, the Italian Supreme Court has confirmed that the decision to grant a further postponement for hearing a respondent witness was not a breach of due process as stated in Article V (1)(b).⁵⁷²

6.2.13 Incapacity to Participate for Reasons out of a Party's Control

A party may contest the enforcement of an award on the basis that they have been barred from participating in the arbitration process by reasons out of their control and as such, they were not able to present their arguments on the case. Still, this kind of allegation has not been proven successful in actual practice. For instance, in the case of *Consorcio Rive SA De CV v Briggs of Cancum Inc*, an American respondent opposed the enforcement of an award granted in Mexico

⁵⁷⁰ See, eg, *Parsons & Whittemore Overseas Co v RAKTA* 976; *Glencore Ltd v Agrogen SA de CV* 36 FedAppx 28 (US Court of Appeals 2nd CIR 2002). See also, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 309.

⁵⁷¹ *Parson's & Whittemore Overseas Co v RAKTA* 976.

⁵⁷² *DalmineSpA v M & M Sheet Metal Forming Machinery AG* 713.

on the basis that Mexican criminal proceedings had been initiated against their representative, who was hence barred, from fear of arrest, from entering Mexico to participate in the arbitration. As such, the respondent claimed that it was unable to present their case pursuant to Article V (1)(b).

The US District Court refused this objection claiming that the respondent had enough of an opportunity to participate in the arbitration through other alternative means such as sending a representative or its attorney. The respondent could have also participated by use of telephones. The Court finalized that fear of arrest and extradition did not amount to incapacity to attend an arbitration hearing.⁵⁷³ This decision was supported by the US Court of Appeals.⁵⁷⁴ In a similar case, a US District Court in *National Development Com v Adnan M Khashoggi* the claim that the accused was afraid of being taken into custody for extradition to face criminal charges in the United States, did not amount to an inability to attend the hearings.⁵⁷⁵

6.2.14 The Challenge of Estoppel/Waiver

Raising an objection in a timely manner is a basic duty of the parties involved in arbitration. This may entail that objection based on the violation of due process should be made first to the tribunal during the arbitration itself, if the pertinent facts were known to the objecting party. Otherwise, an enforcing court might regard such party as having waived their right to such an objection and hence stop them from raising it at the enforcement stage. It is deemed that the justifications behind this approach are to avoid undermining the effectiveness of international arbitration, and particularly, to preserve the main purpose of the NYC of enforcing awards. To permit a party to raise a complaint for the first time during the enforcement stage would be deemed unfair as the permitting deficiencies of due process in the arbitration process.⁵⁷⁶ This approach may be reinforced where parties are permitted to apply to the court during the arbitration, to take out an arbitrator for lack of fair treatment⁵⁷⁷ or misconduct⁵⁷⁸ and no such application has been raised.⁵⁷⁹

⁵⁷³ *Consortio Rive SA DE CV v Briggs of Cancun Inc* 797; *National Development Com v Adnan M Khashoggi* 781 FSupp 959 (US District Court SD NY 1992) 962.

⁵⁷⁴ *Consortio Rive SA DE CV v Briggs of Cancun Inc* 82 FedAppx 359 (US Court of Appeals 5th Cir 2003) 364.

⁵⁷⁵ *National Development Com v Adnan M Khashoggi* 781 FSupp 962.

⁵⁷⁶ Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-89; Garnett and others, *International Commercial Arbitration* 107; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 158.

⁵⁷⁷ eg, English Arbitration Act 1996, s.23(1)(a); UNCITRAL Model Law of 1985, Article 12(2).

6.2.15 If Breach of Due Process has no Effect in the Arbitration Result

It may be deemed important to address the issue as to whether the enforcing court can exercise its discretion to implement an award if the decision of the arbitration tribunal would have been the same in the absence of a serious breach of due process. The permissive wordings used in the opening paragraph of Article V(1) of the NYC that the “enforcement of the award may be refused...” might signify that the enforcing court still has limited discretion in some circumstances to implement an award even as the non-enforcing grounds have been proven to be existent.

A Critique of the Position of Saudi Arabia on Non-Adherence to Due Process

Just like all other grounds of exception to the recognition and enforcement of awards, the issue of lack of due process of law is a critical aspect in KSA. This shows why, as seen in the foregoing discussions, the violation of due process as a basis for resisting enforcement under Article V (1) (b) is regarded essentially according to the standards of due process of the forum in which enforcement is sought. Hence, it is very important to outline, from the very outset, the nature of the requirement of due process.

The Mandates of Due Process under the Saudi Arbitration Law

The formality of arbitration process in any country is essentially the hallmark of free and expedient arbitration.⁵⁸⁰ Where the process is dogged with informality, there is significant risk that arbitration will be hampered. KSA, unfortunately, epitomizes this informality. There is no denying that the doctrine of due process of law is as varied as it can possibly get across nations. Foreseeing this obstacle, Article V of the NYC sought to limit these variations to only those it stipulates. Therefore, the test of Article V regarding due process ought to be the governing principle of the law of individual states such as KSA.⁵⁸¹

578 eg, English Arbitration Act 1996, s.23(I)(d)

579 Garnett and others, *International Commercial Arbitration* 107

580 Van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 309.

581 N Majeed, ‘Good Faith and Due Process: Lessons from the Shari’ah’ (2004) 20 (1) *Arb Intl* 97 at 106.

These nations ought to incorporate within their own laws the provisions of this article as soon as they ratify the treaty. However, KSA has been adhering to the NYC for about eighteen years now though it still lags behind, it's due process laws being at best ambiguous and still subject to contention. In fact many courts still have to resort to the narrow interpretation of the doctrine of due process as has been done with most other grounds for exception to recognition and enforcement of arbitration awards. It is this narrow interpretation – done with Islamic Shari'a law as the main standard – that has rendered the enforcement of foreign arbitration awards in the kingdom very difficult. From the onset of the proceedings. They are as follows:

6.2.16 Equal Treatment of All Parties

The first major principle is maintaining strict equality of treatment for both parties without regard for their social or economic status or any other state of difference that may be found.⁵⁸² Equality should be maintained from the onset of the proceedings to the announcement of the verdict. The parties should be treated equally in all aspects of the arbitration which includes seating and speaking. The confidence of both parties must be maintained as well as their feeling of equality and fairness while presenting their case.⁵⁸³ This obligation is grounded on the principle that justice in Islam is exceptionally important and it is something which the judge and arbitrator must apply in all matters without exception.

6.2.17 The Right of all Parties to be Heard

The second principle is to allow both parties to be heard. Hence, the judge or arbitrator is bound under the provision of the Shari'ah that equal opportunities to present their case must be provided to both parties.

It is also reported that a man has come to Omar Ibn Al-Khattab to protest against someone who has knocked out his eye, but Omar told that: “bring your opponent (first before me) ... as you might have knocked his both eyes”.⁵⁸⁴ This translate that the judge or arbitrator is required to provide each party a fair opportunity to present its case as well as to rebut the case made against him.

582 N Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah' (2004) 20 (1) Arb Intl 97 at 106.

583 See, IbnQudamah, *Al-Mughna* vol 13 pp 577-82; IbnQasim, *HaashiyaAlrrawd* vol 7, 526. See also, N Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah' (2004) 20 (1) Arb Intl 97 at 106.

584 Reported by A IbnHazm, *Al-Muhalla bi Al-Athar* (Dar al-Kutuv al-Ilmiyah, Beirut 'in Arabic' in Arabic) vol 8, 436.

Case Law

An issue of great interest here and one requiring significant attention is with regard to the attitude of Saudi enforcing authorities towards the application of the violation of due process as a non-enforcement ground under Article V(1)(b) of the Convention. In essence, do the Saudi Courts, similar to majority of other national courts, interpret Article V(1)(b) narrowly so as to accept the objection of violation of due process only in grave cases? In a case raised in a Saudi enforcing court (the 25th Subsidiary Panel),⁵⁸⁵ an application was made by a foreign claimant to enforce an ICC award in SA. The Saudi respondent refused the enforcement on the basis that the award, through proceedings, did not comply with the procedural rules of the Board of Grievances (the Saudi competent court). The respondent added that the award was delivered in default since no notices for the hearing have been provided to them or their lawyer. However, the claimant produced documents to confirm that the respondent and their lawyer were provided all the necessary documents by registered mail. The respondent claimed that notices sent through mail were not sufficient as these did not contain signatures.⁵⁸⁶

The court however refused the objections for the reason that registered mail is deemed as enough of a reason to assume that the respondent was properly informed.⁵⁸⁷ The court continued to hold that the respondent's allegation was considered a frivolous allegation and an approach to impede the implementation of the award with no legal justification. Hence, the respondent was duly summoned and provided ample opportunity to defend their case before the tribunal and to adduce evidence to maintain their case, but had intentionally or recklessly missed the opportunity provided. The Court also rejected the respondent's claim that the award, through proceedings was non-compliant with the procedure and rules of the Board of Grievances (the Saudi competent court). As such, the Court granted leave for the implementation of the award.⁵⁸⁸ The Saudi respondent then appealed at the appeal court (the 2nd review committee) from the lower court decision, but the Review Committee dismissed the appeal and confirmed the leave of enforcement of the foreign award.⁵⁸⁹

585 the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996).

586 Ibid pp 3-4.

587 Ibid.

588 Ibid pp 7-8.

589 The 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997).

6.3 Refusal of Recognition and Enforcement of Awards on the Grounds of Lack of Arbitrability of Dispute (Scope Of Jurisdiction)

The third basis for recourse against the implementation of a foreign award under Article V of the NYC revolves the issue of jurisdiction scope. As has been viewed, a tribunal, unlike a court, lacks the capacity to resolve a particular dispute except when the parties have granted that authority by agreement, as the international commercial arbitration requires consent of both parties. The basic concept is adopted by the Convention and majority of national and international laws, so that enforcement of a foreign award is subject to denial if the award exceeds the scope of the parties' submission to the arbitration. As such, Article V (1)(c) of the Convention indicates that implementation of an award may be refused if the opposing party confirms that:

6.3.1 The Scope of Article V (1) (c)

It has been viewed that it is becoming increasingly common in practice for the parties declining enforcement of foreign awards to raise the issue of jurisdiction as an initial defence, arguing either that there was no valid agreement or that the tribunal has exceeded its jurisdiction.⁵⁹⁰ Still, one should note that Article V(1)(c) does not deal with the situation where the entire jurisdiction of the tribunal is disputed because of the absence of a valid arbitration agreement. The invalidity of the arbitration agreement is, as already viewed,⁵⁹¹ ruled over by Article V(1)(a). Inversely, Article V (1)(c) presumes that there is a valid arbitration agreement, but the tribunal has either (1) acted beyond its authority by granting an award concerning a dispute or disputes not submitted to it (*extra petita*), or (2) has gone beyond its mandate in some aspects but not all (*ultra petita*).⁵⁹² In this sense, the English Commercial Court in *Dardana Ltd. v Yukos Oil Co*⁵⁹³ put forward Article 103(2) (d) of the Arbitration Act⁵⁹⁴ (which implements

590 See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 464.

591 See, *supra* Ch 3.

592 See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 312; van den Berg, 'Consolidated Commentary' (2003) at 656; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-91; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 158-159; Merkin, *Arbitration law* para 19.54.

593 *Dardana Ltd v Yukos Oil Co* [2002] 1 Lloyd's Rep 225 (UK QBD Com Ct) para 20-22. See also, Merkin, *Arbitration law* para 19.54.

594 English Arbitration Act 1996, s.103(2)(d).

Article V (1) (c)) which did not extend to the situation in which there was no agreement at all, but somewhat applied only to the situation wherein there was an unquestionably valid arbitration agreement, and something had gone subsequently wrong.

6.3.2 Refusal Based on the Doctrine of Extra Petita

The first part of Article V (1)(c) indicates that it is a basis for declining enforcement if “the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration”. This may be regarded as an ‘*extra petitia*’ since it refers to the condition where the complaining party contends that the tribunal has gone beyond its authority, and granted an award that does not fall within the scope of the arbitration agreement between the parties. It has also been regarded that the matter is one of “private arbitrability” since the issue of whether or not the subject matter of the dispute can be settled by arbitration depends on the private regulation⁵⁹⁵ of the parties in question, as they may consent to leave out certain disputes from arbitration even as they may be arbitrarily based on the applicable law. Hence, this defence applies generally to situations where the award is concerned with matters that were not forwarded to arbitration.

6.3.3 Refusal Based on the Doctrine of Ultra Petita

The second reason for declining enforcement under Article V (1) (c) is concerned with the situation in which the tribunal’s award to some extent goes beyond its jurisdiction. In such a case, only a portion or portions of the award are within the coverage of the mandate of the tribunal, while other portions of the awards are within the scope of the mandate. This defence has been successfully invoked in most cases. Courts have dealt with this defence in support of the tribunal whenever probable,⁵⁹⁶ in the context of the powerful assumption that the tribunal has not overstepped its jurisdiction, but rather moved within its authority.⁵⁹⁷

⁵⁹⁵ Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 159.

⁵⁹⁶ See, eg, *Fiat SpA v Ministry of Finance and Planning of Republic of Suriname* 1989 WL 122891 (US District Court SD NY 1989) 5; *Kersa Holding Co v Infrancourtage* 624; *Isaac Glycer v Moses Israel Glycer & Estera Glycer-Nottman* 640. Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-93.

⁵⁹⁷ See, eg, *Parsons and Whittemore Overseas Co v RAKTA* 976; *Management and Technical Consultants SA v Parsons-Jurden International Corp* 1534; *American Construction Machinery & Equipment Corp Ltd v Mechanised Construction of Pakistan Ltd* 429; *Ministry of Defense of the Islamic Republic of Iran V Cubic Defense Systems Incpp* 1171, 1173/ See also, Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-93; Bishop and Martin, ‘Enforcement of Foreign Arbitral Awards’ 21.

6.3.4 Partial Enforcement of an Award

The issue stemming from *Ultra Petita* objection is whether implementation of the whole award must be denied or only those parts not within the scope of the arbitration agreement.

As such, the implementation of the entire award may be declined where those portions which fall beyond the scope of the tribunal's jurisdiction cannot be separated from the parts that are covered by its authority. Still, partial enforcement of an award, to the point that it deals with matters within the authority of the tribunal, is probable if they are separable from the remainder of the award. As a result, the Convention's pro-enforcement bias is challenged to protect the sections of the award which have not been stained by the *ultra petita* objection at least if the enforcement of the whole award is impossible. The view is taken that some sections have been appropriately rendered within the arbitrator's authority and to refuse enforcement of such sections would result to an undesirable waste of time, resources and effort.⁵⁹⁸

6.3.5 A Critical Analysis of the Position in Saudi Arabia

The SAL of 1983 and the IRSAL of 1985 do not mention that the award may be challenged or declined enforcement on the basis that the arbitrators have gone beyond its jurisdiction, as these provisions permit either party to dispute the award before the court without mentioning specific bases of challenge.⁵⁹⁹ However, such a defence is prominent under Islamic jurisprudence and the rules of the Saudi Courts. Concerning Islamic jurisprudence, there is no disagreement among Muslim scholar's of *Shari'ah* that the authority stems from the voluntary agreement of the parties to resolve their argument by that arbitrator. Respectively, the arbitration agreement, similar to the official appointment of the judge, establishes the arbitrator's authority concerning the subject matter and the parties to arbitration. As such, the arbitrator's award would be, as a general rule, not binding if it holds matters beyond the disputes forwarded to arbitration.⁶⁰⁰ The Saudi Court has also assumed the principle that the tribunal has to grant its award within the scope of its jurisdiction based on the arbitration agreement.⁶⁰¹

598 Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-93; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 160.

599 See, Y Al-Samaan, the Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' (1994) 9 Arab L Q 217 at 234.

600 See, eg, Z IbnNujaym, *AlBahrAlra'iqsharhKanzAldaqa'iq* (Dar al-Kutub al-ilmiyah, Beirut 1997 in Arabic') vol 7 p 41; S Al-Sarkasi, *Al-Mabsout* (Dar-al Kutub al-ilmiyah, Beirut 1993 'in Arabic') vol 16 p 111; ibnQudamah, *Al-Mughna* vol 13 p 629; IbnQasim, *HaashiyatAlrrawd* vol 7 p 521. See also, for contemporary scholars, M Al-Sartawy, 'The Scope of Arbitration and Power of the Arbitrator' (Symposium of Arbitration in Islamic Shariah, Dubi 2001 'in

Similarly, the scholars of Islamic jurisprudence collectively agree that the award would not bind a third party who did not agree to arbitrate, however, if the third party is one of the owners of a business, they could be bound by an award made against their partner who entered into arbitration.⁶⁰²

In view of this discussion, it may be viewed that Article V (1)(c) is concerned with the situation where the tribunal has overstepped the bounds of its authority in all or some decisions of the award. It does not deal with the situation in which the entire jurisdiction of the tribunal is disputed because of the absence of a valid arbitration agreement since this matter is covered by Article V (1) (a). Similarly, Article V (1) (c) does not deal with issues of procedural violations nor error of law. An incomplete award is not excluded from enforcement under Article V (1) (c) nor under any other grounds of the Convention. Regardless of the use of the phrase “submission to arbitration”, Article V (1)(c) is concerned with both kinds of arbitration agreements, namely; submission agreements and arbitration clause.

6.4 Refusal of Enforcement of an Award on Grounds of the Composition of Authority

In Article V (1) (d), the NYC states the fourth ground by which foreign awards may be declined. Similar to majority of modern international and national arbitration laws⁶⁰³, it provides that implementation of foreign awards may be declined if the procedure including the composition of the tribunal, strayed from the will of the parties or the law of the seat of arbitration. Accordingly, Article V (1) (d) cites that enforcement of a foreign award may be declined if the oppressed party can verify that:

Arabic’) pp 9-11; M AagBeeg, ‘Arbitration in Islamic Shari’ah and Islamic Fiqh’ Symposium of Arbitration in Islamic Shariah, Dubi 2001 ‘in Arabic’) pp 23-24; E Gattorah, *Arbitration in the Light of the Islamic Shari’ah*(Jeddah Chamber of Commerce and Industry Jeddah 194) 84.

601 See, the 4th Review Committee, decision No 33/T/4 dated 1414 H (1994); Al-Ajlan, *Compilation of Judicial Principles* 58.

602 See, O Al-Nashmi, International Arbitration and Arbitrating in Islamic Shari’ah (Symposium of Arbitration in Islamic Shariah, Dubi 2001 ‘in Arabic’) 20; IbnNujaym, *AlBahrAlra’iqsharhKanzAldaqa’iqvol* 7 p 47; AagBeeg, ‘Arbitration in Islamic Shari’ah and Islamic Fiqh’ 25.

603 See, eg, UNCITRAL Model Law of 1985, Article 36(1)(a)(iv); European Convention on International Commercial Arbitration of 1961, Article IX(1)(d); English Arbitration Act of 1996, s.103(1)(e).

*The composition of the authority or the 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.*⁶⁰⁴

While Article V (1) (d) *prima facie* instituted two distinct non-enforcement grounds in the form of irregularities; (a) the composition of the tribunal and (b) the procedure. These two grounds are reasonably close since the issue of the composition of the tribunal is a type of procedural matter which surfaces at the start of the hearings. As such, specifically bringing up the issue of the composition of the tribunal distinctly from the procedure under Article V (1)(d), specifies that the NYC affords particular attention to defective composition of tribunals.

6.4.1 The Unpopularity of Article V (1)(d)

It may be deemed important to note initially that Article V(1)(d) is not as frequently resorted to compared to the other grounds of Article V.⁶⁰⁵ There are a number of reasons for this case. Firstly, in an effort to advance the goals of the convention, courts will often be very sceptical of broad-based assertions of bias, not raised before the panel itself, but subsequently raised to block enforcement of the awards. Courts may even characterize these attempts as made in bad faith.⁶⁰⁶ (Secondly), the agreement on the procedure is usually embodied in Arbitration Rules of a specific institution, which generally affords wide discretionary power to arbitrators as to the conduct of the procedure. It is therefore rare for the procedure not to be conducted in accordance with the agreement of the parties.⁶⁰⁷ A third reason may be added as far as an irregular method may be confused or overlapped with the absence of due process, the party refusing implementation of the award would usually depend on Article V (1) (b) which deals with violation of due process or Article V (2) (b) which is concerned with public policy and may seem more successful compared to Article V (1) (d).⁶⁰⁸

604 NYC of 1958, Art V (1)(d).

605 Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 22; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 26-95; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 163.

606 D Richard, 'Enforcement of Foreign Arbitral Awards under the United Nations Convention of 1958: A Survey of Recent Federal Case Law' (1987) 11 Maryland J Intl L & Trade 13 at 32; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 22.

607 Van den Berg, *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation* 323.

608 See, supra Ch 5 para 5.3.

6.4.2 The Distinction between Article V (1) (d) and Article V (1) (b)

It may also be deemed relevant to note that an overlap between Article V (1) (b) and V (1)(d) may regularly arise as both articles relate to alleged procedural violations in proceedings. Despite this close relationship, there is a significant difference between them which should be kept in mind. Article V (1) (b) concerns violation of basic standards of due process such as procedural fairness or fair hearing, as implemented in the country of the enforcing court. Inversely, Article V(1)(d) emphasizes on non-compliance with aspects of procedure aside from due process which are agreed upon by the parties, or failing such agreement, provided by the law of the seat of arbitration, even if such regularities do not comprise a violation of due process. Consequently, an award which may not be disputed under Article V (1) (d) may yet offend against the basic requirements of due process. As such, if the agreement of the parties affords that one of the parties has no right to be heard or to put their case, or that the names of the arbitrators will not be revealed to the parties, which is without a doubt against the fundamental requirement of process, and as such, Article V (1) (b) or even V (2) (b) may be invoked against implementation of an award arising from such a case.⁶⁰⁹

6.4.3 The Applicable Law

Based on the Geneva Convention of 1927, the content of the tribunal and the procedure were required to be in accordance with both, at the same time, the agreement of the parties and the law of the country where the arbitration was held. Thus, enforcement may be rejected under the Geneva Convention if the award arose from a procedure which offended against the law of the seat of arbitration, even if both parties agreed to the procedure. This basically suggested that the parties were unable to agree on a procedure which differs with the law of the seat of the arbitration.

6.4.4 Criticism of Article V (1)(d)

While a significant development is reached by Article V (1)(d) in comparison with the Geneva Convention of 1927, by decreasing the function of the law of the seat of arbitration in support of party autonomy, it may still be reproached in comparison with contemporary arbitration laws.⁶¹⁰ For instance, while Art, V(1)(d) permits enforcement to be rejected if the

⁶⁰⁹ See, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* p 298, 301; Born, *International Commercial Arbitration* 833 fn 83; G Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitration Procedure – The Role of Law of the Place of Arbitration' (ICCA Congress Series no 9 Paris 1998) 337.

⁶¹⁰ See, eg, French New Code of Civil Procedure of 1981, Article 1502; Swiss International Law of 1987 Article 190. See also, Yugoslav law of conflict of laws of 1982, Article 99 (which provides only that the existence of the alleged

composition of the committee or the procedure was not in compliance with the agreement of the parties, or failing such agreement, was not in conformity with the law of the seat of arbitration. For example, the French law permits enforcement to be refused on the ground that such issues do not conform to the law of the seat of arbitration only if the parties have specifically indicated that the law should have jurisdiction over the proceedings.⁶¹¹

Another criticism is that Article V (1)(d) seems to be drafted imperfectly as the authors of the NYC make use of the word “failing such agreement”,⁶¹² which might denote that the agreement must be explicit and as such, an implicit agreement could be insufficient. Force might appear to be a characteristic of the provision since Article V (1)(a) utilizes the words “failing indication thereon”. Nevertheless, this shortcoming seems to pose no actual difficulty since Article V (1) (d) has generally been perceived to cover both expressed and implied agreement.⁶¹³

A more significant criticism is that the standards used in Article V (1) (d) may unusually pose real dilemmas for arbitrators. In cases where the agreement of parties would breach the compulsory requirements of the procedural law of the seat of arbitration, arbitrators may struggle to grant an award enforceable in the international level. If they conform with the agreement of the parties and hence breach the mandatory laws of the seat of arbitration, the court of that country may leave behind the award, and implementation may be rejected in other countries as mandated by Article V(1)(e).⁶¹⁴ Alternatively, if they utilize the mandatory standards of the seat in a conduct that does not conform with the agreement of the parties, the enforcement of the award may be declined in other countries under Article V(1)(d). Prof. van den Berg indicates that this consequence of Article V (1) (d) is unfortunate but apparently inevitable.⁶¹⁵

irregularities is to be determined according to the law of the arbitration agreement), cited in Sajko, ‘The New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues’ 211.

611 See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 989.

612 See, David, *Arbitration in International Trade* 399. Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 990.

613 See, Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 990.

614 See, eg, *RederiAktiebolaget Sally v S.r.l. Termarea* (1979) IV YBCA 294 (Italy Court of Appeal 1969) pp 295-96. See also, David, *Arbitration in International Trade* 399; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 327-30; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1702; Davidson, *Arbitration* 349; Soo, ‘International Enforcement of Arbitral Awards’ at 256.

615 Van den Berg Albert Jan, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (Kluwer Law International)

6.4.5 Irregularities in the Composition of the Tribunal

The proceedings cannot start until the arbitrator(s) has been selected and the tribunal created. As a basic rule, parties are entitled to select their own arbitrators; hence, the composition of the tribunal should basically be made in accordance with the agreement of the parties. In the absence of an agreement, the composition of the tribunal should be created on the basis of the law of the seat of arbitration. Enforcement of the award may be refused under Article V (1) (d) if the composition of the tribunal strays from the agreement of the parties or, failure to which, the law of the seat.

However, an examination of the case-law indicates that Article V(1)(d) is rarely successful in declining enforcement.⁶¹⁶ For example, in *Imperial Ethiopian Government v Baruch-Foster Corp* brought before a US appellate court, the respondent tried to contest implementation of the award on the basis that the arbitration agreement was breached for the reason that the arbitrator was a member of a commission preparing a civil code for the winning party, in this case, the Ethiopian government, given that the arbitration agreement afforded that the third arbitrator should have no direct or indirect association with either party. The appellate court confirmed the implementation of the award agreeing with the decision of the district court that the respondent had relinquished any objections to the composition of the tribunal before the court, for the reason that it did not raise these objections in the proper time. The US Court continued that the respondent had failed to demonstrate that the objection was stated in good faith and for any reason aside from delaying enforcement.⁶¹⁷

6.4.6 Irregularities in Procedure

As has been viewed, the agreement of the parties concerning procedure is subject to the most basic requirement of due process; the first principle guiding arbitrators in performing the arbitration proceedings. If the parties do not come to an agreement on the matter of procedural rules, the procedure will be governed by the law of the seat of arbitration. Respectively, if the arbitrators show a lack of compliance with the parties' agreement, or failing such agreement, the law of seat in relation to the arbitration procedure, implementation of the award may be resisted based on the grounds of Article V(1)(d).

616 See, eg, *Imperial Ethiopian Government v Baruch-Foster Corp* ; *Al Haddad Bros Enterprises Inc v M/S AGAP* ; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holding Co Ltd*; *Ministry of Public Works of Tunisia v SocieteBceFrerespp* 668, 690; *X v X* (2004) XXIX YBCA 673 (Germany Court of Appeal 20 Oct 1998) pp 675-676; *KarahaBodas Co LLC v Perusahaan PertambanganMinyak Dan Gas Bumi Negara* pp 296-298.

617 *Imperial Ethiopian Government v Baruch Foster Corp*.

However, in actual practice, this defence is also rarely successful when brought before the enforcing court.⁶¹⁸ For example, a failed attempt was raised by a losing party to convince a German appellate court to resist the implementation of a foreign award made in London for the reason that the arbitrator did not list the basis for the decision in the award. The Court discharged the arguments on the basis that such an absence of reasons does not translate to a procedural irregularity as stated under Article V(1)(d) since the appropriate law (in this case, the English law) did not require such.⁶¹⁹ The same judgment was also passed recently by the same court on the same basis that an absence of reasons does not constitute procedural irregularity.⁶²⁰ The same English court further claimed that the absence of an oral hearing is not a violation of Article V (1)(d) since the agreed procedural rules in that case permitted an award to be granted even in the absence of an oral hearing.⁶²¹

6.4.7 A Critical Examination of the Position in Saudi Arabia

Initially, it may be deemed vital to make some points concerning the requirements for the composition of tribunals under Saudi law and the extent of its application. This is principally important since several commentators, including Saudi commentators, have raised the issue of whether the Saudi enforcing courts would consider the restrictions enforced by Saudi arbitration laws on the choice of arbitrators as being relevant in the context of a foreign award sought to be implemented in the Kingdom under the Convention. Specifically, some commentators hesitated on whether a foreign award made by a non-Muslim or by a woman would be considered enforceable by the Saudi courts.⁶²² Considering the requirement of the IRSAL of 1985 Article 3 mandates, among a number of requirements, that “The arbitrator shall be a Saudi national or Muslim expatriate”.⁶²³ This provision clearly states that an arbitrator must be Muslim. Still, there

618 See, eg, *Hainan Machinery Import and Export Copr v Donald &McCarthyPte ltd* (1970 XXII YBCA771) (Singapore High Court) pp 774-77; *Food Services of America v Pan Pacific Specialties Ltd* (2004) XXIX YBCA 581 (Canada Supreme Court 1997) pp-586-89; *Industrial Risk Insurers v M.A.N. Gutehoffnungshutte GmbH* 141 F3d 1434 (US Court of Appeals 11th Cir 1998) pp 1442-43; *Transocean Shipping Agency P Lit v Black Sea Shipping* (1998) XXIII YBCA 713 (India Court of Appeal 1998) pp 716-18; *Manufacturer(Slovenia) v Exclusive Distributor (Germany)* pp 693-95; *MinmetalsGermany GmbH v Ferco Steel Ltd* pp 745-46.

619 *German Buyer v English Seller* (Germany Court of Appeal 27 July 1978) 267.

620 *Shipowner v Time Charterer* (2000) XXV YBCA 714 (Germany Court of Appeal 30 July 1998) 716.

621 *Ibid.*

622 Alhoslan ‘*The Symposium of European-Arabian Arbitration*’ cited in El-Ahdab, *Arbitration in Arab Countries*’ 2, 242; El-Ahdab, ‘Saudi Arabia Accedes to the New York Convention’91.

623 IRSAL of 1985, Art 3.

is no provision under the SAL of 1983 or its implementation of 1985 which expressly prevents women from acting as arbitrators, although based on the majority of *Shari'ah* schools, including the *Hanbali* School followed in KSA; a female cannot be made an arbitrator.⁶²⁴

The new Saudi Arbitrating law enacted in 2012 does not expressly put a requirement on the gender and religion of arbitrators, unlike the old which was categorical that arbitrators must be male Muslims. However, as it were, the full effect of this new law is yet to be seen or felt, considering that Saudi Arabia strictly adheres to the *Shari'ah* and deems any law null and void if it contravenes the Islamic law. In addition, the *Hanbali* school prohibits non Muslims and women from serving as members of an arbitral tribunal. It can be recalled that Saudi Arabia subscribes to the *Hanbali* school of thought.

It is believed across the Muslim world that a woman was appointed judge by Omar who was the third Khalifa after Prophet Mohammed. In modern times, there are women judges in almost all Muslims countries with the exception of Saudi Arabia. With more and more Muslim countries rushing to modernize and reform their laws, both generally and arbitration specific ones, it will not be long before the first woman arbitrator delivers an award. Most of these reforms are aimed towards gaining much more international acceptance from global investors and embracing universal best practices within respective countries.

With Saudi Arabia having acceded to international treaties, it tacitly indicates that she has accepted women as arbitrators. This is not inconsistent with the general principle of *Shari'ah* which forms Saudi's public policy. Articles 3 and 5 of the Circular of the Grievance Board explicitly limit the principle of the *Shari'ah* public policy by declaring that a foreign award cannot be enforced if it "violates any general principles of *Shari'ah*". The presence of the qualifier "general" signifies that not every violation of mandatory rules or concepts of *Shari'ah* by a foreign award would lead to a basis for resisting enforcement. Only the breach of a general principle of *Shari'ah* would do so.

However, it cannot be conclusively argued at this point whether or not there will be harmonization in the interpretation and execution of laws at some point in time across the Muslim world. There still remains the risk of unenforceable awards obtained in either a domestic or foreign legislation and a sense of unpredictability emanating from the conflicting principles of

624 See, Al-Hasen Alkasem, *The Shari'ah Rules of Arbitration* (Al-Narjes, Riyadh 1996 'in Arabic') 49; Gattorah, *Arbitration in Light of the Islamic Shari'ah* pp 123,125; M Al-Kalidy, 'The Capacity of Arbitrator in Islamic Jurisdiction' (Symposium of Arbitration in Islamic Shari'ahDubai 2001 'in Arabic') pp 7, 28; S Jameel, 'Arbitration in Islamic Shari'ah and its Important Settling Disputes' (Symposium of Arbitration in Islamic Shari'ahDubai 2001 'in Arabic') 17,18; AagBeeg, 'Arbitration in Islamic Shari'ah and Islamic Fiqg' 14,15.

civil and customary laws as well as varied interpretations across borders. In this respect, it will not be unusual for an international arbitral award to be rendered unenforceable in one jurisdiction on the ground that it has been pronounced by a woman or non Muslim arbitrator in another jurisdiction.

6.4.8 KSA'S Position on Irregularities in the Composition of the Tribunal

Relative to the defence that the tribunal is irregularly composed, in one case a Saudi party having called for a Saudi court to refuse implementation of the award on the basis that the tribunal was not properly represented as one of the three arbitrators was not Muslim, in which the court called for the enforcement of the award,⁶²⁵ applying a foreign law which did not require all arbitrators to be Muslim. This denotes that the Saudi courts would make a distinction between national and international arbitration in handling the implementation of awards, and the absence or lack of Muslim arbitrators would definitely not refuse the enforcement of a foreign award.

6.4.9 Irregularities in the Procedure

Regarding the defence that the procedure has been irregularly conducted, one Saudi company charged that a foreign award has been granted under an procedure that breached the kingdom's procedural law and that the arbitration had been held in Jordan,⁶²⁶ although the agreement specifically noted that arbitration will be in Paris. The Court stated that the agreement between the parties specified clearly that any disagreements would be resolved by ICC arbitration in Paris, which intended that the arbitration procedure was not bound by Saudi procedural law of the competent courts. In addition, the ICC itself chose to refer the settlement to the arbitrator in Jordan subsequently confirming this award. As such, the award could be deemed as an ICC award made under its rules. The Court enforced the award,⁶²⁷ which decision was affirmed by the Saudi Court of Appeal.⁶²⁸

These two cases show that the Saudi court will not consider every violation of the applicable procedure as adequate basis for resisting enforcement, an approach entirely in accordance with the objectives of the Convention.

⁶²⁵ See, the 9th Administrative Panel, decision No. 32/D/A/0 dated 1918H (1997).

⁶²⁶ The 2th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996)

⁶²⁷ Ibid 3,4, 6, 8.

⁶²⁸ The 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997).

6.4.10 The Applicable Law

Regarding the issue of the applicable law, the above considerations specify unquestionably that the Saudi courts would initially give power to the parties' agreement concerning the composition of the tribunal and the procedure. In the lack of such agreement, there appears to be no definite answer. Nevertheless, in one case where it is not apparent whether or not an agreement exists regarding the procedure, the Saudi court⁶²⁹ utilized Egyptian procedural law since Egypt was the seat of the arbitration.⁶³⁰ This decision was supported by the Saudi appellate court.⁶³¹ This may provide evidence that the Saudi courts are willing to respect the law of the arbitration seat in case the parties fail to agree on a law that will rule over the procedure. Moreover, one may imply that from a solely hypothetically legal point of view, Saudi court should utilize the law of the arbitrations seat in accordance with the mandates of Article V(1)(d) since the Kingdom adheres to the Convention.

6.5 Refusal Of Recognition And Enforcement Of Awards On Grounds Of The Status Of Award

Article V (1)(e) of the NYC affords the fifth ground for resisting enforcement of foreign awards. This ground is composed of three sub-grounds, namely, (1) the award has not yet become binding, (2) the award has been annulled in its country of origin, and (3) the award has been suspended in its country of origin. In this regard, Article V (1)(e) instituted that the foreign award may be resisted if the party against whom the award is invoked demonstrates that:

The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.⁶³²

6.5.1 The Non-Binding Consideration

Elimination of Double-Exequatur

629 The 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003)

630 Ibid.

631 The 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

632 NYC of 1958, Art V (1) (e).

Article V(1)(e) states that enforcement of a foreign award may be rejected if the party resisting enforcement declares and confirms that the award has not become binding. Under the Geneva Convention of 1927, the party wanting the enforcement of the foreign award holds the responsibility of confirming that the award has become “final” in the country where it was made, so that it may become enforceable in other countries.⁶³³ This requirement has been interpreted that the party seeking enforcement would initially seek some form of leave for execution of the award from the court of the country in which the award was made in order to demonstrate that it is final. This requirement hence had led in practice to the problem of what has been dubbed as “double exequatur” because of the fact that the party looking for enforcement would also have to find leave to execute the award from the court of the country where implementation is sought.

However, based on the legislative history of the NYC, a proposition of initiating a prerequisite that an award under the NYC should be final was rejected mainly on two grounds:

First of all, it would be normally impossible for the party seeking enforcement to submit a negative proof that the enforcement of the award has not been suspended or that no appeal has been lodged against the award and it seems therefore illogical to impose the burden of such a proof on the person seeking enforcement. ... (Secondly), the enforcement authorities might interpret it as requiring prior exequatur or other form of ratification of the award by the competent judicial authorities of the country where arbitration took place, and thus make it necessary to duplicate enforcement action both in the country where the award was made and in the country where the award is to be relied upon.⁶³⁴

In an attempt to eliminate the problem arising from “double exequatur”, which has basically been viewed as cumbersome and unsuccessful, the people behind the NYC made use of the term “binding” instead of the term “final”.⁶³⁵

6.5.2 At What Point Does the Award Become Binding?

Distinct from the Geneva Convention of 1927, which decides when an award becomes “final”,⁶³⁶ the Convention does not provide a definition for the word “binding”. This makes the

⁶³³ Geneva Convention of 1927, Art 4(2).

⁶³⁴ UN E/CONF. 26/2 para 15.

⁶³⁵ See. UN Doc. E/CONF.26/SR.17p3.

⁶³⁶ See, Geneva Convention of 1927, Art 1(d).

term vague in context. As such, two main views have come up in relation to the issue of when an award can be deemed “binding” under Article V (1)(e).

Reference to the Law of the Country of Origin

The first view which utilizes numerous courts⁶³⁷ and several authors⁶³⁸ is that the binding character of an award should be identified by the law of the country of its origin. Hence, an award should only be deemed binding if it had become so based on the law of the seat of arbitration. In this context, an Italian appellate court claimed that the issue when an award was made in England became binding should be identified under English instead of the Italian law, in order that the court declines to enforce the award was not necessitated so as to make the award binding.⁶³⁹

6.5.3 Autonomous Determination under the NYC

The second view, which seems to have lately achieved increased approval from numerous courts⁶⁴⁰ as well as most commentators,⁶⁴¹ is that the term “binding award” should be accorded an independent meaning for the intention of Article V(1)(e) not dependent on the

637 See, eg, *Carters Ltd v Francesco Ferraro* 277; *Animalfeeds Intl Corp v SAA Becker & Cie* (France Court 1970); *Seller (Denmark) v Buyer (Germany)* (Germany Court of Appeal 16 December 1992) 541; *Oil and National Gas Commission v the Western Comp of North America* (1998) XIII YBCA 473 (India Supreme Court 1987) 485,87.

638 In favour of this view, see, Gaja, *International Commercial Arbitration* para I.C.4 and citations in fn 74; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 1681-1682, 1684 and citations in fn 59. See also in general, van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, 341; Nazzini ‘The Law Applicable to the Arbitral Award’ (2002) 5 (6) *Intl Arb L R* 179 at 185; Merkin, *Arbitration law* para 19-56.

639 See, *Carters Ltd v Francesco Ferraro* 277.

640 See, eg, *Carters Ltd v Francesco Ferraro* (Italy Court of Appeal) 277; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d’Investissements* (1999) XXIV YBCA 603 (Belgium Supreme Court 1998) pp 610-11; *AB Gotaverken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden Supreme Court 1979) 240; *SNOC v Keen Lloyd Resources Ltd* (2004) XXIX YBCA 776 (Hong Kong High Court 2001) pp 777-83; *Rosseel N.V. v Oriental Commercial & Shipping Co Ltd* (UK QBD Com Ct 1990) 628.

641 See, eg, Sanders Peter, ‘A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1979) 13 *Intl Lawy* 269 at 275; van den Berg Albert Jan, ‘Consolidated Commentary’ (2003) 660; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 341-45; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1679; David, *Arbitration in International Trade* 400; Mistelis L A and Brekoulakis S L, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 166; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 468; Davidson, *Arbitration* 395; Nazzini, ‘The Law Applicable to the Arbitral Award’ 186.

applicable law in the country of the origin of that award. Logically, it is evident that the text of Article V (1) (e) does not necessitate the binding force of the award be determined by the law of the country of origin. Particularly, the first section of Article V(1)(e) does not utilize the phrase “the country in which, or under the law in which, that award was made” relative to the matter of a binding award, whereas the second section of that provision utilizes the expression relative to the issue of the setting aside or suspension of the award.⁶⁴² Consequently, this could mean that whether or not the award has become binding is a matter to be decided apart from the law of the seat of arbitration. Otherwise, it would come to a type of double *exequatur*, a problem which the proponents of the NYC obviously wanted to avoid through the use of the word “binding” in place of “final”.⁶⁴³

6.5.4 Approaches to the Autonomous Determination of Binding Award

Proponent of the autonomous determination theory have forwarded a variety of views concerning the issue of the moment at which the award can be considered binding under the Convention.

6.6 Refusal On Grounds Of Award Having Been Set Aside

The second section of Article V(1)(e) dictates that the enforcing court may refuse enforcement if the party opposing implementation of the award can confirm that the award has been set aside or suspended by a competent court of the country in which, or under the law of which, that award was made. The competent authority as mentioned in the second part of Article V (1)(e) and Article VI, is always the court of the country where the award was made.⁶⁴⁴ These two articles instituted the concept that the decision to set aside or suspend the award is completely provided to the court of the location where the award was made. Accordingly, a verdict to set aside an award by a court elsewhere must be afforded no weight by all enforcing courts.⁶⁴⁵

642 Sanders Peter, ‘A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1979) 13 *International Lawyer* 269-275, 342; Nazzini, ‘The Law Applicable to the Arbitral Award’ fn 50.

643 See, Sanders Peter, ‘A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ 275,76; *Di Pietro and Platte Martin, Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) .

644 See, Van den Berg Albert Jan, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (Kluwer Law International 2000).

645 See, eg, *Norsolor v Pabalk* (1982) VII YBCA 312 (Austria Supreme Court 1980); *Coutinho Caro USA Inc& Co v Marcus Trading* (2001) XXVI YBCA 894 (US District Court Connecticut 2000) 901; *Gabon v Swiss Oil Cor* (2004)

6.6.1 Enforcement of Previously Set Aside Awards

Lately, particularly after the *Chromalloy* US case⁶⁴⁶ and the French extraordinary case of *Hilmarton*,⁶⁴⁷ the issue whether an award has been set aside in its country of origin should be nonetheless implemented in another country covered by the NYC, has given origin to broad debate in arbitration literature and practice.⁶⁴⁸ In responding to this question, four main approaches have been followed:

First, the conservative approach, which seems to be approved by a number of courts⁶⁴⁹ and commentators,⁶⁵⁰ is that an award set aside in the place of origin is, as a generally-accepted

XXIX YBCA 1140 (US District Court SDF 2003) 1157; *Empresa Colombiana de Vias Ferreas v Drummond Ltd* 653; *Four Season Hotels & Resorts BV v Consorcio Barr SA* (2004) XXIX YBCA 882 (US District Court SDF 2003) pp 893-96; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 289. See also, van den Berg, 'Consolidated Commentary' (2003) at 572, 662.

⁶⁴⁶*Chromalloy Services Inc v Arab Republic of Egypt*.

⁶⁴⁷*Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV*.

⁶⁴⁸ See, eg, E Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' (ICCA Congress Series no 9 Paris 1998) 505; D Rivkin, 'The Enforcement of Awards Nullified in the Country of Origin: The American Experience' (ICCA Congress series 9 Paris 1998) 528; A El-Kosheri, 'The Enforcement of Awards Nullified in the Country of Origin (ICCA Congress series No 9 Paris 1998) 544; K Sachs, 'The Enforcement of Awards Nullified in the Country of Origin: The German Perspective (ICCA Congress series No 9 Paris 1998) 552; Freyer and Garavi, 'Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity' 101; R Chan, 'Enforcement and Setting Aside of International Arbitral Awards in the United States: A Critic of Chromalloy' (1997) 17 (1) Boston Univ Intl L J 141; M Hwang and A Chan, 'Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries' (ICCA Congress series No 10 New Delhi 2000) 165; C Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 Am Rev Intl Arb 451; Gharavi, 'The International Arbitration Awards: An Economic Approach' (2000) Am Rev Intl Arb 451; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award*.

⁶⁴⁹ In favour of this approach from courts, see, eg, *Claude Clair v Louis Berardi* (1982) VII YBCA 319 (France Court of Appeal 1980); *Baker Marin Ltd v Chevron Ltd* 191 F3d 194 (US Court of Appeals 2nd CIR 1999); *Marin I Spier v Calzaturificio Tecnica* 71 F Supp 2d 279 (US District Court SDNY 1999); *MIR Meauteahhitlik v KB Most-Bank KG – A-40/4363-03* (Russia Appeal Court 29 July 2003); *X v X* (2000) XXV YBCA 717 (Germany Court of Appeal 28 October 1999) 719; The Chinese Supreme People's Court Notice on the implementation of the NYC, cited in Chang, 'Enforcement of Foreign Arbitral Awards in the People's Republic of China' pp 468-69.

⁶⁵⁰ In favour of this approach from writers, see, eg A Rogers, 'The Enforcement of Awards Nullified in the Country of Origin' (ICCA Congress Series no 9 Paris 1998) 548; E Schwartz, 'A Comment on Chromalloy-Hilmarton, a l'americaine' (1997) 14 (2) J Intl Arb 125 at 131; G Sampliner, 'Enforcement of Nullified Foreign Arbitral Awards – Chromalloy Revisited (1997) 14 (3) J Intl Arb 141; Rognlien, the Norwegian delegate at the NYC's Conference, UN Doc. E/CONF.26/SR.17 p 11; Dicey, Morris and Collins, *Conflict of Laws* para 16-118; Ajons 'Enforcing Annulled Arbitral Tribunals – A Comparative View' (2000) 7 Croat Arbit Yearb 55, cited in Mistelis L A and Brekoulakis S L,

rule, not acceptable in a different place under Article V (1)(e). This approach is plainly founded on the letter of Article V (1) (e) which affords that the implementation of awards may be declined if the award has been set aside in the country where it was given. The NYC particularly considers that the state in which, or under the law of which, the award will be, will have liberty to set aside or modify an award in accordance with its domestic law.⁶⁵¹

It is argued that awards obtain their power from the legal system of the country in which they are made and, as such, the voiding of an award by the courts of that country denies the award of force in other countries as mandated by Article V(1)(e). In other words, an award set aside by a court of the country in which it was handed basically no longer exists and, hence, has no capability of being implemented in any other jurisdiction.⁶⁵² According to Prof. van den Berg:

The disregard of annulment of the award ... involves basic legal concepts. When an award has been annulled in the country of origin, it has become non-existent in that country. The fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of origin, how then is it possible that courts in another country can consider the same award as still valid? Perhaps, some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special legal status to an award notwithstanding its annulment in the country of origin.⁶⁵³

6.6.2 A Critique of Successful Case Laws on Setting Aside of Award

Arbitrability: International & Comparative Perspectives (Kluwer Law International, 2009) 26-110; fn 167; Giarding 'The International Recognition and Enforcement of Arbitral Awards Nullified in the Country of Origin' in Briner, et al (eds) *Law of International Business and Dispute Settlement in the 21st Century* (2000) 205, cited in Lew, Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 26-110 fn 167; See also in general, Mayer, 'Revisiting Hilmarton and Chromalloy' 165; R Smit, 'International Arbitration of Infrastructure Project Disputes and the Enforcement Regime Under the New York Convention' (2003) <<http://www.stblaw.com/content/Publications/pub224.pdf>> (accessed 9/20/2010) 12.

651 See, *Marin I Spier v Cazaturificio Tecnica* p 285.

652 See, in general, Smit, 'International Arbitration of Infrastructure Project Disputes and the Enforcement Regime Under the New York Convention' p12; UN Doc.A/CN.9/460 para 137.

653 Van den Berg, 'Annulment of Awards in International Arbitration; (International Arbitration in the 21st century; towards judicialization and uniformity? (1992), cited in Gharavi hamid, *The International Effectiveness of the Annulment of an Arbitral Award* 84.

Setting aside as basis for refusing enforcement has seldom been raised due to the fact that awards that have been set aside in the country of origin are uncommon.⁶⁵⁴ Nevertheless, it was generally presumed that an award could not be implemented under the Convention if it has been set aside in its country of origin. Subsequently, implementation has been denied in a number of cases on the basis that the award has been set aside in the seat of arbitration. For instance, a French court of appeal resisted enforcement of award rendered in Geneva since the award had been set aside by the Geneva Court of Appeal which regarded that the award was arbitrary.⁶⁵⁵ In another case, the German appellate court annulled leave to implement an award when it was set aside in Moscow where was initially made.⁶⁵⁶ Yet again, in the case of *Baker Marin Ltd v Chevron Ltd*, a US appellate court resisted to implement two award granted in Nigeria on the ground that the awards were set aside by a Nigerian court on the basis that the arbitrators had inappropriately granted punitive damages, well over the extent of the submissions, incorrectly declared parole evidence, and made inconsistent awards.

A US district court refused enforcement claiming that under Article V(1)(e), “it would not be proper to enforce a foreign award under the Convention when such an award has been set aside by the Nigerian courts”.⁶⁵⁷ In the appeal the plaintiff argued that the awards were set aside by the Nigerian courts since that would not be accepted under US law as applicable grounds for nullifying an arbitration award, and that based on Article VII of the Convention which allows enforcement where local law favors it), it might raise US national arbitration law without consideration of the action of the Nigerian court, The Court of Appeal refused this argument claiming that:

*It is sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria. The governing agreements make no reference whatever to United States law. Nothing suggests that the parties intended United States domestic law to govern their disputes.*⁶⁵⁸

6.6.3 Unsuccessful Case Laws

654 See, Van den Berg Albert Jan, ‘The Application of the New York Convention by the Courts’ 33.

655 *Claude Clair v Louis Berardi*.

656 *X v X* (Germany Court of Appeal 28 Oct 1999) 719.

657 *Baker Marin Ltd v Chevron Ltd* pp 194-96.

658 *Ibid* pp 196-97.

Conversely, the conventional view that the setting aside of an award in its country of origin should limit its implementation in other countries under Article V(1)(e) has lately been braved by courts in France, Belgium, Austria and the USA which provide enforcement of awards which had been set aside in their individual seats of arbitration.

The French courts were first to consider implementing awards which had been set aside. On several occasions since 1984, French courts have taken the stand that they have the capacity to implement awards that have been set aside in their country of origin. *Norsolor* was the first case to utilize such an approach where an award handed in Austria was voided by an appellate court in Vienna on the basis of transnational rules. The French Court of Appeal having resisted the enforcement of the award on the basis of Article V (1) (e), reversed the decision claiming that Article VII of the Convention affords that the provision of the Convention does not deny any involved party of any right they may have to avail themselves of an award where enforcement is demanded.⁶⁵⁹ As such, the authorized court cannot resist implementation when its own national law allows such, and this award would be deemed enforceable in France as stated in Article 12 of the Code of Civil Procedure.⁶⁶⁰

Refusal due to Suspension of an Award

The second section of Article V(1)(e) indicates that the authorized court may refuse enforcement if the party rejecting the enforcement can ascertain that the award has been suspended a capable court of the country in which, or under the law of which, that award was authorized. The term “suspended” has not been identified in the Convention, and as such, it is arguable what the proponents meant by the term. However, this method is generally interpreted to “refer presumably to a suspension of the enforceability or enforcement of the award by the court in the country of origin” until it settles over an application to set aside the award.⁶⁶¹ It is to be observed that, similar to setting aside ground, an award needs to be successfully annulled by the court of the location where the award was made so that the losing party may be permitted to invoke this ground for resisting enforcement under Article V(1)(e). As such, the suspension of the award cannot be a reliable ground for non-enforcement if the party refusing the enforcement has only initiated an application for setting aside or suspending the award in the seat of arbitration. In that case, a party is permitted at best to a deferment of the judgment on enforcement as specified by Article VI.

⁶⁵⁹ Paulsson Jan, *Awards set aside at the place of arbitration* (Lawhouse Books 2000).

⁶⁶⁰ See, *PabalkTicaret Ltd Sirketi v Norsolor SA* pp 489-91.

⁶⁶¹ See, Van den Berg Albert Jan, ‘Consolidated Commentary’ (2003)’ at 664; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1690.

6.6.4 A critical Look at the Position in Saudi Arabia

Non- Binding Award

Regarding the ground that the award has not become binding, it is important to note that the Saudi Arabian law affords no answer concerning the binding nature of foreign awards and when they may be considered as having become binding. Still, the Circular of the Grievance Board regarding the enforcement of foreign judgments and awards of 1985, Article 1 states that the extent of recognition and enforcement of foreign decisions in the Kingdom is only restricted to final judgments.⁶⁶² Similarly and more accurately, Article 5 of the same Circular indicates that the authorized court, when considering appeals to implement foreign awards, has to ascertain that the foreign award has been deemed final in the country where it was handed.⁶⁶³

Earlier Actions by Courts: Setting Aside and Suspension of Awards

Regarding the question of setting aside or suspension of the award, there exists no provisions nor case laws accessible to shed light on the attitude of the Saudi courts regarding the implementation of an award that has been set aside or nullified in its country of origin. As such, it has been asserted that it is not easy to enforce such an award in SA. One author claimed that bases for termination remain administered exclusively by national laws which are exceptionally diverse, ranging from the clear and liberal provisions of the French Code of Civil Procedure to the provision of the Saudi Arbitration Regulation, which authorizes the Saudi court to challenge the award without providing the basis for the challenge.⁶⁶⁴

Still, the inverse could be argued, and not listing the bases under the Saudi law for the disputing domestic awards can be regarded as an advantage for supporting the implementation of terminated foreign awards in SA. Such is the case because the fact that Saudi law does not specify bases for challenge, implies that it unconditionally refers to the *Shari'ah* rule which does not permit courts to review or vacate awards, unless in extraordinary cases such as obvious unjust decisions. Hence, from a theoretical perspective, one may suggest that enforcement of award which have been set aside or otherwise annulled might be probable in SA under the application of Article VII of the NYC (i.e. the more-favourable provision) for two reasons. The

662 The Circular of the Grievances Board regarding Enforcement of Foreign Judgments and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Art 1.

663 Ibid Art 5.

664 Gharavi Hammid, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002).

first reason is that the Saudi law, similar to the French law, does not implicitly nor explicitly have annulment or suspension of an award as a basis for resisting implementation. The second reason is that, based on the concept adopted by most *Shari'ah* scholars, the moment that an award is handed, it would not be accountable to challenge a revocation by the court, except when it violates fundamental principles in the *Shari'ah* such as clear injustice.⁶⁶⁵

Finally, it may be observed that, as was demonstrated in the previous case, when a Saudi party requested the Saudi implementing court (the 18th Administrative Panel) to resist implementation of the foreign award for the reason that an appeal against the award in Egypt, where it was made, was raised. The Court not only denied the appeal to refuse enforcement, but it deferred its decision on implementation until the appeal was resolved as mandated in Article VI.

6.7 Conclusion of Grounds of Exception Contained in Article V (1) NYC

This chapter lays out the exceptions to enforcement of foreign awards as laid out in Article V (1) of NYC. On the basis of the first section of Article V (1)(e), implementation of a foreign award may be refused if it has been deemed to be non-binding. However, this does not necessitate a previous leave of enforcement or a proper confirmation from the court of the country of the arbitration seat, the supposed “double exequatur”. Majority of courts, including the Saudi courts, have supported this practice. On the issue of when a foreign award can be regarded as binding, there are differing views. Some courts pertained to the applicable law of the country of arbitration to answer the question while others interpreted the word “binding” to mean as autonomous of the law of that state. The latter approach has resulted in a number of alternative interpretations, the prevailing interpretation being that the award becomes binding when it is closed for genuine appeal on the merits to a second tribunal or court. Some court and authors regard that the award should be deemed binding when it is no longer subject to an appeal to a different tribunal while some consider that the award is binding the moment that it is handed even if it is still open for other methods of recourse. The latter approach is supported by most *Shari'ah* scholars and has, therefore, been adopted by the Saudi courts.

According to the second section of Article V(1)(e), the implementation of a foreign award may be refused if it has been set aside or suspended by the authorized court of the state of origin. Such an act must have been efficiently decided by a court in the country of origin to make up a ground for refusing enforcement on the basis of Article V(1)(e). Hence, plainly raising an action to annul or suspend the award is not a valid basis for refusing enforcement, although it

⁶⁶⁵ Paulsson Jan, *Awards set aside at the place of arbitration* (Lawhouse Books 2000).

may be considered a basis for the possibility of adjourning under Article VI. In addition, automatic suspension of an award by the operation of law in the state where the award was handed has been practically considered as an insufficient basis for refusing enforcement.

While the ground that the award was set aside or has been hardly ever raised to resist enforcement, there are some cases wherein the ground has been successfully invoked. Nonetheless, courts in countries such as France, Austria, and the US have shown the willingness to implement awards even in cases where it has been set aside in the country of origin. These courts invoke the discretionary power of the implementing court as provided by the permissive language used in Article V(1) as well as the “more favourable” provision in At. VII (1).

There is substantial controversy as to the reason whether the previous annulment of an award in its state of origin should impede its enforcement in other countries under the NYC. The most conventional opinion is that an annulment should hinder enforcement. Another view held is that an annulment should be completely disregarded. A third view claims that enforcement of an annulled award should be left to the judgment of the implementing court. The final approach states that if the annulment is based on the grounds similar to those mandated in Article V (1) (a-d), it may hinder enforcement in other countries but the application of national standards of annulment should be ignored internationally.

CHAPTER SEVEN

THE GROUNDS OF EXCEPTION TO RECOGNITION AND ENFORCEMENT OF AWARDS LAID DOWN IN ARTICLE V (2) NYC 1958 AND THEIR LEGAL FUNCTION IN THE KINGDOM OF SAUDI ARABIA

7.0 Introduction

Article V(2) lays out two other mostly cited and applied grounds for failure by Saudi courts to not only recognize foreign awards but also to enforce them.

From the time of KSA's accession into the NYC and its official recognition of the statute as part of its own laws, many disputes referred to arbitration for resolution have ended up being unresolved because either the courts have found the awards non-enforceable or faulty in some way. This has prompted the Saudi courts to refuse to enforce them on the grounds of being opposed to the kingdom's public policy or the entire issue/dispute being non-arbitral. From the very early days since the NYC came into force, there have been arguments regarding whether or not arbitrability of a dispute and foreign policy ought to be included together as one and the same aspect and ground for refusing enforcement or to be treated as separate.

Those in support of treating the two as one ground for refusal of recognition and enforcement of foreign awards have often cited the fact that non-arbitrability is by and large a public policy of KSA because it is a requirement that only certain issues (referred to as arbitral issues) ought to be referred to arbitration. Opponents, on the other hand, contend that non-arbitrability can be occasioned by many other issues and not just policy of the government; and as such it ought to be treated separately from public policy. Therefore, this chapter examines how these two issues – non-arbitrability and public policy have been used as grounds for refusal to enforce foreign awards in Saudi Arabia and so effectively impeding arbitration as a dispute resolution process. Both issues are relatively easy to be invoked by disgruntled parties to an arbitration agreement and as such, they represent some of the most widely invoked grounds for refusal to enforce foreign awards. Since KSA adheres strictly to Islamic *Shari'ah* law, most of its public policies (as indeed are its laws) are based on *Shari'ah* law. This makes enforcement of awards made in foreign countries, particularly those that are not Islamic, very difficult. A critical consideration made in this chapter is the legal implications of these two grounds for refusal to enforce foreign awards in KSA.

7.1 Refusal of Recognition and Enforcement of Awards Due To Arbitrability Limitations

The other basis for resisting enforcement is the case of non-arbitrability. The grounds found in Article V (2)(a-b) which can be invoked by the authorized courts of its own accord to

protect the basic values of the state where enforcement is demanded. These grounds are based on the non-arbitrability of the dispute and the fact that the award violates public policy. The arbitrability of the dispute is a requirement of the validity of the arbitration agreement as well as the award. As such, Article V (1) states:

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

The subject matter of the defence is not capable of settlement by arbitration under the law of that country.⁶⁶⁶

7.1.1 Understanding the Relationship between Arbitrability and Public Policy

Initially, it may be important to determine if arbitrability makes up one aspect of public policy and if so, should it be considered as a distinct ground from the public policy stated under Article V(2)(1)? Numerous authors have cited that making non-arbitrability as a distinct ground for resisting enforcement is unnecessary since its subject matter is considered as forming a section of the notion of public policy specified in Article V(2)(b).⁶⁶⁷ The legislative history of the Convention dictates that the French delegate was against the separation of inarbitrability from public policy for the reason that it could persuade a court “to give international application to rules which were of exclusive domestic validity and that the exception of incompatibility with public policy was quite sufficient.”⁶⁶⁸ Nevertheless, it was settled to maintain inarbitrability as a distinct defence under Article V(2)(a), as put forward by the ICC draft of 1953 and the ECOSOC draft of 1955,⁶⁶⁹ pursuant to the Geneva Convention of 1927.⁶⁷⁰

666 NYC of 1985, Art V (1) (a).

667 See, eg, Sanders, ‘A Twenty Years Review of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards’ at 270; Gaja, *International Commercial Arbitration* para I.C.5; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* pp 360; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1704; Garnett and others, *International Commercial Arbitration* 108; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 149, 471; Lew, Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 26-111; T Carbonneau, ‘The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi’ (1986) 19 *Vanderbilt Journal of Transnational Law* 265 at 270; A Sheppard, ‘Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (International Law Association London Conference 2000) 15.

668 UN Doc. E/CONF.26/SR.11 p 7.

669 See, van den Berg, *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation* pp 368.

670 Geneva Convention of 1927, Art 1(b).

7.1.2 The Legislation Pertaining to Non-Arbitrability

The NYC mandates a dispute to be at the pre-award stage so that the agreement may be enforced, and at the post-award stage for the enforcement of a foreign award. However, Article II (1) only necessitates the arbitration agreement to concern ‘a subject matter capable of settlement by arbitration under the law of’ the state where implementation of the award is demanded.⁶⁷¹ Hence, it is generally recognized by the courts that the law of the state where enforcement of the award is sought must be utilized to identify the issue of the arbitrability of the dispute at the enforcement stage.⁶⁷²

7.1.3 Non-Arbitrability as Entrenched in Domestic Laws

Each state has the liberty of choosing which disputes must be resolved judicially, to ascertain that crucial domestic standards concerning social, moral, political, and economic policy are not subject to possible settlements through non-judicial methods of dispute settlement.⁶⁷³ Evidently, this reference to the state law of the authorized court means that a standardized model for what matters is or is not found in the Convention. Inversely, national laws usually entail controls on what forms of disputes can be arbitrated even as it varies from each nation. Every country has adopted a standard of what disputes should be exclusively dealt with by the national courts and which ones can be forwarded for arbitration. Hence, some disputes that are in one state may not be in the state where the interests entailed are deemed to be more significant.⁶⁷⁴

7.1.4 Domestic and International Arbitrability: Variations

671 NYC of 1958, Art V(2)(a).

672 See, eg, *Italian Party v Swiss Company* 828; *ThyssenHaniel Logistic Intl GmbH v BarnaConsignataria SL* (2001) XXIV YBCA 851 (Spain Supreme Court 1998) 852; *Consmaremma – Consorzio v HermanosEscot Madrid SA* 859; *Audi-NSU Auto Union A.G v S.A. Adelin Petit & Cie*(1980) V YBCA 257 (Belgium Supreme Court 1979); *Nitron Intl Corporation v Golden Panagia Maritime Inc*(2000) XXV YBCA 924 (US District Court SD NY 1999) 927; *Seven Seas Shipping Ltd v TondoLimitada*(2000) XXV YBCA 987 (US District Court SD NY 1999) 989; *Societe Van hoppylynus v Societe Coherent Inc*(1997) XXII YBCA 637 (Belgium Court of First Instance 1994) 640.

673 See, Okekeifere Andrew, ‘Public Policy and Arbitration Under The UNCITRAL Model Law’ (1999) 2 (2) Intl Arb L R 70 at 72; Redfern Alan and Hunter, *Law and Practice of International Commercial Arbitration* 148; Davison, *Arbitration* 373; P Baron and S Liniger, ‘A Second Look at Arbitrability’ (2003) 19 (1) Arb Intl 27.

674 See, in general, Gaja, *International Commercial Arbitration* para I.C.5; Lew, Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* paras 9-2, 9-5; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 369; Baron and Liniger, ‘A Second Look at Arbitrability’ 27; Bishop and Martin, ‘Enforcement of Foreign Arbitral Awards’ 31; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 471.

The NYC makes no difference between domestic and international arbitrability since Article V (2)(a) simply states the question of arbitrability to the national law of the country in which enforcement is sought. That which is regarded by national law as non- in relation to domestic arbitration would not necessarily be considered non-arbitration in international arbitration. As such, authorized courts should narrowly interpret restrictions imposed by national law upon arbitrability if the arbitration is concerned with international transactions.⁶⁷⁵ The principal justification of this distinction is that the needs of international trade vary from those of local commerce. Arbitrability under national law mirrors the political, social, and economic privileges of the country and its treatment of arbitration.

7.1.5 A Critical Examination of Appropriate Case Law

Regardless of the diversity of contracting countries concerning non-arbitrability and the subsequent lack of uniformity under the Convention, the non-arbitrability defence has been raised in fairly few cases.⁶⁷⁶ It has been raised that this is generally because of the application of the difference between domestic and international public policy.⁶⁷⁷ Still, the main reason seems to be that the non-arbitrability defence is usually raised at the pre-award stage compared to the enforcement stage of the process.

In accordance with the concept of narrowly interpreting Article V and the principle of the difference between domestic and international arbitrability, national courts have usually resisted to reject implementation of foreign awards for the reason of non-arbitrability.⁶⁷⁸

675 In favour of this approach, see, eg, *Fritz Scherk v Alberto-Culver Co* 417 US 506 (US Supreme Court of 1974); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (US Supreme Court 1985). In favour of this approach from authors, see, eg, Gaja, *International Commercial Arbitration* para I.C.5; van den Berg, 'Consolidated Commentary' (2003)' at 667; van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* 630; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 1707; Carbonneau, 'The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi' 271; Born, *International Commercial Arbitration* 278; Lew, Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 26-113; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 176; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 148; Bishop and Martin, 'Enforcement of Foreign Arbitral Awards' 26.

676 See, Van den Berg, 'Consolidated Commentary' (2003)' at 666; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1708; Bishop and Martin, 'Enforcement of Foreign Awards' 31; Sajko, 'The New York Arbitration Convention of 1958 from the Yugoslav Point of View: Selected Issues' 208.

677 See, Van den Berg 'Consolidated Commentary' (2003)' at 667.

678 See, eg, *Parsons & Whittemore Overseas Co v RAKTA; X (Syria) v X (Germany Court of Appeal 1998)* 669; *Exclusive Distributor (Spain) v Seller (Germany)* (2004) XXIX YBCA 715 (Germany Court of Appeal 2000) 719; *Italian Party v*

7.1.6 An Analysis of the Position in Saudi Arabia Regarding Arbitrability

Non-Arbitrability under Saudi Laws

The SAL of 1983 establishes a general rule concerning the area of arbitrability instead of providing a list of disputes which cannot be resolved by arbitration. Hence, Article 2 mentions that “Arbitration shall not be permitted in cases where conciliation is not allowed.”⁶⁷⁹ Article 1 of the IRSAL of 1985 provides some cases wherein, “Arbitration in matters wherein conciliation is not permitted, such as *hudoud*, *laan* between spouses and all matters relating to the public order shall not be accepted.”⁶⁸⁰ *Hudoud* refers to the approved or fixed sentence for certain crimes including; theft, adultery, alcohol drinking, and highway robbery. On the other hand, *Laan* (which means divorce because of adultery) stands for a type of separation that transpires between a husband and wife after five oaths which are assumed by both spouses of one accuses the partner of committing adultery.

This law has to do with the background of Islamic jurisprudence since the schools of Islamic jurisprudence are not unified concerning the issue of arbitrability. The *Hanbali* School took on the view that arbitration is permitted in all disputes that can be decided by the court since the arbitrator can be likened to a judge.⁶⁸¹ However, most Islamic jurisprudence schools (including *Hanafi*, *Maliki* and *Shafi*) reached a consensus that any right that can be subject to compromise, conciliation or forgiveness by people can be deemed and vice versa.

7.1.7 The Case Law

The non-arbitrability defence has been raised versus enforcement in the Saudi courts in two cases. The first one involved a Saudi authorized court (the 18th Subsidiary Panel) rejecting an effort to hinder enforcement of an award regarding the building of a wall surrounding a

Swiss Company 828; *Fincantieri-CantierinavalitalianiSpA and OtoMelaraSpA v M and arbitral tribunal* (1995) XX YBCA 766 (Switzerland Supreme Court 1992) 770.

679 SAL of 1983, Art 2.

680 IRSAL of 1985, Art 1.

681 See, Al-Zaid, ‘Arbitration: Its Definition and Its Importance’ pp 10-11; Al-Hasen, *The Shari’ah Rules of Arbitration* 38; Gattorah, *Arbitration in the Light of the Islamic Shari’ah* 82; Jameel, ‘Arbitration in Islamic Shari’ah and Its Important of Settling Disputes’ pp 19-21; Al-Nashimi, ‘International Arbitration and Arbitrating in Islamic Shari’ah’ 18; Al-Sartawy, ‘The Scope of Arbitration and the Power of the Arbitrator’ 7.

university and the purchase of land, holding that these subject matters are regarded to be capable of resolution through arbitration.⁶⁸² In the second case, another Saudi university resisted the implementation of an award granted in favour of a Dutch company. The objection was based on the position that the dispute was not authorized to be resolved by arbitration because a university is a state body belonging to the Saudi High Education Ministry and Saudi law prohibits state entities from resorting to arbitration. A Saudi authorized court (the 9th Administrative Panel) consented with the university that the disputes are related to administrative or governmental affairs and as such cannot be resolved with arbitration. Nonetheless, the court maintained that because the contract between the company and the university had an arbitration clause, and the University took part in the proceedings, it is not just that the University raises the subject of non-arbitrability after the award has been made against its favour. The court backed its conclusion with the provisions in the *Shari'ah* to attain a just result as stated in the Qur'an.

In view of the discussion above, it is important to note that in contrast with what is stated under Article V (1), an authorized court may of its own accord refuse the enforcement on the basis of non-arbitrability (Article V (2) (a)) and violation of public policy (Article V (2)(b)) as they engage with the basic interests of the country where enforcement is demanded. It was viewed that in spite of being listed as a distinct ground in Article V(2)(a), the non-arbitrary defence is basically considered as forming a part of public policy under Article V(2)(b).

Regarding the issue of applicable law, it was noted that courts had consistently taken the side that the issue whether the subject matter of the dispute is or not, depends on the law of the country where enforcement is demanded. This is expressly provided by Article V (2) (a). Generally, it was discovered that Saudi laws have a reasonably wide view of arbitrability. Similarly, Saudi courts have interpreted narrowly the non-arbitrability defence supporting the enforcement of foreign awards.

7.2 Refusal of Recognition and Enforcement of Awards On Grounds Of Inconsistencies with Public Policy

The policy of any nation is always supreme and is treated as law. It is final and binding to all parties involved, its breach being punishable as a civil or criminal offence. Therefore, it is important to assess the manner in which public policy in KSA as a ground for refusing the recognition and enforcement of awards has impacted the general arbitration process and particularly how it has affected the enforcement of foreign awards. That is why the last ground for resisting enforcement of foreign awards found in Article V of the NYC is that the

⁶⁸² The 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003) 5.

enforcement of the award would breach the public policy of the enforcing state. This is similar to the second of the grounds mentioned in Article V (2) which may be invoked by the authorized court on its own accord without a request of the party refusing implementation. Accordingly, Article V (2) of the Convention specifically mentions that:

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

c. The Recognition or enforcement of the award would be contrary to the public policy of that country.

7.2.1 The Meaning of Public Policy under Article V (2) (b)

A critical matter to discuss is if there exists a definition of public policy under Article V (2) (b). While public policy, otherwise known as *ordre public*, has been a basis for resisting enforcement of foreign laws, judgments and awards, for a long time, there is no clear definition of its contents. This is not an unanticipated fact since one of national public policy's fundamental attribute is its uncertainty and ambiguity, and its vague characteristics are as such, well documented.⁶⁸³ This is the case since the concept of public policy delves on a wide range of subjects,⁶⁸⁴ and its content changes as public confidence, beliefs, and interests change from time to time and from state to state.⁶⁸⁵ According to Burroughs J:

Public policy ... is a very unruly horse, and when you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when points fail.⁶⁸⁶

683 See, Redfern Alan, 'Commercial Arbitration and Transnational Public Policy' 1,2; ILA Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 4; Lew, Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 26,115; Dicey, Morris and Collins, *Conflict of Laws* 642; A Sheppard, 'Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?' (2004) 1 (1) *Transnational Dispute Management*, para I.

684 See, Lalive Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' (ICCA Congress Series no 3 New York 1986) 309. Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 179; M Buchanan, 'Public policy and International Commercial Arbitration' (1988) 26 (3) *Am Bus L J* 511 at 513.

685 See, Redfern Alan, 'Commercial Arbitration and Transnational Public Policy' 2; Lew, Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 26,117; Sheppard, 'Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?' para I.

686 *Richardson v Mellish* [1824-1834] All ER Rep 258 (UK Court of Common Pleas).

Still, it is regarded that the very vagueness of public policy is meant to make its scope flexible in order to enable courts to settle on its content in the context of changing national interests, needs, attitudes, and convictions.⁶⁸⁷

7.2.2 The Legislation Applicable to Public Policy

Having examined that the principle of public policy is hard to define, the next reasonable issue that should be presented is what law would rule over the public policy under the Convention. As already noted, the NYC does not provide a description of public policy, however, it refers the issue to existing legislation in the enforcing state. Article V (2) explicitly raises the law of the implementing country to rule over both (a) the issue of non-arbitrability and (b) the issue of breach of public policy. Hence, the public policy mentioned in Article V (2)(b) is basically the public policy rules of the country where implementation of the award is demanded.⁶⁸⁸ In this context, the Supreme Court of India denied the claim that the use of the words “public policy” in the Indian statute which passed the NYC, instead of the words “public policy of India”, denoted that those words were not limited to Indian public policy, but also included the public policy of the law ruling over the contract and the law of the arbitration seat.⁶⁸⁹

7.2.3 Differences between National and International Public Policy

When considering an accusation that enforcement would violate public policy, in case authorize courts utilize the same standards they utilize in domestic award, the general consensus points to the negative,⁶⁹⁰ since the goal of domestic and international relations vary.⁶⁹¹

687 See, Biah, ‘Features and conditions of communication with the other; means and mechanisms’ (We and Other 2006 ‘in Arabic’); Delvolvae, Rouche and Pointon, *French arbitration law and practice* 156.

688 See, *Renusagar Power Co. Ltd v General Electric Co* (India Supreme Court 1993) 701,702; *Eddie Javor & Fusion-Crete Inc v Luke Francoeur & Fusion-Crete Products Inc* 602; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 472; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1710; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) ; Merkin, *Arbitration law* para 19.58; ILC Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ 30.

689 See, *Renusagar Power Co. Ltd v General Electric Co* pp 701-702.

690 There were only a few writers of the opinion that foreign awards should subject to the same standard that public policy applicable to domestic awards. See, Kroll, ‘Recognition and Enforcement of Foreign Arbitral Awards in Germany’ 172 fn 3.

691 See, van den Berg, ‘Consolidated Commentary’ (2003)’ at 665; Sheppard, ‘Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?’.

Undeniably, it is generally deemed vital to provide a distinction between domestic and international public policy in the sense of implementing foreign award as can be seen in the next discussion. Still, within this general trend, there is considerable diversity in judicial and theoretical approaches.

7.2.4 International Public Policy

The first approach deals with the application of “international public policy.” This means that the concept of domestic public policy of the state involved is to be utilized very narrowly to the implementation of foreign awards. Accordingly, it is stressed that not all cases of breach of a mandatory rule of the implementing state validates the denial of enforcement of foreign awards, since although the violation of public policy must contravene a mandatory rule, not every mandatory rule entails a concern of public policy. As such, implementation of foreign awards should be rejected only in cases wherein it undoubtedly breaks the most basic principles of the implementing state. Even as international public policy is not independent of the standards of domestic public policy of the implementing state, it mirrors only a constrained version of these standards.⁶⁹²

7.2.5 Truly International or Transnational Public Policy

The second approach is dubbed as the “transnational public policy,” otherwise known as “truly international public policy,”⁶⁹³ which has been approved and built up by a number of writers,⁶⁹⁴ and accepted by some courts.⁶⁹⁵ Distinct from international public policy which is based on each nation’s personal view of that principle, truly international or transnational public

692 See, Buchannan, ‘Public policy and International Commercial Arbitration’ (1988) 26 (3) American Business law Journal 511 at 514; Gaillard and Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 1711, 1712; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 181.

693 The term “transnational law” is not new as it was referred to by Judge Jessup in his lectures at Yale thirty years ago. Then it was presented in great details and supports by Pierre Lalive in his report of “Transnational (or Truly International) public policy an International Arbitration” at the ICCA Congress no 3 in 1986. See, Redfern, ‘Commercial Arbitration and Transnational Public Policy’ 1; Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’.

694 See, eg, Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ pp 257-318; Buchanan, ‘Public policy and International Commercial Arbitration’ 514 and fn 15.

695 See, eg, *Allsop Automatic Inc v Tecnoskisnc* (1997) XXII YBCA 725 (Italy Court of Appeal 1992) 726; *W v F and V* (Switzerland Supreme Court 30 Dec 1994), cited in ILA Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards’ 7.

policy is intended practically to cover nothing more than rules and policies deemed crucial by the international community, instead of any individual state.⁶⁹⁶ Hence, it only covers concepts that signify an international agreement as to significant principles or basic norms of conduct that must constantly apply in the law of international trade.⁶⁹⁷ It is proposed that the concept of this manner of public policy comprises “fundamental rules of natural law, principles of universal justice, *jus cogens* (compelling law) in public international law, and the general principles of morality accepted by what are referred to as civilized nations”.⁶⁹⁸ In addition, it has been examined that even as transnational public policy is greatly similar to international public policy, they are undeniably different. The latter clearly exemplifies the specific character of public policy within each individual state, while the former is less restrictive, which mirrors the general fundamental values of the world community.⁶⁹⁹

7.2.6 Case Law for Common Breach of Public Policy

It is important to note that, while Article V(2)(b) is the most common ground invoked in refusing implementation of foreign awards, its use is hardly ever successful.⁷⁰⁰ Additionally, the lack of a description of public policy has led to significant overlap between Article V(2)(b) and other grounds, namely; Article V(1)(a) which deals with incapacity of parties or invalidity of the agreements, Article V(1)(b) which deals with breach of due process, Article V(1)(c) which deals with excess of jurisdiction, Article V(1)(d) which deals with improper procedure or composition of the tribunal, and Article V(2)(a) which deals with non-arbitrability. Still, there are a number of issues which are regularly invoked in practice as breach of public policy as stated under Article V(2)(b).

696 See, Turnean Paulsoo, ‘Grounds for Refusal of Recognition and Enforcement under the New York Convention: A Comparative Approach’ 7.

697 See, Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ 287; Buchanan, ‘Public policy and International Commercial Arbitration’ 514.

698 See, ILC Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards’ pp 6-7; Turne and Paulsso, ‘Grounds For Refusal Of Recognition And Enforcement Under The New York Convention: A Comparative Approach’ 8.

699 See, Buchanan, ‘Public policy and International Commercial Arbitration’ 514.

700 See, Gaillard Fouchard and Savage John (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para 1713; Lew, Mistelis and Kreoll Stephane, *Comparative International Commercial Arbitration* para 26-118; Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) ; Kroll, ‘Recognition and Enforcement of Foreign Arbitral Awards and Public Policy – a Note of Caution’ 195.

7.2.7 Corruption as a Basis for Breaching Public Policy

The public policy defence has been raised but it is usually unsuccessful on the basis that the original contract or procedure is illegal, in cases such as when the award deals with issues such as; corruption, fraud, bribery smuggling, drug trafficking, prostitution or slavery.⁷⁰¹ The report of the UNCITRAL Commission on International Trade Law mentions that:

It was understood that the term ‘public policy’, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a good ground for setting aside.⁷⁰²

Irregularity of Procedure as a Basis for Breaching Public Policy

While breach of due process and procedural irregularity are distinct grounds under Article V(1)(b) and Article V(1)(d), such issues are usually regarded as violations of public policy Article V(2)(b). Still, some courts – at certain times – disallow the invoking of such issues under the basis of public policy. For instance, a Hong Kong court in *Qinhuangdo Tongda Enterprise Development Co And another v Million Basic Co Ltd*,⁷⁰³ refused to consider a claim that implementation of an award made in Beijing should be rejected on the basis that a party had no chance to present its case, so that enforcement would be against Hong Kong’s public policy. After taking into consideration the concept of narrowly interpreting public policy, the court asserted that:

The public policy ground for refusal must not be seen as a catch-all provision to be used wherever convenient. It is limited in scope and is to be sparingly applied.⁷⁰⁴

The court was not set to permit the defendant to invoke matters of irregularity in the procedure based on the public policy defence.⁷⁰⁵

701 cf. *Kersa Holding Co v Infancourtage* (Luxembourg Court of Appeal 1993) 625; *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1998] 2 Lloyd’s Rep 111 (UK QBD Comm Ct); *AAOT Foreign Economic Association (Vo) Technostroyexport v International Development and Trade Services Inc ; X (Syria) v X* (Germany Court of Appeal 1998) pp 669-70; *Europcar Italia SpA v Maiellano Tours Inc* 156 F3d 310 (US Court of Appeals 2nd Cir 1998) pp 315-16; *Harendra H Mehta et al v Mukesh H Mehta et al* (2000) XXV YBCA 721 (India Supreme Court 1999) pp 726-27.

702 UN Doc. A/40/17, para 297.

703 *Qinhuangdao Tongsa Enterprise Development Co And Another v Million Basic Co Ltd*.

704 Ibid 78.

Absence of Impartiality of the Arbitrator as a Basis for Breaching Public Policy

It is a basic requirement for every arbitration process to act in a just manner throughout the arbitration proceedings. This requirement is breached if the arbitrator has been proven to have a personal interest in the case.⁷⁰⁶ Subsequently, the absence of just arbitrators has repeatedly been raised under the public policy head, but is usually unsuccessful.⁷⁰⁷ One instance of a failed challenge was a case in the Hong Kong Court of Final Appeal when it overturned judgment resisting enforcement of a foreign award on the basis that the award was against the public policy of the state since there was a strong case of evident bias. The Court maintained that there must be convincing reasons to refuse enforcement of a NYC award on public policy grounds, concluding that:

I think that a distinction can and should be made between the effect of actual bias and that of apparent bias. (When I say “bias” I mean a lack of impartiality required of judges and arbitrators.) Actual bias would be more than our courts could overlook even where the award concerned is a convention award. But short of actual bias, I do not think that the Hong Kong courts would be justified in refusing enforcement of a convention award on public policy grounds as soon as appearances fall short of what we insist upon in regard to impartiality where domestic cases or arbitrations are concerned. Our stance must be that something more serious even than that is required for refusing such enforcement. In adopting such a stance, we would be proceeding in conformity with the stance generally adopted in regard to convention award of enforcement by the commercial jurisdictions whose decisions from around the globe.⁷⁰⁸

Absence of Reasons in Award as a Basis for Breaching Public Policy

Based on the arbitration laws of a number of countries, it is a fixed requirement that the award must contain the reasons for such a decision.⁷⁰⁹ Such laws deemed it necessary to provide

705 Davidson Michael, *Arbitration* 401.

706 See, van den Berg, ‘Consolidated Commentary’ (2003)’ at 667; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 187.

707 See, eg, *Fitzroy Ltd v Flame Engineering Inc ; Buyer (PR China) v Seller (Japan)* (1995) XX YBCA 742 (Japan High Court 1994) pp 734-44; *Hebei Import and Export v Polytek Engineering Co Ltd* (Hong Kong Court of Final Appeal 1999) 676; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* (German Court of Appeal 1999); *Transocean Shipping Agency P Lit v Black Sea Shipping* 718; *Logy Enterprises ltd v Haikou City Bonded Area Wansen Products Trading Co* (1998) XXIII YBCA 660 (Hong Kong Court of Appeal 1997) pp 662-65.

708 *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* 676.

709 See, eg, Brazilian Arbitration Act of 1996, Article 26 (II); French New Code of Civil Procedure of 1981, Art.1471; Italian Code of Civil Procedure, Art.823 (3); Chinese Arbitration Law of 1994, Art.54; Russian International

sufficient explanations of the reasons in which the award is based since it is essential to notify the party how justice has been served in their case.⁷¹⁰ Even as the lack of reason stops the parties from demanding proof that the arbitrators were mistaken,⁷¹¹ it is normal in a number of common law countries not to provide justifications for the award.⁷¹²

7.2.8 Mandatory Laws as a Basis for Breaching Public Policy

Mandatory laws have been considered as essential provisions of law which must be applied regardless of their applicability to a contract or the procedural rule chosen by the parties, reflecting the country's internal or international public policy.⁷¹³ Usual examples of mandatory laws are competition and antitrust laws, currency controls, specific tax laws, import/export laws, environmental protection laws, and measures of embargo, blockade or boycott rules, laws to protect parties assumed to be in a lower bargaining position (e.g. wage earners or commercial agents),⁷¹⁴ law governing interest rates, and even mandatory procedural law.

National Interests/Foreign Relations as Bases for Breach of Public Policy

Enforcement of a foreign award may be declined on public policy grounds where it is deemed as a threat to a nation's national interests or may prejudice foreign relations. In the leading case of *Parsons & Whittemore Overseas Co v RAKTA*, the American party rejected implementation of the award for the reason that it would gravely affect US foreign policy since relations with Egypt would be damaged. The US appellate court initially recognized that

Commercial Arbitration Law of 1993, Art.31(2). See also, van den Berg, 'Consolidated Commentary' (2003)' at 668; Di Pietro D and M Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 189-90.

710 See, van den Berg, 'Consolidated Commentary' (2003)' at 668.

711 Di Pietro and Platte Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May, London 2001) 190.

712 See, van den Berg, 'Consolidated Commentary' (2003)' at 668.

713 See, Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' 206; P Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arb Intl 274.

714 See, in general, Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' 206; Mayer, 'Mandatory Rules of Law in International Arbitration' 275; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 17.

extensive construction of the public policy defence would vitiate the central effort of the Convention to remove pre-existing impediments to implementation.⁷¹⁵ The court claimed that:

[T]he Convention's public policy defence should be construed narrowly. Enforcement of foreign awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.⁷¹⁶

Hence, the court ended that US public policy was not to be associated with national policy (in the diplomatic or foreign policy sense), and that it would pursue the enforcement of the award even as there is existing tension between American and Egyptian relations.⁷¹⁷

7.2.9 Case Law Analysis

The aforementioned cases demonstrate that, since the Convention does not define the contents of public policy, a broad range of procedural and substantive issues are regularly raised under this; hence, a complementing of the applications contained in this ground is fairly distant. Still, the cases demonstrate that the public policy defence is usually declined for these reasons. Initially, because national courts have recognized that the principle of public policy in Article V(2)(b) is international, which is more restrictive compared to considerations of domestic public policy defence should be construed very narrowly, and utilized only to grave violations. Secondly, courts at times regard a losing party to have surrendered their right to invoke public policy at the stage of the enforcement when that party was unable to raise such a protest before the arbitrator or the court of the arbitration seat.

Thirdly, courts occasionally enforced the award for the reason of suspected breaches of public policy had no significant impact on the outcome of arbitration. Fourthly, a number of courts narrowed their review of the award to the decision itself and declined to review if the original contracts did breach public policy. Lastly, some courts endeavoured to strike a balance between the safeguarding of their basic national interests and values on one hand, and their foreign relations and international interest on the other hand.

The Position in Saudi Arabia

⁷¹⁵*Parsons & Whittemore Overseas Co v RAKTA* 973.

⁷¹⁶*Ibid* 974.

⁷¹⁷ *Ibid*.

As said before, public policy is usually a very important aspect of the law of any land. In fact the public policy ground is extensively regarded as the most significant impediment to the implementation of foreign awards in Saudi Arabia.⁷¹⁸ Nonetheless, no one was able to present a single case wherein enforcement was refused on this basis. The rationalization for this common accusation is possibly the fact that the Saudi legal system is based on the principles in the *Shari'ah* and all contemporary Saudi statutes need to be in accordance with the *Shari'ah*. One western writer, for example, mentions that:

Shari'ah and the Saudi Public Policy

The Saudi legal system is greatly dependent in Islamic *Shari'ah rules*. The rules in the *Shari'ah* do not only deal with the religious life of Muslims. It also deals with their commercial and political activities. Article 1 of the Saudi Constitutional Law stresses that:

More specifically, the Circular of the Grievances Board concerning implementation of foreign judgments and awards of 1985 necessitates compliance with public policy by verifying that:

The Arab League Convention on Enforcement of Judgments (and Awards of 1952) empowers the competent court in the country where enforcement is sought to refuse to enforce the foreign award if it contradicts the public policy or the good public morals of the enforcement country, and that the court has the discretion to estimate this matter. Accordingly, it is not possible in any case to grant execution of any foreign award that violates any general principles of *Shari'ah* (such as interest), since the Islamic *Shari'ah* is the constitution and highest reference for the judiciary and the governance in Saudi Arabia (emphasis added).⁷¹⁹

These specific provisions clarify without a doubt that the Islamic *Shari'ah* based on the *Qur'an* and the *Sunnah* has control over the Saudi legal system and as such, the Islamic *Shari'ah* rules makes up Saudi public policy in the sense of enforcing awards

Definition of Saudi Public Policy

718 In this manner, see eg, Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' 922; Mason, 'International Commercial Arbitration ; Saudis Accept N.Y. Convention' 26; Akaddaf, 'Application of the United Nation's Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles? Art 23; El-Ahdab Jall, *Arbitration in Arab Countries* vol. 1 242,43 ; El-Ahdab Jaal, 'Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1958: Part 2' 50,51.

719 The Circular of the Grievance Board Regarding Enforcement of Foreign Judgments and Awards, no 7 dated 15/8/1405 H (1985), Art.s. 3,5.

Having distinguished that the *Shari'ah* rule is the backbone of the Saudi policy, the issue that needs to be discussed is whether all mandatory rules of the *Shari'ah* constitute public policy in the light of enforcement of foreign awards under the Convention. Basically, *Shari'ah* translates to the Islamic divine law founded on the teachings of the *Qur'an* and the traditional sayings and doings of the Prophet Muhammad contained in the *Hadith* and the *Sunnah*, setting religious, moral, secular duties and in some situations, penalties for breaking the law. Some of these rules are compulsory while others are not (recommending things to do or avoid).

Regarding the definition of Saudi public policy, it appears that, similar with other countries, there is no accurate definition of the *Shari'ah* mandatory rules which make up Saudi public policy. Nevertheless, there are endeavours to provide a general explanation of public policy in Muslim law in general, and particularly in Saudi Arabia. One writer claims that:

In Muslim Law, the concept of public policy is based on the respect of the general spirit of the *Shari'ah* and its sources (the Quran and the Sunnah, etc.) and on the principle that “individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden.”⁷²⁰

7.2.10 Differences between Domestic and International Public Policy

It has regularly been doubted that Saudi courts will implement foreign awards, for instance those made by non-Muslim arbitrators, or governed by non-Islamic laws, or including compensation for lost profits or opportunities or awarding interest, regardless of Saudi national mandatory rules, on the basis that national public policy is not the same as international public policy. On the other hand, such issues will be considered to be against Saudi public policy and hence, the awards will not be enforceable.⁷²¹ Consequently, the main issue that needs to be addressed is whether Saudi law or Saudi courts differentiate between domestic and international public policy. There seems to be a clear reference to “international public policy” by the Saudi arbitration laws or courts.

Still, the contextual meaning of that doctrine (i.e. interpreting domestic policy narrowly in the context of enforcing foreign awards) is well accepted in the Kingdom. This can be viewed

⁷²⁰ El-Ahdab Jalal, *General Introduction on Arbitration in Arab Countries' in P Sanders and AJ van den Berg (eds) International Handbook on Commercial Arbitration* (Kluwer, 1998).

⁷²¹ See, eg, ILC Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards’ 21; El-Ahdab, ‘Saudi Arabia Accedes to the New York Convention’ 91; Roy, ‘The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ pp 950, 259 fn 259.

through a comparative consideration between the phrases utilized in the provisions related to implementation of foreign and domestic awards. This specific provision pertains to the *Shari'ah* in a wide term (i.e. *there is nothing*) without any limitation, and as such can be interpreted literally to include every mandatory rule stated in the *Shari'ah*. On the other hand; and in light of enforcement of foreign awards, Articles 3 and 5 of the Circular of the Grievance Board explicitly limits the principle of the *Shari'ah* public policy by declaring that a foreign award cannot be enforced if it “violates *any general principles of Shari'ah*”. The presence of the qualifier “general” signifies that not every violation of mandatory rules or concepts of *Shari'ah* by a foreign award would lead to a basis for resisting enforcement. Only the breach of “a *general principle of Shari'ah*” would do so.

Common Examples of Saudi Public Policy

Having identified that Saudi law seems to concede the concept of a difference between a national and international public policy, the issue that comes to mind is if the Saudi courts have also accepted the principle in practice as well as in dealing with the public policy exception concerning the implementation of foreign awards. In addressing this question, the Saudi judicial attitude will be analyzed in the context of issues that are regularly invoked as examples of breaches of the Kingdom’s public policy, such as foreign awards made by non-Muslim arbitrators, or ruled over by non-Islamic laws, or included compensation for lost profit opportunities or containing interest.

Awards Rendered by Non-Muslim Arbitrators

It has been implied that the implementation of a foreign award may be rejected by the Saudi courts on the ground of public policy if non-Muslim arbitrators made it.⁷²² The IRSAL of 1985 indicate that arbitrators must be Muslim.⁷²³ Still, by utilizing the difference between domestic and foreign awards, the Saudi courts do not consider foreign awards rendered by non-Muslims to be against Saudi public policy. They utilize the rule that if a Saudi party sees eye to

722 Alhoslan ‘*The Symposium of European-Arabian Arbitration*’ cited in El-Ahdab, *Arbitration in Arab Countries*, v 2, 242; El-Ahdab, ‘Saudi Arabia Accedes to the New York Convention’ 91; ILC Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards’ 21.

723 IRSAL of 1985, Art 3.

eye with a foreign party to arbitrate outside Saudi Arabia, they are covered by the decision of the arbitrators even if they are not Muslim.⁷²⁴

Ruled Over by Non-Islamic Laws

Similarly, it was regarded that Saudi Courts may hold foreign awards ruled over by non-Islamic law to be contrary to Saudi public policy and hence not enforceable in Saudi Arabia.⁷²⁵ It is true that the IRSAL of 1985 specifically requires the arbitrators, in granting their awards, to heed the provisions of Islamic *Shari'ah* and Saudi applicable laws.⁷²⁶ Nevertheless, by utilizing the difference between domestic and foreign arbitration, the application of this article is regarded as limited to domestic awards and to have no relations with foreign awards. Additionally, SA is mandated, by its adoption of the Convention, to implement foreign awards which are usually governed by non-Islamic law. Subsequently, the Saudi courts adopt the ruling that if a contract between a Saudi party and a foreign party affords for arbitration abroad, it will be regarded as binding even as it is governed by non-Islamic law.⁷²⁷

Compensation for Lost Profit or Opportunity

It has been argued that compensation for lost profit is not accepted by the *Hanbali* Doctrine, which applies in Saudi Arabia, and may as such be held as against Saudi public policy in light of the enforcement of foreign awards.⁷²⁸ From the outset, it should be emphasized that one general condition for compensation is that the loss or damage actually transpired. Application for compensation for actual loss, as well as the legal and arbitration costs,⁷²⁹ is

⁷²⁴ See, Al-Ajlan, *Compilation of judicial principles* pp 61-62; the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994); the 4th Review Committee, decision No. 43/T/4 dated 1416 H (1995); the 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992); the 4th Review Committee, decision No. 156/T/4 dated 1413 H (1992).

⁷²⁵ See, Roy Kristin, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' 950, 259 fn 259.

⁷²⁶ IRSAL of 1985t, Art 39.

⁷²⁷ pp 61-62; the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994).

⁷²⁸ See, El-Ahdab Jalal, 'Saudi Arabia Accedes to the New York Convention' 91; ILC Committee on International Commercial Arbitration, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' 21.

⁷²⁹ See, eg, the 18th Subsidiary Panel has enforced a foreign award including arbitration and lawyer costs. See, the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003). This decision was upheld by the 4th Review Committee. See, the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004).

clearly received within judicial practice in the Kingdom. Reference to the term “actual loss” implies that the plaintiff needs to prove that the loss has really taken place or was sure as an end result of the default in contractual obligations. The courts are not keen on awarding compensation on the basis of mere presumption or possibility.

7.2.11 Charging of Interest

The most frequent example of violation of Saudi public policy is legal or contractual interest. Arbitrators outside Saudi Arabia generally bestow legal or contractual interest along with the primary damages to be paid to the distressed party. Still, it is evident that the Saudi court will not grant leave to execute interest in foreign awards as it is deemed that interest to enter into prohibited framework of usury (*riba*) in Islamic *Shari'ah*.⁷³⁰ Conceptually, the *Qur'an* and *Hadith* explicitly forbid usury. In the *Qur'an*, Allah prohibits usury in absolute language and cautions those engaging in such with the harshest threats such as:

But Allah has permitted trading and forbidden Riba (usury). So, whoever has received an admonition from his Lord and desists shall not be punished for the past, and his case is for Allah (to judge); but whoever returns [to dealing in Riba (usury)], those are the companions of the Fire; they will abide internally therein. Allah will destroy Riba (usury) and will give increase for Sadaqat (deeds of charity, alms, etc.) And Allah likes not every sinning disbeliever.⁷³¹

In addition, Allah and the Prophet Mohamed have pronounced war with the usurer, save when he stops dealing in *Riba*. Accordingly, Allah states:

O you, who believe, fear Allah and give up what remains (due to you) from Riba (usury), if you are (really) believers. And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you shall have your capital sums. Deal not unjustly (by asking more than your capital sums), and you shall not be dealt with unjustly (by receiving less than your capital sums).⁷³²

730 Usury (*Riba*) in Islamic Shari'ah is divided into two categories; (a) Excess [Al-Fad] Usury (To sell a certain amount of anything for a greater quantity of the same thing); (b) Delay [Al-Nasi'ah] Usury (Conditioned excess for delay of payment or to take interest on lent money). See, S Al-Fawzan, *A Summary of Islamic Jurisprudence* (Al-Maiman Publishing House, Riyadh 2005 'in Arabic') vol 2 p 38.

731 *The Qur'an, Al-Baqarah*[2: 275-276].

732 *Ibid* [2: 278-279].

On top to these prohibitive *Qur'an* verses that discourage dealing in *Riba* and accepting interest, numerous other prohibitive *Hadiths* are mentioned in the prophet's *Sunnah* (tradition). For instance, Muhammad considered *Riba* as one of the great destructive sins.⁷³³

The Legal Implications of the Public Policy Exemption for Arbitration

For a very long time, it has been very difficult for courts in KSA to enforce foreign awards because they have been deemed to be in gross violation of public policy.⁷³⁴ Given the discussions so far made and the understanding of the variations in the interpretation of 'public policy', it remains to be seen how foreign award may be implemented in KSA even though the public policy ground or exception as laid out under Article V (2) b is still in place. In essence, it remains to be seen how the principle of public policy can be watered down, even circumvented, to ensure that foreign awards are enforceable in KSA regarding the public policy ground of exception.⁷³⁵

A case in question and one which shows that the public policy being considered in one country might not be the same in another country was one pitting Northrop Corporation against Triad International Marketing.⁷³⁶ The case sought to establish whether or not the public policy of Saudi Arabia where marketing had been done was breached, and if so, whether this consideration ought to be applied given that the firms involved were foreign to Saudi Arabia. Northrop hired Triad International Marketing as its sole marketing agency abroad, including in Saudi Arabia. This occurred in 1970. Five years later in 1975, the government of KSA issued a decree prohibiting the payment of commissions related to armament contracts. Thus Northrop ceasing paying Triad International Marketing and the matter went to arbitration. Though their contract provided that California law was to govern the arbitration process,⁷³⁷ "The validity and construction of this Agreement shall be governed by the laws of the State of California." It further provided: "Any controversy or claim between the parties hereto arising out of or in

733 Reported by Al-Bukhari Muhammad, *Sadih al-Bukhari*(in Arabic) no. 2266; Muslim, *Sahih Muslim* no. 258.

734 Sanders Peyton, 'A Twenty Years Review of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards' at 270.

735 Al-Shareef Najla, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (A thesis submitted to the Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, Scotland in the fulfillment of the requirements for the Award of Degree of Doctor of Philosophy in International Law on Commercial Arbitration 2000)

736 *Northrop Corp. v. Triad Intern. Marketing SA*, 811 F. 2d 1265 - Court of Appeals, 9th Circuit 1987.

737 *Northrop Corp. v. Triad Intern. Marketing SA*, 811 F. 2d 1265 - Court of Appeals, 9th Circuit 1987.

connection with this Agreement ... shall be settled by arbitration," and "[t]he award of a majority of the arbitrators ... shall be final and binding upon the parties."

On its part, Northrop argued that there was need for the courts to decline enforcing a Marketing Agreement (the award earlier granted to Triad International Marketing) because it was contrary to the public policy of Saudi Arabia (specifically Decree No. 1275) in spite of the contract having expressly provided that the law of California and the law of Saudi Arabia where the marketing was to be undertaken by Triad International Marketing would determine the validity of the contract between the two. Although the earlier court had ruled in favour of Northrop, the court of appeals overruled the earlier ruling, effectively saying that Northrop could still have to pay commissions to Triad International Marketing in spite of the Decree issued by the government of Saudi Arabia. Noted the court:

To justify refusal to enforce an arbitration award on grounds of public policy, the policy "must be well defined and dominant." *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. at 2183. The Saudi Arabian policy the Department of Defence arguably adopted was neither. It is clear the Department wished to accommodate Saudi Arabian interests and sensibilities. It is also clear; however, that the Department was interested in encouraging sales to Saudi Arabia of American manufactured military equipment, and considered the efforts of Triad critical to that end. It is not clear from the evidence before the arbitrators and the district court what policy the Department of Defence adopted in pursuit of these sometimes inconsistent goals.⁷³⁸

On the basis of this ruling, it can be ascertained that it matters so much whose country's public policy is being violated as much as it is who is the actual player and what are the rules of engagement in the whole game. The court refused to consider as valid the argument by Northrop that if the directive was against Saudi law, it was also against California law. This is because, noted the court, the two states were very distinct and have their own values and preferences. Although there was the possibility that what was public policy in California could also be public policy in Saudi as occasioned by attempts to have the laws of the two different jurisdictions being aligned, that could never be the basis for the court's decision. Instead, the court ruled that Northrop had the obligation to pay Triad International Marketing its commission as agreed in the contract.

Furthermore, the court noted that:

"Northrop calls attention to evidence indicating Saudi Arabia and the Department of Defence adopted a policy of prohibiting payment of commissions whether or not ultimately

⁷³⁸ *Northrop Corp. v. Triad Intern. Marketing SA*, 811 F. 2d 1265 - Court of Appeals, 9th Circuit 1987.

charged to the Saudi Arabian government. Triad argues from evidence indicating both Decree No. 1275 and Department of Defence policy were aimed at prohibiting commissions that added to the cost of Saudi procurement, and that in any event the Department of Defence was unable to determine the Decree's exact application, even assuming the Department wished to mirror its policy. The district court resolved the conflict in Northrop's favour, 593 F.Supp. At 936 n. 13, 937-38, but even if we were to agree, we could not say on this record the policy the Department adopted was "well defined and dominant." The district court's refusal to enforce the arbitrators' decision on the ground that it conflicted with the policy of the Department of Defence was, therefore, unwarranted.⁷³⁹

In essence, uniformity or lack thereof of policies is not sufficient grounds for assuming that a public policy of one country is the same as that of another at all time.

This then means that every country or state has to consider public policy on its own merit. In view of this, the parties to an arbitration agreement can contend that although the award contravenes Saudi public policy, it does not contravene their countries' public policies in any way. Alternatively, it can be argued that the contractual agreement between the two parties explicitly requires that a certain law be used in the whole arbitration process (including enforcement of the award) to govern the process.⁷⁴⁰ For as long as this law is not Saudi law, then the Saudi courts will have no choice but to enforce the award that was granted. In this case, the court did not care what consequences Northrop would face but cared for what they laid. Accordingly, the provisions of the arbitration agreement ought to be given priority over any other requirements by any interested players, including adherence to public policy requirements.

Variations between International Public Policy and Transnational Public Policy

Generally, international public policy and transnational public policy are different. The differences between the two, as few as they may be, may act as a basis for having the public policy ground for exception to the recognition and enforcement of foreign awards being circumvented and so having such awards enforced. By law, international statutes are supposed to be given priority over national ones. This is the same with the aspect of public policy. As noted

⁷³⁹ *Northrop Corp. v. Triad Intern. Marketing SA*, 811 F. 2d 1265 - Court of Appeals, 9th Circuit 1987.

⁷⁴⁰ Al-Shareef Najla, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (A thesis submitted to the Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, Scotland in the fulfilment of the requirements for the Award of Degree of Doctor of Philosophy in International Law on Commercial Arbitration 2000)

before, international public policy means that the concept of domestic public policy of the state involved is to be utilized very narrowly to the implementation of foreign awards. Accordingly, it is stressed that not all cases of breach of a mandatory rule of the implementing state validates the denial of enforcement of foreign awards, since although the violation of public policy must contravene a mandatory rule, not every mandatory rule entails a concern of public policy. As such, implementation of foreign awards should be declined only in cases wherein it undoubtedly breaks the most basic principles of the implementing state. Even as international public policy is not independent of the standards of domestic public policy of the implementing state, it mirrors only a constrained version of these standards.⁷⁴¹

On the contrary, “transnational public policy,” or “truly international public policy”⁷⁴² has been approved and built up by a number of writers⁷⁴³ and accepted by some courts.⁷⁴⁴ Distinct from international public policy which is based on each nation’s personal view of that principle, truly international or transnational public policy is intended practically to cover nothing more than rules and policies deemed crucial by the international community, instead of any individual state.⁷⁴⁵ Hence, it only covers concepts that signify an international agreement as to significant principles or basic norms of conduct that must constantly apply in the law of international trade.⁷⁴⁶ It is proposed that the concept of this manner of public policy compromises “fundamental rules of natural law, principles of universal justice, *jus cogens*

741 See, Buchanan James, ‘Public policy and International Commercial Arbitration’ (1988) 26 (3) American Business law Journal 511 at 514; Gaillard Fouchard and Savage John (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras 1711, 1712; Di Pietro and Platte martin , *Enforcement of International Arbitration Awards: The New York Convention of 1958* (Cameron May 2001) .

742 The term “transnational law” is not new as it was referred to by Judge Jessup in his lectures at Yale thirty years ago. Then it was presented in great details and supports by Pierre Lalive in his report of “Transnational (or Truly International) public policy an International Arbitration” at the ICCA Congress no 3 in 1986. See, Redfern, ‘Commercial Arbitration and Transnational Public Policy’ 1; Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’.

743 See, Lalive Pierre, ‘Transnational (or Truly International) Public Policy and International Arbitration’ pp 257-318; Buchanan, ‘Public policy and International Commercial Arbitration’ 514 and fn 15.

744 See, *Allsop Automatic Inc v Tecnoskiscnc*(1997) XXII YBCA 725 (Italy Court of Appeal 1992) 726; *W v F and V* (Switzerland Supreme Court 30 Dec 1994), cited in ILA Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards’ 7.

745 See, Turnean Paulsoo, ‘Grounds for Refusal of Recognition And Enforcement Under The New York Convention: A Comparative Approach’ 7.

746 See, Lalive Pierre, ‘Transnational (or Truly International) Public Policy and International Arbitration’ 287; Buchanan, ‘Public policy and International Commercial Arbitration’ 514.

(compelling law) in public international law, and the general principles of morality accepted by what are referred to as civilized nations”⁷⁴⁷ In addition, it has been examined that even as transnational public policy is greatly similar with international public policy, they are undeniably different. The latter clearly exemplifies the specific character of public policy within each individual state, while the former is less restrictive and mirrors the general fundamental values of the world community.⁷⁴⁸

To invoke international public policy would ultimately mean that quite few, if any at all; foreign awards would be enforced in the kingdom. The way out of this quagmire is for arbitration parties with grievances to require that courts interpret the doctrine of public policy as transnational public policy and not international public policy because KSA has acceded to the NYC which is an international community approach to arbitration as opposed to a Saudi one.⁷⁴⁹

The government of KSA, by acceding to the NYC, effectively agreed to do everything therein in accordance with international standards as opposed to Saudi standards. The law is therefore clear on which of the public policy facets ought to be applied when enforcing international arbitration awards. In essence, if an award that a party is seeking to be enforced in KSA involves an international entity or party, the rule of the game that has to be applied ought to be international laws. On the contrary, when the Saudi courts are dealing with an award granted domestically or involving Saudi entities or parties, then public policy issues can be considered with respect to Saudi laws (international public policy).

Furthermore, the general practice of the enforcing authorities in Saudi Arabia, referred to as the Board of Grievances, can be used to further understand how and when parties can legally go around the public policy restriction.⁷⁵⁰ First and foremost, it is worth mentioning categorically that the Board of Grievances has in the past come up with a number of issues that it considers to constitute or be part of public policy. These include *estoppel*, the sanctity of contracts and

747 See, ILC Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards’ 6,7; Turne and Paulsso, ‘Grounds For Refusal Of Recognition And Enforcement Under The New York Convention: A Comparative Approach’ 8.

748 See, Buchanan, ‘Public policy and International Commercial Arbitration’ 514.

749 Al-Shareef Najla, ‘Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958’ (A thesis submitted to the Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, Scotland in the fulfilment of the requirements for the Award of Degree of Doctor of Philosophy in International Law on Commercial Arbitration 2000)

750 Lalive Pierre, ‘Transnational (or Truly International) Public Policy and International Arbitration’ International Congress on Arbitration (1986) 257, 318.

property, equity, the binding force of an award, vested rights and prohibition of unjust enrichment.⁷⁵¹ Having found these to be valid bases, the formation of Saudi international public policy; Saudi courts often refer to them when determining whether or not an award's enforcement can be denied for breaching public policy. This shows a very wide interpretation of public policy. It also shows that as long the basis is Saudi public policy, many awards cannot be enforced. Nonetheless, the good news is that these areas just apply to Saudi arbitration and Saudi awards. They do not in any way extend to cover foreign awards.

As such, these cannot hinder any court from enforcing an award that has been granted by a foreign court. This is also because the customary practice and Shari'ah rules of *lex mercatoria* or *international arbitration* are clearly in agreement on the aspect of the need for contracts to be accorded the sanctity they deserve and to be therefore the need for all such contracts to be performed in good faith. It then follows that emphasis on transnational public policy as opposed to international public policy is done. It clearly defeats the logic and the very letter and spirit of international law (of which the NYC is part and the KSA a participating member) for a matter that has an international bearing to be treated as though it was domestic. Parties ought to contest that public policy ground for non-enforcement ought to be applicable with regard to international law and Saudi domestic law depending on the identity of the parties to the arbitration agreement. This will see foreign arbitration awards scrutinized with regard to transnational public policy while Saudi awards will be enforceable on the basis of being in agreement with international public policy. This way, foreign arbitrators might possibly get around the public policy limitation and have the awards granted in their nations or by international courts enforced in KSA.⁷⁵²

7.2.12 The Legal Restrictions Placed on Public Entities and Possible Circumvents

On its own, the NYC has not offered any direction regarding which parties have the legal right to engage in arbitration and which ones may not.⁷⁵³ As such, there exists some form of void

751 Al-Shareef Najla, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (A thesis submitted to the Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, Scotland in the fulfillment of the requirements for the Award of Degree of Doctor of Philosophy in International Law on Commercial Arbitration 2000).

752 Lalive Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' International Congress on Arbitration (1986) 257, 318.

753 Al-Shareef Najla, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (A thesis submitted to the Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, Scotland in the fulfilment of the requirements for the Award of Degree of Doctor of Philosophy in International Law on Commercial Arbitration 2000).

which can be utilized to challenge the exceptions to enforcement based on public policy.⁷⁵⁴ This aspect of legality is closely related to the doctrine of arbitrability. That is, what can be arbitrated and what cannot or may not. It is a principle applied to public policy because it is the government that ultimately decides what to arbitrate and what not to. In KSA, the order has been that public entities cannot resort to arbitration. This is because it is believed that such public entities are so much the custodians of the interests of the people of the kingdom to be left to arbitrate; given that arbitration can be very unpredictable when it comes to the final outcome (the rendering of an award).

However, there is a further legal provision in law and one that can be potentially invoked (actually it has been utilized to a very large scale) to have foreign awards enforced even if they are deemed to be contrary to public policy. This has to do with public entities.⁷⁵⁵ As noted earlier, the law of KSA provides that every public entity in KSA does not resort to arbitration as a way of revolving its disputes. As such, any award that is granted by a foreign court against a Saudi public entity and one requiring the Saudi courts to enforce the award might be declined because it is against Saudi public policy for such public entities to engage in arbitration. However, close examination of Saudi law reveals that if public entities can prove that they are not only financially independent but also legally independent, then they can be exempted from the restrictions under the public policy grounds for refusal of enforcement of foreign awards.⁷⁵⁶

This means that by having public entities offering or providing proof to the courts that indeed they are legally independent and financially independent or both, then they can have foreign awards enforced in their favour. The same argument can be fronted by any foreign party to an arbitration agreement which requires enforcement in KSA so that an award may be enforced in their favour or to their advantage.⁷⁵⁷ In KSA, public entities that can successfully front such an argument are Saudi ARAMCO and the Royal Commission for Jubail and Yanbu

754 Lalive Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' International Congress on Arbitration (1986) 257, 318.

755 287 Lalive Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' International Congress on Arbitration (1986) 257, 318.

756 Al-Shareef Najla, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (A thesis submitted to the Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, Scotland in the fulfillment of the requirements for the Award of Degree of Doctor of Philosophy in International Law on Commercial Arbitration 2000)

757 Lalive Pierre, 'Transnational (or Truly International) Public Policy and International Arbitration' International Congress on Arbitration (1986) 257, 318.

both of which are financial and legally independent. By extension, any other public entity that seeks to find a way around the provision that public entities are not to arbitrate their disputes can pursue either financial or legal independence (or both). Such entities have the right to arbitrate their conflicts in spite of the legal restrictions found in Saudi arbitration laws.⁷⁵⁸

7.3 Conclusion

Arbitrability and public policy are sometimes treated together as the same ground for exception to enforcement of foreign awards. However, it is important that they be treated separately for thoroughness of analysis. Arbitrability concerns the matters or cases which ought to or may be referred to arbitration in KSA. In the event that any aspect has been rendered non-arbitrative, then any award that is granted in such a case will not be enforced in KSA because it contravenes this requirement. Public entities are some of the most common examples of agencies that might not arbitrate. As such, they are required to settle their disputes by some other ways.

The other ground for exception is violation is public policy. The public policy defence under Article V (2)(b) of the NYC has, for a long time, been a traditional and essential basis for resisting enforcement which can be found in a majority of foreign legislation and international treaties concerned with the enforcement of foreign awards. The general objective of Article V (2)(b) is to permit each contracting state to safeguard its most basic economic, legal, moral, political, religious and social principles from being damaged by implementation of foreign awards. While the NYC provides significant emphasis to party autonomy under Article V (1), the Convention sets limitations on this freedom under the public policy ground under Article V (2).

The principle of public policy under Article V (2) (b) could be practically difficult. The Convention does not explicitly mention the concept and contents of public policy. Instead, it refers this issue to the law of the country where enforcement is demanded. National courts affirmed the law with jurisdiction over the concept of public policy in Article V (2) (b) is the law of the enforcing Country. Yet, the principle of public policy, in itself, is vague and lacks an accurate description under national law, its contents differing from country to country. Still, in spite of uncertainty and inconsistencies, the public policy ground has not produced any severe

758 N Al-Shareef, 'Enforcement of Foreign Arbitral Awards in Saudi Arabia: Grounds for Refusal Under Article (V) of the New York Convention of 1958' (A thesis submitted to the Centre for Energy, Petroleum and Mineral Law & Policy, University of Dundee, Scotland in the fulfillment of the requirements for the Award of Degree of Doctor of Philosophy in International Law on Commercial Arbitration 2000).

impediments to the implementation of foreign awards since national courts have normally interpreted public policy under Article V (2)(b) as meaning international policies instead of domestic policy, the former being a lot narrower compared to the latter.

In Saudi Arabia, public policy pertains to the general principles of Islamic *Shari'ah* and some essential administrative rules. Contentions that implementation of foreign awards is exceptionally difficult or impossible since the Saudi concept of public policy were found to be greatly lacking in merit. Undeniably, the Saudi courts are hesitant in refusing enforcement of foreign awards on the basis of public policy except where there are cases of grave violations. This is because the difference between domestic and international public policy is accepted by the Saudi courts, and they aspire to maintain the status quo. To be able to get around, water down, or possibly circumvent the requirements laid down under the public policy principle, parties to an arbitration agreement have to utilize the ambiguity of the term 'public policy' as well as the variations between international public policy and transnational public policy. Furthermore, they can utilize the exceptions granted to public entities that are financially and legally independent to have awards enforced in KSA. Otherwise, the public policy limitation will continue to be a major hindrance to the enforcement of foreign awards in KSA.

CHAPTER EIGHT

ARBITRABILITY OF INVESTMENT CONTRACTS UNDER SAUDI ARABIA'S LEGAL SYSTEM

8.0 Introduction

Generally, arbitration is a significant method of resolving disputes between transnational parties in investment and commercial matters.⁷⁵⁹ Since arbitration exists in tandem and in cooperation with judicial systems, Saudi Arabia's law is very important for the arbitrability of foreign investment disputes and their corresponding awards. Saudi Arabia's legal system is unquestionably complex in that it brings together traditional Shari'ah law⁷⁶⁰ as well as efforts at modernising the arbitration law.⁷⁶¹ However, Saudi Arabia, like a number of other Middle Eastern states is increasingly attempting to gain international confidence in its domestic legal systems.⁷⁶²

In line with this trend, Saudi Arabia, by Royal Decree in 1994, ratified the Convention on the Recognition and Enforcement of Foreign Awards 1958 (New York Convention).⁷⁶³ However, it can be argued that the legal framework for the recognition and enforcement of foreign awards falls short of ensuring that foreign investment awards can escape the scrutiny and application of domestic laws. Article V of the New York Convention permits national courts to refuse recognition and/or enforcement of foreign awards.⁷⁶⁴ Therefore, this thesis has its aim, as the interpretation and application of Article V of the New York Convention with the emphasis on

759 El-Fouz Al-Fahd and Mislem Faisal, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 23 Arab Quarterly 31,57 31.

760 Esmaili Hossein, 'On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26 (1) Arizona Journal of International and Comparative Law 2,47, 2.

761 El-Fouz Al-Fahd and Mislem Faisal, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 23 Arab Quarterly 31,57.

762 Wakin Mark, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 (1) New York International Law Review 1,51, 1.

763 Delkousis Jim and Bajaj Gitanjali' Arbitration in the Kingdom of Saudi Arabia' (2010) *DLA Piper* 1,3, 2.

764 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958, Article V (Hereinafter New York Convention).

Saudi Courts. The main question for determination is the impact of Shari'ah law on the interpretation of Article V of the New York Convention with respect to the recognition and enforcement of foreign awards. The issues relative to the grounds for refusal or for vacating a foreign award are especially important to the arbitrability of foreign investment contracts in Saudi Arabia. Understanding the level of arbitrability of investment and other related contracts under the Saudi law as discussed in this chapter is key in order to derive a conclusion as to whether Saudi's perceived laxity in adhering to international conventions is by choice or not. This domestic level of arbitrability is an important arm of the overall arbitrability of international commercial contracts in Saudi Arabia.

8.1 Foreign Investment Contracts

The relationship between the foreign investor and the host state is very important to the success of a foreign investment.⁷⁶⁵ The definition and nature of foreign investment contracts, demonstrate the significance of this unique relationship between a state and an alien. Foreign investment arises when either “tangible or intangible assets” are transferred from abroad for utilization in the country of destination as a means of generating riches but remain under the transferee's control either in part or entirely.⁷⁶⁶

Essentially a foreign investment contract can exist as a standalone contract between an alien and a host-government or a government owned business. The investment contract is typically related to an investment project conducted within the host state. Investment treaties which also contain investment contracts are negotiated and completed between at least two countries and typically regulate how investors from one state will be treated and protected in another states' territory.⁷⁶⁷

Foreign investment contracts are typically contained in or are subject to Bilateral Investment Treaties (BITs). BITs are very important to emerging economies seeking to attract foreign direct investment.⁷⁶⁸ BITs are significant because they provide for foreign investors,

⁷⁶⁵ Wolfgang Peter and Jean-Quentin de Kuyser and Benedict de Candolle, *Arbitration, and Renegotiation of International Investment Agreements* (Kluwer Law International 1995).

⁷⁶⁶ Sornarajah Muthucumaraswamy, *The International Law on Foreign Investment* (Cambridge University Press 2010).

⁷⁶⁷ Cotula Lorenzo, *Investment Contracts and Sustainable Development* (ILED 2010).

⁷⁶⁸ Jennifer Tobin and Susan Rose-Ackerman, 'Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties' (2005) Yale Law School: Center for Law, Economics and Public Policy, Research Paper No. 293 2.

legal protection in an area of international law where customary law is decidedly not firmly established.⁷⁶⁹

In addition to setting forth minimum standards of treatment for foreign investors and their investments, BITs make provision for the foreign investor to commence arbitration proceedings with respect to claims relative to the host state as a means of resolving any dispute relating to the host state's failure to accord the investor or the investment, the minimum standards of treatment. In other words, the BIT permits the foreign investor to take action against the host state without having to resort to state-to-state action. Therefore the BIT and its fortification of investor-state arbitration is an important milestone in international investment law.⁷⁷⁰

Foreign investment law is emerging as a "rapidly expanding and changing" phenomenon with a large number of foreign investment conflicts resolved via international arbitration.⁷⁷¹ The International Centre for the Settlement of Investment Disputes (ICSID) is the world's leading institution for the arbitration of foreign investment disputes. The ICSID together with the development and growth of BITs the formation of the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the US have contributed to a vast body of international law relative to foreign investment dispute resolution via international arbitration.⁷⁷²

Cumulatively, each of these developments speaks to the fact that foreign investment contracts can lead to a number of issues that can give rise to disputes. The resolutions of these disputes require some body of international law otherwise they may be left to national courts, a scenario that the alien investor is not entirely amenable to.

769 Dumberry Patrick, 'Are BITs Representing the 'New' Customary International Law in International Investment Law?' (2010) 28 (4) Penn State International Law Review 675,701, 675.

770 Schill Stephan, '*Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*' Cited in Michael Waibel; Asha Kaushal; Kyo-Hwa Liz Chung and Claire Blachin (Eds) *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

771 Doak Bishop and Crawford James and Reisman William Michael, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International 2005).

772 Doak Bishop and Crawford James and Reisman William Michael, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International 2005).

One of the first issues under a foreign investment contract giving rise to a dispute is the question of whether or not the arbitration panel or the arbitrator has proper jurisdiction to determine a dispute. The determination of this question will rely in large part on whether or not the foreign investment contract contains an arbitration agreement. The jurisdiction challenge will also relate to the existence of a commercial dispute. In either case, the investment contract will provide the answers to these questions.⁷⁷³

8.2 Foreign Investment in Saudi Arabia:

Over the past twenty years or so, BITs have more than tripled. As of 2007, approximately 170 states worldwide were parties to at least one BIT.⁷⁷⁴ According to the United Nations Conference on Trade and Development (UNCTAD) Saudi Arabia currently has BITs with Austria, Germany, Italy, the Republic of Korea, Belgium, France, Malaysia, and Switzerland.⁷⁷⁵ This trend is consistent with Saudi Arabia's drive to transfer domestic investment from the government to the private sector. In particular, the Saudi government has sought to liberalize and privatize its utilities, transport, healthcare, education and communications.⁷⁷⁶

For any foreign investor conducting business in the host state, protection of his/her investment is of primary significance. Foreign investors ultimately fear that the host government can exercise its sovereignty and expropriate the investment or place restrictions on the repatriation of the investment or profits derived from it.⁷⁷⁷ In addition to BITs signed with the various countries listed, Saudi Arabia has responded to those potential fears by implementing the Foreign Capital Investment Law which was approved by its Cabinet in April 2000.⁷⁷⁸

Article 6 of the Foreign Capital Investment Law 2000 provides that:

⁷⁷³ Van den Berg Albert Jan, *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International 2005).

⁷⁷⁴ Susan Franck, 'Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law' (2007) 19 *Global Business and Development Law Journal* 19 338,373, 339.

⁷⁷⁵ UNCTAD, 'Bilateral Investment Treaties' (2010) United Nations Conference on Trade and Development <http://www.unctadxi.org/templates/DocSearch.aspx?id=779&PageIndex=1&TextWord=%27Oman> accessed 15 May 2011

⁷⁷⁶ Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd. 2006).

⁷⁷⁷ Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd. 2006).

⁷⁷⁸ Saudi Arabia, ' Foreign Capital Investment Law' (2001) 16 (1) *Arab Law Quarterly* 10,104, 101.

A project that has been licensed pursuant to these regulations shall enjoy all rights, incentives, and guarantees available in respect of a national project in accordance with Saudi law.⁷⁷⁹

These rights entail the right to repatriate profits or proceeds realized on a sale of property that is owned by a foreign investor;⁷⁸⁰ the right to hold realty provided it is consistent with the activities for which the foreign investment is licensed or for housing employees;⁷⁸¹ sponsorship of non-Saudi employees⁷⁸², and protection from expropriation unless ordered by the court or for public policy issues and only with just compensatory damages.⁷⁸³

In addition to securing the protection of the foreign investment, the Foreign Capital Investment Law goes on to make provision for the resolution of disputes. The Foreign Investment Capital Law provides for two distinct possibilities: the resolution of a dispute between Saudi Arabia and the foreign investor or the resolution of a dispute between the foreign investor and a national partner. In this regard, Article 13 of the Foreign Capital Investment Law 2000 provides that separate and apart from any agreements to which Saudi Arabia has subscribed to:

Disputes that may arise between the government and a foreign investor in relation to foreign investments that are licensed pursuant to this law shall, as far as possible, be resolved in accordance with the relevant laws.

Disputes that may arise between a foreign investor and its Saudi partners in relation to foreign investments that are licensed pursuant to this law shall, as far as possible, be settled amicably, failing which the dispute shall be resolved in accordance with the relevant laws.⁷⁸⁴

The settlement of foreign investment disputes is entirely important. Traditional adjudication before the courts can be problematic from the investor's perspective as it involves

⁷⁷⁹ *Foreign Capital Investment Law 2000*, Art 6.

⁷⁸⁰ *Foreign Capital Investment Law 2000* Art 7.

⁷⁸¹ *Foreign Capital Investment Law 2000*, Art 8.

⁷⁸² *Foreign Capital Investment Law 2000*, Art 9.

⁷⁸³ *Foreign Capital Investment Law 2000*, Art 10.

⁷⁸⁴ *Foreign Capital Investment Law 2000*, Art 13.

the state and a private party. Obviously, an alternative to formal adjudication is the preferred method of dispute resolution so as to confer upon the parties' equal status.⁷⁸⁵ In this regard, the Saudi Arabian dispute settlement processes for disputes involving the government are brought before the Board of Grievances. Disputes against individuals are brought before the judiciary unless the investment agreement has an arbitration clause or a clause for some other form of alternative dispute resolution.⁷⁸⁶

Some guidance is found in Shoult's interpretation of Article 13 of the Foreign Investment Capital Law 2000. According to Shoult, the word agreement employs an Arabic term which can mean treaty or convention as well as contract. In addition, Shari'ah principles of law do not distinguish between state contracts, treaties and privately concluded contracts. Moreover, the Arabic word *nizam* is used to refer to the Foreign Capital Investment Law and the Arabic word 'anzima' is used as plural for laws. The latter term implies that the wider collection of Saudi Arabian laws will apply.⁷⁸⁷

Theoretically, the Saudi government is at liberty to modify or even repeal its own laws. As a result, foreign investors "may consider the guarantees and assurances" enshrined under the Foreign Capital Investment Law 2000 "to be of limited value."⁷⁸⁸ Therefore, foreign investors may find it more appropriate to pursue claims against the Saudi government by reference to one of the BITs or multilateral treaties that Saudi Arabia subscribes to. As previously noted, these BITs generally provide for investor-state arbitration. Interest will not be awarded and if it is attached to a foreign judgment, it will not be enforced in Saudi's courts because again, interest is inconsistent with Shari'ah laws.⁷⁸⁹

As it may be, the latest available data generated in 2006 by the Saudi Arabia General Investment Authority (SAGIA) shows that more than 1400 licences were granted to foreign investors for the year 2006. Among these licences, foreign investment projects included 328

785 El Rahman , *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (Cambridge University Press 2003) .

786 Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd. 2006).

787 Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd. 2006).

788 Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd. 2006).

789 Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd. 2006).

industrial sector undertakings worth US\$14 billion and over 1000 projects in services in excess of US\$60 billion. Moreover, the most recent available data published by the Saudi Arabian Monetary Authority (SAMA) demonstrates that foreign investment stock in Saudi Arabia totalled US\$52.4 billion for the year 2006. Foreign direct investment flows were at US\$18.6 billion for the year 2006 representing an increase of 52 per cent over the previous year.⁷⁹⁰

This data corresponds with the Saudi government's initiatives to attract foreign investment. These initiatives are guiding by an increasing effort on the part of Saudi Arabia to appeal to foreign investors with a view to improving the foreign investment flows into Saudi Arabia. The idea is to use this capital flow for the purpose of supporting the government's economic aspirations for development of the Saudi Arabia economy. The Saudi government has indicated that it wants to attract and inject at least US\$ 500 billion in investments into its cities and another US\$100 billion into its "knowledge-based industries" by then ensuing 10 to 15 years.⁷⁹¹

As we shall see in this chapter, Saudi Arabia is particularly reluctant to confer upon private adjudicators, the authority to pass judgment on the actions of the government. Although significant efforts have been made to improve foreign investment laws and arbitration in general, the government continues to maintain significant control over the arbitration process via its judiciary and government bodies. Although investment contracts are in Saudi Arabia, state intervention remains a problem, as will be demonstrated in this chapter.

This is a particularly contentious issue for foreign investors. Aside from fears of expropriation, foreign investors have another major concern. This concern is the certainty that should they have a dispute with the host government, they will be able to have those disputes resolved outside of and away from the national courts of the host state. There is a fear, whether actual or not, that they will be denied a fair and equitable treatment by national courts if the other party happens to be the state.⁷⁹² Saudi Arabia has not been able to satisfactorily assuage the fears associated with litigation. This chapter reveals that despite the arbitrability of investment contracts under Saudi law, the national courts remain a significant part of the process in a way that is virtually unprecedented.

⁷⁹⁰ Oxford Business Group, *The Report: Saudi Arabia 2008* (Oxford Business Group 2009) .

⁷⁹¹ Oxford Business Group, *The Report: Saudi Arabia 2008* (Oxford Business Group 2009) .

⁷⁹² Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008).

8.3 Foreign Investment Arbitration under Saudi and Shari'ah Laws:

Shari'ah and Saudi laws are both amenable to the resolution of commercial disputes via alternative dispute resolution processes. Investor-state disputes can also be resolved by alternative dispute resolution processes. However, this mechanism has some restrictions.⁷⁹³ The primary restriction relates to arbitrability which is entirely subjective and relates to capacity which is a criterion for upholding the validity of an arbitration agreement. In Saudi Arabia, a state may only agree to arbitration by virtue of approval from the proper authorities.⁷⁹⁴ Previously, Saudi Arabia did not permit the government or any government agency to participate in arbitration. However, the total ban was removed in 1983 although approval must be obtained from the council of 'ministers' president. The restriction however remains in place relative to any and all disputes relative to oil.⁷⁹⁵

The Hanbali school which is Saudi Arabia's official school⁷⁹⁶ dictates that the award is just as binding as a judgment of the court.⁷⁹⁷ However, this principle of Shari'ah law may be entirely inconsequential. Although Article 37 of the Convention on Judicial Co-operation between States of the Arab League 1983 (Riyadh Convention) forbid examining the merits of a dispute,⁷⁹⁸ Saudi Arabia's judges do not generally comply with Article 37. As justification for this practice, the Saudi Arabia judiciary generally argue that the public policy concerns in Saudi Arabia are different from those of their neighbours.⁷⁹⁹

793 Lerrick Allison and Mian Javed, *Saudi Business and Labour Law: Its interpretation and Application* (Graham & Trotman, 1982).

794 Daniel Julian Lew and Mistelis Loukas and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 734-735.

795 Mistelis Loukas and Brekoulakis Stavross, *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009).

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

797 Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd 2006).

798 *Convention on Judicial Co-operation between States of the Arab League 1983* (Hereinafter, Riyadh Convention), Art 37.

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

Even so, Saudi's judiciary's claims do have merits. Many awards that require enforcement include awards for interest or for the sale of musical items or tobacco each of which are inconsistent with Shari'ah law. Moreover, Article 37 of the Riyadh Convention also provides that an award can be vacated if:

The dispute cannot be arbitrated under the law of the seat of arbitration;

The unsuccessful party did not receive appropriate notification of the arbitrator's appointment or the process;

The award covers matters that were not within the contemplation of the agreement to arbitrate or matters that are not within the scope of the arbitration agreement; or

Recognising the award would be inconsistent with principles applicable to Shari'ah, appropriate laws or the public interest.⁸⁰⁰

This means that despite subscribing to the New York Convention, awards are not automatically enforced in Saudi Arabia. Moreover, Hanbali school judges demand that arbitrators are knowledgeable with respect to Shari'ah law.⁸⁰¹ Complicating matters, disputants are at liberty to revoke an arbitrator at any time prior to the final award unless otherwise provided for in the arbitration agreement. However, if a judge appoints an arbitrator, the arbitrator is deemed to be the judge's representative and therefore may not be revoked by the disputants.⁸⁰² Essentially what this means is that the New York Convention has limited effect on the arbitration of international commercial disputes including investment disputes in Saudi Arabia's legal regime.

The effect of the New York Convention requires greater discussion and consideration before moving forward. The implications of the New York Convention are necessary before discussing the arbitrability of investment contracts in Saudi Arabia under the Convention on the

800 Riyadh Convention, Article 37.

801 Dr. Yahya Al-Samaan, 'The Legal Protection of Foreign Investment in the Kingdom of Saudi Arabia' (1993) Centre for Petroleum and Mineral Law and Policy, University of Dundee 271.

802. Shoult Anthony, *Doing Business with Saudi Arabia* (GMB Publishing Ltd 2006).

Settlement of Investment Disputes Between States and Nationals of Other States 1965 (Washington Convention). Saudi Arabia joined the Washington Convention in 1980.⁸⁰³

8.4 The Effect of the New York Convention on Investment Arbitration in Saudi Arabia:

The New York Convention anticipates and provides for two specific scenarios. First, it provides for the recognition and enforcement of foreign awards. This scenario is contemplated under Article I which essentially sets out the applicability of the Convention. The New York Convention thus applies to the enforcement of an agreement where the parties thereto are resident in or have businesses in at least two different states.⁸⁰⁴ The New York Convention may also apply where the “subject matter of the arbitration relates to more than one State.”⁸⁰⁵

A contracting state’s duty to recognise and enforce the award however is limited by Articles III and V of the New York Convention. Essentially Article III provides in part that:

Each Contracting State shall recognise awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon...⁸⁰⁶

In other words, each of the contracting states to the New York Convention is required to enforce foreign awards pursuant to its own procedural rules. As O’Kane explains however, this is rather “cumbersome” with respect to Saudi Arabia.⁸⁰⁷ Fouchard, Gaillard, Goldman, and Savage also note that although a number of Middle Eastern states modernised their arbitration laws by distinguishing between domestic and foreign arbitration, Saudi Arabia did not. Saudi Arabia did however; reform its arbitration laws in 1983 and 1985. However, many of the pre-existing traditions continue to provide for constraints relative to religious and nationality.⁸⁰⁸

803 Dr. M.S. Abdel Wahab and M. Mansour, “Saudi Arabia” *The International Comparative Legal Guide to: International Arbitration 2009*, 48 (2008): 387-389, 388.

804 New York Convention, Art. I(a).

805 New York Convention, Art. I(b).

806 New York Convention, Art. III.

807 O’Kane Michael, *Doing Business in Saudi Arabia* (Al-Andalus Legal Publishing 2009).

808 Phillipe Fouchard, *Emmanuel Gaillard; Berthold Goldman and John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration*, (Kluwer Law International 1999).

Saudi Arabia's Arbitration Law 1983 was issued by Royal Decree No. M/46 Dated 12 July, 1403 HA (April 25, 1983 AD) and the Implementation Rules of 1985.⁸⁰⁹ The Arbitration Laws are not modelled after the UNCITRAL Model Law 1985.⁸¹⁰ Essentially, arbitration in Saudi Arabia is not final in the sense that either party is at liberty to appeal the award within 15 days of the date the award is rendered.⁸¹¹ This in and itself opens up the possibility that investor-state arbitration may eventually find its way to the national courts of Saudi Arabia on appeal under the auspices of Article III of the New York Convention.

To start with, arbitration is the preferred method for the resolution of disputes between private investor and the state. Ultimately, the idea is to avoid the exigencies of formal adjudication. For obvious reasons, the private investor will not have confidence in the ability of the judiciary of the host state to be impartial in a matter involving an alien and the government for whom it is paid to serve.⁸¹² The mere fact that the disputants are at liberty to take the matter to the courts for the purpose of challenging an award immediately defeats the purpose of investor-state arbitration.

Moreover, Article 6 of Saudi Arbitration Law 1983 confers upon Saudi's Board of Grievances jurisdiction to hear and determine an application designed to enforce arbitration agreements.⁸¹³ This is generally perceived as a method for eventually circumventing delays later on when the validity of the arbitration agreement is challenged. Obviously if the Board of Grievances approves the agreement, a challenge later on will be futile. However, this invites a number of problems in that, it provides for excessive intrusion into the concept of party autonomy.

This is where the cumbersome proceedings arise. The UNCITRAL Model Law which is not ratified or used by Saudi Arabia is simple and clear. The Model Law is presented as a simplified guide and includes each of the elements and operations relative to arbitration. The Model Law commences with the criteria for substantiating the agreement to arbitrate and goes on

809 Fouchard et al, *International Commercial Arbitration*, 92.

810 Dr. Abdel Wahab Mansour, 'Saudi Arabia' (2008) 48 *The International Comparative Legal Guide to: International Arbitration* 2009 387,389, 388.

811 *Ibid* 388.

812 United Nations Conference on Trade and Development, 'Dispute Settlement: International Commercial Arbitration' (2005) United Nations 1,43, 25.

813 Arbitration Law 1983, Art. 6.

to provide instruction on law applicable at each of the various phases of arbitration. Put another way, the Model Law systematically constructs a road map for the validity of the arbitration agreement, the rules for arbitration, the seat of arbitration, the appointment and make-up of the arbitration panel, procedural matters and finally to the stage after which an award is issued.⁸¹⁴ According to Redfern, the Model Law is a “major success” and it is entirely simple and sets out the arbitration process in a manner that can be understood by virtually anyone who can read.⁸¹⁵

A Saudi Arabian cannot, pursuant to public policy, elect to have his/her duties regulated by a law that is not Shari’ah law. Although the Board’s ruling was challenged on appeal to the Review Panel who ruled that Shari’ah law insists that Muslims live up to their legal duties, and therefore a ban on enforcing a choice of law clause was inconsistent with Shari’ah principles, the Board refused to relent.⁸¹⁶

It is readily apparent thus that there are inherent difficulties created both by Article III of the New York Convention and the application of Saudi Arbitration Law. The fact is that the New York Convention Article III only mandates compliance with the enforcement of foreign arbitration awards in accordance with the contracting states’ procedural laws. Saudi’s procedural laws under the Arbitration Law permits the Board of Grievances to disallow foreign arbitration provisions if the party files his/her dispute with the Board. As we have seen, the Board of Grievances will not dismiss the process for want of jurisdiction automatically and may proceed to hear the case itself.

The problems created by Article III of the New York Convention are not specific to Saudi Arabia. Cohen readily notes that the application of national procedural laws can “result in unforeseen barriers to the enforcement of awards.”⁸¹⁷ For instance in the US, the courts have been inconsistent in enforcement of foreign awards under the New York Convention based on national procedural questions relative to jurisdiction.⁸¹⁸

814 Gerold Herrmann, *The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions*, Cited in P. Sarcevic, *Essays on International Commercial Arbitration* (BRILL 1989).

815 A. Redfern Hunter, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell 2004).

816 O’Kane Michael, *Doing Business in Saudi Arabia* (Al-Andalus Legal Publishing 2009)

817 S. Cohen Charlotte, ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) NYSBA New York Dispute Resolution Lawyer 47, 50, 48.

818 ‘The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards’ (2008) 1 (1) NYSBA New York Dispute Resolution Lawyer 47, 50, 48.

The enforcement of the foreign award is likewise problematic despite Saudi Arabia's subscription to the New York Convention. Article V (1) specifically permits vacating a foreign award if the party seeking the setting aside of the award can prove incapacity of the other party, that the agreement was not valid, or there was insufficient or improper notice of the process, the award went beyond the mandate of the arbitration agreement, the tribunal was irregularly constituted, or the award has not yet run its course so as to become binding.⁸¹⁹

Article V (1) while permitting vacating an award if it is not yet binding has proven to be a complicated affair. The New York Convention fails to interpret what amounts to a binding award. While there is an apparent consensus among national courts that for an award to be considered binding, it does not mean that a party has obtained permission to enforce the award at the seat of arbitration. There is a vast difference with respect to what law is applicable to the determination of what amounts to a binding award. The result is, some courts consider that an award is binding if it is not appealable on its merits and other courts take the position that unless the award has been vacated or suspended, it is final.⁸²⁰

Certainly, the fact that an award may not be considered binding in some national courts if it is subject to appeal means that arbitration awards could be delayed. As previously noted, an award is appealable in Saudi Arabia, provided the appeal is lodged within 15 days of issue. Therefore, if an appeal is not filed within 15 days, the award is considered not binding and therefore the court before whom enforcement is sought may vacate the award pursuant to Article V (1) of the Convention. If an appeal is filed, then obviously, that appeal will render the award non-binding until such time as the appellate process is exhausted.

Article V (2) is particularly relevant to the enforcement of a foreign award inclusive of the investor-state award. Article V (2) provides as follows:

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

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

⁸¹⁹ New York Convention, Art. V(1).

⁸²⁰ S. Cohen Charlotte, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA New York Dispute Resolution Lawyer 47, 50, 48.

The recognition or enforcement of the award would be contrary to the public policy of that country.⁸²¹

Article V(2)(b) is especially problematic as it does not distinguish between public policy with respect to national or international policy. Presumably, if a country subscribes to the New York Convention, it has some policy reflective of a desire to harmonize its local arbitration laws with that of other contracting states. In this regard this may be considered to be that country's international policy. As it may be, a number of national courts have taken a guarded approach to the idea that Article V (2)(b) relates to international policy. This kind of gap in the New York Convention only persuades the party against whom the award is rendered to attempt to circumvent enforcement of the award on the grounds that it is inconsistent with domestic policy.⁸²²

Article V in its entirety is problematic in terms of enforcement under the procedural laws of Saudi Arabia. By virtue of Articles 20 and 21 of the Arbitration Law 1983 of Saudi Arabia, an award is not enforceable unless it has been approved by the Board of Grievances. However, once the award has been approved by the board it will have the same force as would a judgment of a court. To this end Article 20 of the Arbitration Law 1983 provides as follows:

The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the Shari'ah.⁸²³

Since there is no distinction between domestic and foreign arbitration in Saudi Arabia, Article 20 applies to both types of arbitration. This means that the foreign investor seeking to enforce an award against Saudi Arabia must first apply to the Board of Grievances and participate in a hearing which inevitably requires an examination of the merits of the case. The merits will have to be visited for the purpose of determining whether or not the award is enforceable pursuant to Shari'ah law. The problem for the foreign investor is that the Board of

821 New York Convention, Art. V(2).

822 Cohen Charlotte, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 (1) NYSBA New York Dispute Resolution Lawyer 47, 50, 48.

823 *Arbitration Law* 1983, Art 20.

Grievances is a government board. Saudi Arabia's legal system is comprised of Shari'ah judges and government boards.⁸²⁴

Essentially, this means that in order to enforce a foreign award against the Saudi government, the foreign investor must turn to that same government's board. Once the matter is filed with the Board, there may be delays. Although Article 18 gives the respondent 15 days to respond to the application for enforcement,⁸²⁵ in practice extensions of time are given generously and automatically. This is because, fixed times are viewed as "anathema to Shari' a".⁸²⁶

The board's decision can also be appealed to the Review Panel. According to Article 36 of the Implementing Regulations of the Arbitration Law 1985, the Review Panel may hear the matter as if it were a case at first instance.⁸²⁷ In other words, the disputants are at liberty to make submissions, present witnesses and perhaps bring in new evidence. The fallacy with this appellate process is that it does not accomplish much beyond delaying the execution of the foreign award. This is because the Review Panel basically only makes recommendations to either affirm or reverse the Board's decision. Therefore, the Review Panel's decision is not binding on the board.⁸²⁸

Only after the Board of Grievances conducts a hearing and affirms an award, will Article 21 arise to give the award the authority of law? However, this procedure is entirely consistent with Article III of the New York Convention. Similarly it is consistent with Article V of the New York Convention which confers the power to refuse recognition and enforcement on the competent authority where enforcement is sought.⁸²⁹

Ironically, the New York Convention is designed to prevent intrusive national court supervision by limiting the grounds for review on procedural grounds.⁸³⁰ However, Articles III

824 Sayen George, "Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia", *University of Pa. Journal of International Business Law*, 9(2) (1987): 211-255, 214.

825 *Arbitration Law* 1983, Art 18.

826 O'Kane, *Doing Business*, 33.

827 *Implementing Regulations of the Arbitration Law* 1985, Art 36.

828 O'Kane, *Doing Business*, 33.

829 *New York Convention*, Art V(2).

830 Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55 *International Organization* 919, 947, 939.

and V of the New York Convention enable Saudi Arabia to permit intrusive government intervention in the process which cannot bode well for the arbitrability of investment contracts. Essentially, the foreign investor presumably chooses arbitration for the purpose of escaping state control of the process with a view to having a neutral third party, preside over the matter.

However, the Arbitration Law, ensures that the state is very much a part of the arbitration process regardless of whether or not one of the disputants is the state. Sayen maintains that the Arbitration Law of Saudi Arabia is at cross purposes. Sayen explains that the Arbitration Law with respect to the foreign investor:

Is designed to allay their fears over the previous lack of judicial and legislative support for commercial arbitration? . Second, it establishes governmental control not only over the arbitration procedure in general, but over the actual arbitration proceedings by providing for supervision by governmental agencies, courts, or perhaps the Chamber of Commerce and Industry.⁸³¹

It is this degree of government control over the process in Saudi Arabia that separates it from a number of other countries. It goes against the spirit and intent of the New York Convention, yet at the same time it is consistent with Articles III and V of the New York Convention.

8.5 Investor/State Arbitration Under the Investment Contract:

Just as international commercial arbitration is gaining currency globally, so is foreign investment arbitration. Foreign investment arbitration is best known as Investor-State Arbitration (ISA). The term though implies that it is different from international commercial arbitration in that it is in principle the same. The only real distinction is that ISA is strictly confined to disputes between an alien and the host state. On the other hand ISA acts as a vehicle for resolving investor/state disputes. ISA emerged to respond to the disputes arising out of or under a BIT and it is an international treaty between two different states.⁸³²

Most of the world's BITs and similar types of multilateral treaties include clauses that call for ISAs and will usually identify the type of arbitration (i.e. ad hoc or institutional) or the procedural laws and/or rules applicable to the resolution of disputes under the treaty. The Energy

831 Sayen, *Islamic Legal Tradition*, 217.

832S. Luttrell Test, *Bias Challenges in International Commercial Arbitration* (Kluwer Law International 2007).

Charter Treaty 1994 is a foreign investment treaty. The Energy Charter Treaty 1991 was promulgated and agreed upon at the European Energy Charter Conference at the Hague in 1991.

Essentially, the Energy Charter Treaty makes provision for protecting the investments of foreign investors whose activities are those connected with domestic energies of the host states among the European Union. The Energy Charter Treaty 1991 also makes provision for arbitration in the event that a dispute arises under the Treaty of 1991 and that arbitration is to be conducted by virtue of the International Centre for Settlement of Investment Disputes in terms of institutional arbitration, or, arbitration can take place, by virtue of ad hoc arbitration provided the UNCITRAL Rules of Arbitration are applied to the ad hoc arbitration process.⁸³³

A BIT between Saudi Arabia and Austria signed at Riyadh on 30 June 2001 is merely an agreement “concerning the Encouragement and Reciprocal Protection of Investments” that makes provision for arbitration between the two states and arbitration between the states and private investors from each of the other’s state.⁸³⁴ State/state arbitration is provided for under Article 10 which relates to disputes arising out of the proper interpretation and application of the BIT between Austria and Saudi Arabia. In the event that there is such a dispute, it will be resolved amicably via “consultation, mediation, or conciliation of the two Contracting Parties.”⁸³⁵

However, if the dispute cannot be resolved as provided for under Article 10(1), either party may submit the matter to an arbitration tribunal for resolution.⁸³⁶ Arbitration shall be ad hoc with each of the states appointing one member of the panel and both states shall agree upon a third panellist to sit as the chairman.⁸³⁷ If no such appointments are made within three months of one party notifying the other of the intention to arbitrate, the President of the International Court of Justice will be asked to appoint the arbitrators. Should the president be unavailable or unable to do so or is a national of either of the contracting states, the Vice-president of the International Court of Justice will be asked to make the necessary appointments. If that vice-president is

833 S. Luttrell Test, *Bias Challenges in International Commercial Arbitration* (Kluwer Law International 2007) .

834 Agreement between the Republic of Austria and the Kingdom of Saudi-Arabia Concerning the Encouragement and Reciprocal Protection of Investments, 2001 < http://www.unctad.org/sections/dite/ia/docs/bits/austria_saudi-arabia.pdf >(accessed 1 June 2011).

835 Agreement 2001, Art 10(1).

836 Agreement 2001, Art 10(2).

837 Agreement 2001, Art 10(3).

similarly unavailable or unable or a national of either of the contracting state, the next person in seniority will be asked to appoint the arbitrators.⁸³⁸

The arbitration tribunal's decision will be final and binding on the parties and the tribunal will compose their own procedural rules for the arbitration.⁸³⁹ Article 11 of the 2001 agreement deals with the settlement of investment disputes between an investor from either of the contracting states and the host state. To start with, the dispute should relate to investments and efforts should first be made to resolve the dispute amicably via "consultation or negotiation".⁸⁴⁰

Only after six months of attempting to resolve the dispute amicably can either party submit the matter to either the court of the jurisdiction in which the investment is located or to the Convention on the Settlement of Investment Disputes between States and Nationals of other States or by virtue of ad hoc arbitration using the rules of the UNCITRAL Model Law or to any other alternative dispute resolution process that the parties may agree to.⁸⁴¹

It is interesting to note here that although Saudi Arabia is not a party to the UNCITRAL Model Law; her rules can be used for the purpose of arbitrating international investment disputes between Saudi Arabia and a foreign investor. It is also notable that Article 11 (3) proclaims that the parties agree to submit their disputes to international arbitration⁸⁴², thereby overcoming the difficulties that could arise over whether or not a state agrees to arbitration.

Article 11(4) also provides for a method of circumventing the cumbersome procedures under Saudi Arabia's Arbitration Law 1983. Article 11(4) provides that:

If the investor chooses to file for arbitration, the Contracting Party agrees not to request the exhaustion of local settlement procedures.⁸⁴³

In addition, any award will be "binding and shall not be subject to any appeal or remedy" except as provided for in the Washington Convention.⁸⁴⁴ While these provisions ensure that the

838 Agreement 2001, Art 10(4).

839 Agreement 2001, Art 10(5).

840 Agreement 2001, Art 11(1).

841 Agreement 2001, Art 11(2).

842 Agreement 2001, Art 11 (3).

843 Agreement 2001, Art 11(4)

process is free of excessive government intervention particularly the jurisdiction of the Grievances Board, Article 11(7) goes on to state that the “award shall be enforced promptly in accordance with domestic law”.⁸⁴⁵ Therefore, while the process will be governed by international law, the enforcement will although governed by the Washington Convention and presumably the New York Convention; the jurisdiction of the Grievance Board will arise once again.

Investor/state arbitration under Saudi Arabia’s BIT with Malaysia is expressed in similar but more economic terms. The dispute will at the investor’s request, be submitted under the Washington Convention. However, if a contracting state first submits the matter to its own court for resolution, the investor may not proceed with arbitration.⁸⁴⁶ Again, if arbitration ensues, an award will be final and binding and will be enforced pursuant to domestic law.⁸⁴⁷

The Agreements of 2001 and 2000 are reflective of the language used in each of the other BITs to which Saudi Arabia is a party to. However, a vast majority follow the language used in the Agreement of 2001. The meaning of this is that if a foreign investor comes from a state to which Saudi Arabia has a BIT, the investor has an opportunity to have the arbitration process dealt with in accordance with international laws such as the UNCITRAL Model Law of the Washington Convention. Although, while the process itself will escape the cumbersome procedural rules of Saudi Arabia’s Arbitration Law, the enforcement process will invoke the jurisdiction of the Grievances Board. The attendant problems discussed in the previous section indicate that the award can be reviewed on the merits and can be submitted to appeal. Moreover, the award can be denied if it does not comport with Shari’ah principles.

As it may be, BITs are important instruments for enforcing foreign investment contracts and does provide a method by which many of the difficulties and fears surrounding the traditions in Saudi Arabia’s arbitration laws can be overcome by virtue of investor/state arbitration under the relevant BIT. As a developing country, BITs are a significant method for allaying the fears of foreign investors in Saudi Arabia.

844 Agreement 2001, Art 11(6).

845 Agreement 2001, Art 11(7).

846 Agreement Between the Government of the Kingdom of Saudi Arabia and the Government of Malaysia Concerning the Promotion and Reciprocal Protection of Investments 2000, Art 11
http://www.unctad.org/sections/dite/jia/docs/bits/saudi_malaysia.pdf accessed 18 June 2011.

847 Agreement 2000, Art 11.

The fact is, there are approximately three thousand operative BITs. This surge in the number of BITs is a direct result of the efforts exerted by the Organization for Economic Development (OECD). The OECD commenced its efforts as early as the 1960s. These efforts on the part of the OECD were calculated to stabilise the economic relationships between “developed, capital-exporting countries and their capital-importing countries” particularly in the context of the “developing post-colonial world”.⁸⁴⁸ As a result of the OECD’s efforts, there was an increase in the adoption of BITs that involved developing countries, particularly in Asia.⁸⁴⁹

The People’s Republic of China entered into at least 117 BITs between the years 1982 and 2006. Peru signed up to 400 BITs between 1993-2004. These statistics indicate that capital is mobile in that investors have quite a number of choices in terms of investing in jurisdictions where they feel they have greater protection. The continued expansions of BITs have significantly contributed to the popularity of ISAs during the decades of the 1990s. The popularity of ISAs corresponds with the popularity and growth of international commercial arbitration and its universal practices, policies and laws.⁸⁵⁰ For Saudi Arabia, it is important that it keeps pace with the standards of ISA if it hopes to become competitive in terms of attracting foreign investment.

There is a close nexus between investment arbitration and international commercial arbitration. As seen in the BITs to which Saudi Arabia is a party, the UNCITRAL Model Laws can be invoked although Saudi Arabia is not a party to the Model Law. This indicates the increasing importance of international commercial arbitration and its role in the assuaging of the fears that are typically associated with foreign investment. International commercial arbitration in relation to foreign investment is especially important because it is frequently the case that foreign investors place a significant amount of resources into the host state and usually, there is little confidence in the legal system or the judiciary. There are fears that the judiciary will not be impartial in a case where the other party is the government under whom the judiciary serves.⁸⁵¹ UNCTAD explains that it is therefore understandable that a foreign investor should demand a level of protection from the host state that he/she would not necessarily expect of his/her own state. UNCTAD goes on to state:

848 Lutrell, *Bias Challenges* 213.

849 Lutrell, *Bias Challenges* 213.

850 Lutrell, *Bias Challenges* 213.

851 United Nations Conference on Trade and Development, ‘Dispute Settlement: International Commercial Arbitration’ (2005) United Nations 1,43, 25.

On the other hand the investment may have important consequences for the host country of an economic, social, or even political nature. The investment will often be in the form of a company organized under the laws of the host country. It is understandable that the host country may not wish the foreign investment to be treated any differently than a domestic investment.⁸⁵²

In the 19th century and into the early part of the 20th century, foreign investors were substantially restrained in the methods that they could employ to obtain protection. Protection was for the most part possible by making a request for diplomatic immunity from the home state for pursuing claims founded on abusive and exploitive activities against the host state. In the event diplomatic security was provided, the claim could be settled by virtue of mixed arbitration methods.⁸⁵³ As a result a complex body of international law developed relative to when diplomatic security could be provided and the results of this security.

There were a number of difficulties with this dispute resolution process. To begin with, diplomatic immunity was not a guarantee and therefore could not be counted on so as to allay any fears of exploitation and/or abuse. If diplomatic protection was granted and mixed arbitration ensued it, was only between the host state and the state of the foreign investor. Therefore, the foreign investor was essentially denied a voice in the dispute settlement process despite the fact that it was his/her capital at stake. Moreover, leaving the dispute settlement between the host state and the foreign investor's state in circumstances where the capital involved was owned by a private third party unnecessarily created tensions between the two states involved in the dispute settlement process. Obviously, diplomatic protection was viewed by the host state as an encroachment on the integrity of the state's sovereignty.⁸⁵⁴

From the perspective of the foreign investor, litigation could not provide a fair and impartial method for the adjudication of disputes between him/her and the host state. In response to these complications, the World Bank in 1965 found a solution by the implementation of the Washington Convention. By virtue of the Washington Convention, foreign investors may have disputes with host states resolved by submitting those disputes to the International Centre for Settlement of Investment Disputes (ICSID). Even so, some residual difficulties remained.

852 United Nations Conference on Trade and Development, 'Dispute Settlement: International Commercial Arbitration' (2005) United Nations 43, 25.

853 United Nations, 26.

854 United Nations, 26.

BITs that began to take shape in the 1950s would therefore gain greater significance following the promulgation of the Washington Convention. In more recent times, the ICSID and UNCTAD have put together a number of draft or model BITs which are published on the internet. There are several thousand such treaties and a majority of those treaties have provisions which permit the foreign investor to commence arbitration against a host state. As seen Saudi Arabia has made provision for non-state actors who are foreign investors to arbitrate against the state. This is very important because any time a host states voluntarily subscribes to a BIT, the requirement for obtaining the State's consent to arbitrate is regarded as satisfied. The requirement for obtaining the host state's consent to arbitrate is provided for by Article 25 of the Washington Convention.⁸⁵⁵

The Washington Convention is entirely important to Saudi Arabia in terms of investor/state arbitration. It will be recalled that Saudi Arabia is a party to the Convention and is therefore bound by it. The BITs to which Saudi Arabia is a party reflects the fact that Saudi Arabia appreciates its obligations under the Washington Convention. However, a closer reading of the BITs, particularly the BIT of 2001 between Saudi Arabia and Austria indicate that Saudi Arabia or perhaps Austria or perhaps both, have successfully eluded their respective obligations to regard an award as final and binding by forbidding an appeal but permitting enforcement under the domestic laws.

This kind of provision in the BIT of 2001 appears to be disrespectful of the intent of Article 50(1) of the Washing Convention which specifically provides that in the event there is dispute relative to the construction of the award, the matter will be referred to the Secretary-General of the ICSID in writing and requesting clarification.⁸⁵⁶ Such a request will then be submitted to the Tribunal that issued the award and if that tribunal is not available or otherwise unable to take up the request, a new panel will be constituted. In any event the referral can ultimately result in the tribunal suspending the execution of the award until they can clarify the interpretation of the award.⁸⁵⁷

Another problem for the foreign investor in Saudi Arabia arises out of the fact that BITs typically call for enforcement in accordance with the domestic law. Subscription to the Washington Convention should have eliminated this difficulty since Article 52 of the

855 Convention on the Settlement of Investment Dispute between States and Nationals of Other States 1965, Art. 25 (hereinafter the Washington Convention).

856 Washington Convention, Art. 50(1).

857 Washington Convention Art. 50(2).

Washington Convention ensures that the award is not submitted to the national courts for annulment. In this regard, the Washington Convention's procedure for annulment or suspension of an award is different from the provisions for annulment under the New York Convention and the Model Law. By virtue of Article 52 of the Washington Convention, a petition for vacating or annulling an award is submitted to the Secretary-General of the ISCID and not the national courts.⁸⁵⁸

Additionally, the grounds for seeking annulment under the Washington Convention are decidedly more generous than those espoused by the New York Convention and the Model Law. While providing for annulment on each of the grounds extrapolated under both the Model Law and New York Convention, under the Washington Convention, an award can be vacated if, "there was corruption on the part of a member of the tribunal."⁸⁵⁹ Moreover, by virtue of Article 52 of the Washington Convention, an award may be annulled if "it has failed to state the reasons on which it is based."⁸⁶⁰

Confidence in the adjudication process is very important to the foreign investor. This means keeping the matter out of the control of the host state. Recognising this, the Washington Convention does not permit the tribunal that issued the award to sit on a new panel that is formed to determine whether or not there are sufficient grounds upon which the award can be vacated. In fact an entirely new panel is formed. In order to determine whether or not grounds exist for annulment, a new tribunal is formed and neither of the arbitrators who previously sat on the panel may sit on the new panel. The new panel if it deems it necessary will permit the arbitration process to be stayed until such time as a determination can be made relative to challenge the award. If the award is successfully challenged with the result that it is vacated, a new panel is established for the purpose of hearing the dispute upon request by any of the disputant.⁸⁶¹

Article 53 of the Washington Convention mandates that any award made:

Shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with

858 Washington Convention Art. 51.

859 Washington Convention Art. 52(c).

860 Ibid Art. 52(e).

861 Ibid Art. 52.

the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.⁸⁶²

The exceptions under the Convention as well as the power to stay enforcement are all provided for under Articles 51 and 52 of the Washington Convention. .

Article 54 is far more definitive although quite similar to the provisions for the enforcement and recognition of foreign awards under the New York Convention. Article 54 requires that contracting states recognise and enforce an award “within its territories as if it were a final judgment of a court in that State.”⁸⁶³ Federal states are at liberty to recognise and enforce a foreign award under the auspices of the Washington Convention through its federal courts and can require that all federal courts regard the award as one might a “final judgment of the courts of a constituent state.”⁸⁶⁴

If a state is a party to a BIT but is not a member of the Washington Convention, the foreign investor is deprived of the opportunity to use the ISCID for the purpose of resolving a dispute arising under the BIT. However, recourse for the resolution of the dispute may be had by virtue of the ICSID Additional Facility Rules 2006. The 2006 Rules allow the ISCID to be used if the parties agree to have the matter submitted to the ICSID for arbitration.⁸⁶⁵ In order to invoke the 2006 Rules for the purpose of submitting to arbitration under the ICSID, the parties must obtain the approval of the Secretary-General. This may be relevant to Saudi Arabia in the event it concludes a BIT with a non-contracting state. Since Saudi Arabia is a contracting state to the Washington Convention, approval should not be a problem.

As we have already seen, investment arbitration may be conducted by virtue of the use of the UNCITRAL Arbitration Rules or the rules applicable to any other arbitration institution. It is quite frequently the case that BITs contain a provision for the arbitration proceedings to be conducted pursuant to either the UNCITRAL Arbitration Rules or the ICSID Additional Facility

862 Washington Convention, Art. 53

863 Washington Convention Art. 54(1).

864 Washington Convention, Art 54(1).

865 *ICSID Additional Facility Rules 2006* Art. 4.

Rules.⁸⁶⁶ As we have already seen Saudi Arabia has opted for the use of UNCITRAL Arbitration Rules in its treaty with Austria of 2001.

8.6 Conclusion

International commercial arbitration is unquestionably a widely recognised and accepted method for the alternative resolution of disputes. The modernisation of international commercial arbitration is manifested by the international legal instruments that have been promulgated since the 1950s beginning with the New York Convention of 1958. The establishment of international commercial arbitration institutions are also symptomatic of the growth and development of international commercial arbitration. Many states worldwide are modernizing their respective arbitration laws so as to bring them into compliance with the international standards established by the main international instruments.

The main international instruments; the Model Law, the New York Convention and the Washington Convention are all designed to ensure that individual government control by virtue of the national courts is constrained. This is accomplished by limiting the extent to which courts may refuse to annul a foreign award and by setting out a simplified version of the process. Essentially, these international instruments control the extent to which courts may intervene in the arbitration process.

⁸⁶⁶United Nations Conference on Trade and Development, 'Dispute Settlement: International Commercial Arbitration' (2005) United Nations 1, 43, 26.

CHAPTER NINE

CONCLUSIONS AND RECOMMENDATIONS

9.0 Brief Background and Contemporary Context

The Kingdom of Saudi Arabia had applied to join the World Trade Organization in 1993 but was allowed accession to it only as late as 2005, after the Kingdom agreed to various conditions pertaining to trade liberalization and market access. However, Saudi Arabia had acceded to the New York Arbitration Convention on April 19, 1994. “Saudi Arabia has concluded bilateral market access negotiations with all interested WTO Members.... The WTO General Council formally concluded on 11 November 2005 negotiations with Saudi Arabia on the terms of the country’s membership to the WTO. Saudi Arabia became a full WTO Member on 11 December 2005.”⁸⁶⁷

Welcoming Saudi Arabia’s accession to the WTO, her director-general Pascal Lamy had observed, “After all, Saudi Arabia’s importance on the international stage cannot be underestimated. It is the world’s 13th largest merchandise exporter and the 23rd largest importer. It is also an important services trader. Today she joins us at the multilateral table. Saudi Arabia’s accession process started over a decade ago. In that process, it undertook important economic reforms, which it is fair to say have touched virtually all sectors of its economy.”⁸⁶⁸ As the Working Party report highlighted, the horizontal commitments made by Saudi Arabia include the assurance that “Future changes in Saudi tax code will not be less favourable to Foreign Service providers.”

It is significant that the first Trade Policy Review of Saudi Arabia conducted at the WTO did not indicate any particular conflict between the different legal systems involved or any need for any new efforts to reconcile the provisions of the New York Arbitration Convention with the different laws of the Shari’ah as they are practiced in Saudi Arabia. The concluding remarks by the chairperson emphasized the following:

This first Trade Policy Review of the Kingdom of Saudi Arabia has given us a better understanding of the evolution of its trade and related policies since its accession to the WTO in

867 World Trade Organization, Accessions Saudi Arabia, 2005
<http://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm >accessed 4 March 2013).

868 World Trade Organization, Welcoming address by the Director-General to the Kingdom of Saudi Arabia, 2005
<http://www.wto.org/english/news_e/news05_e/stat_lamy_11nov05_e.htm > accessed 4 March 2013).

2005, and enabled us collectively to measure the challenges it faces in maintaining its economic prosperity....

Saudi Arabia's sound economic policies and its outward-looking trade regime have enabled it to successfully weather the global crisis without backsliding on trade liberalization despite a deterioration of certain macroeconomic indicators in 2009. Saudi Arabia has been encouraged by Members to continue its structural reforms and development strategy, which together with high oil export earnings, have contributed to a positive economic performance during the period under review. Saudi Arabia is also taking steps to diversify the economy away from hydrocarbons and ensure intergenerational equity in the exploitation of its non-renewable resources through the improvement of education and health services and modernization of its infrastructure. A key challenge of Saudi Arabia's development process is to increase the participation of the private sector (local and foreign) in the economy and scale-back reliance on the public sector to absorb domestic labour.⁸⁶⁹

It seems pertinent that though the Kingdom of Saudi Arabia was allowed membership of the WTO only as late as 2005, she had applied to join it in the year 1993, while she had acceded to the New York Arbitration Convention in 1994. The international agencies and laws are by no means an integrated system, but even the motley institutions are interconnected, invariably profess similar worldviews with regard to globalization and openness, and often share similar objectives of promoting greater transparency, trade, and accountability. To that extent, in this researcher's opinion, Saudi Arabia's moves to become a part of the international trading organization and to accede to the arbitration convention indicate its willingness to subscribe to at least the essential fulcrum of international laws that may not be found in individual cases to be contrary to its public policy by its Board of Grievances.

Hence, it may be supposed that the Kingdom of Saudi Arabia perhaps discerns the advantages of integrating her economy with the global economy. Being part of the WTO and a signatory to the NYC doubtless brands her as one among the nations that encourage multilateral trade and subscribe to the basic set of international laws pertaining to arbitration. Such moves by the KSA are conducive to her increasing acceptance by the international community, and greater trust in Saudi Arabia's procedures for arbitration, and are likely to convert into rising trade and more foreign direct investment (FDI) into the Kingdom.

869 World Trade Organization, Trade Policy Review: Saudi Arabia, Kingdom Of, Concluding remarks by the Chairperson, January 25 and 27, 2012 < http://www.wto.org/english/tratop_e/tpr_e/tp356_crc_e.htm >accessed 8 March 2013).

The positive trade policy review of the WTO serves to highlight that Saudi Arabia has not come across as a particularly rigid member, though further “structural reforms” are encouraged. As this researcher recommends in the forthcoming sections, Saudi Arabia would do well to integrate her economy with the global economy, and strive to get further acceptance in the international community as a nation with sound policies that encourage – and more importantly, safeguard – trade, by having a rational and reliable system of arbitration in place.

9.1 Research Hypotheses, Questions, and Findings

The fundamental research question that the study had sought to answer was: To what extent has Saudi Arabia signified its commitment to implement the New York Convention, particularly in her application of Article V? The primary research question was accompanied by the following related sub-questions:

Are Shari’ah laws compatible with the New York Convention of 1958?

How do administrative restriction laws legislated by Saudi government impact on the New York Convention?

How have Saudi Arabian authorities been applying Article V in refusing enforcement of foreign awards?

The research served to amply prove the veracity of the following research hypotheses: the KSA laws (including Shari’ah laws) and policies are significantly inconsistent with the normative rules of international trade; and lack of political will in the KSA to enforce the 1958 New York Convention, has compromised Saudi Arabia’s commitment to implement this Convention. Besides, the research tended to yield the following broad answers to the key research questions. The Shari’ah laws are held to be inflexible and an absolute end in their own right in the KSA. The accession of Saudi Arabia to the NYC hinges on the extent to which the Kingdom is willing to accept her mandates and awards. The research highlighted that despite the KSA’s accession to the NYC, the Shari’ah remains of predominant importance in arbitration for the Kingdom.

Moreover, the laws legislated in the KSA tend to erode the authority of the NYC and undermine the value of her awards. To elaborate, the Saudi government prevents its entities from resorting to arbitration unless they have permission from the head of ministries council. Such administrative restrictions detract from KSA’s adherence to the spirit of the NYC, and are liable to be misused if awards are expected to go against Saudi entities. More specifically, the research amply revealed that the KSA has been employing the exceptional grounds allowed to it under

Article V (2) of the NYC in ways that would definitely appear to the other parties as biased, parochial, and expedient.

To recall an illustration that has been dealt with at length in Chapter 4 of the thesis (pp. 80-83), in a landmark case of 1997, the Saudi state agencies had intervened in a case between a Dutch firm and a Saudi public university, on the plea that the university lacked the capacity to resort to arbitration on the basis of the Council of Ministers Resolution No. 58 (1973). However, in a significant decision, the Saudi enforcing court (the 9th Administrative Panel), while affirming that a state body is prohibited under national law from resorting to arbitration, invoked the Shari'ah to stress the binding nature of the arbitration, recalling the Quranic injunction "O you who believe! Fulfil all obligations!" Hence, while the KSA government may try to employ administrative means to selectively escape awards, the Saudi court has been known to intervene in a manner that can further the larger goals of the NYC.

A research is an academic undertaking involving an objective assessment of given facts and an honest evaluation and analysis. Research into a topic that is as vast, complex, and labyrinthine as the subject of this research is bound to involve the scope for multiple interpretations. Hence, research into such social, economic, and legal issues as the present one cannot claim to deal with specific factors that lead to absolute conclusions. The research doubtless led to clarity, insights, and indications; but it devolves upon the individual researcher or reader how to analyze the given results as one might. Hence, the major limitation of this research stems from the sheer range and complexity of the issues that are sought to be studied. To elaborate, the research clearly highlighted that KSA is inclined to invoke the exceptional grounds under Article V (2) of the NYC. This fact could be interpreted by one as indicating that the Shari'ah prevents Saudi Arabia's compliance with the NYC, while another person might just as well conclude that Article V (2) has fulfilled an effective role in allowing virtual integration of disparate nations by providing them flexibility within the NYC. Hence, the fact may be given but its interpretation rests on the subjectivity of the researcher or the reader. Another practical limitation pertains to the lack of transparency that attends most KSA arbitration. Hence, adequate information about KSA cases was difficult to access, and where available, access to the rationale for the arbitration proceedings remained largely a matter of conjecture.

Despite the apparent efforts by Saudi Arabia to streamline its laws and policies to facilitate international trade, there remains several incongruence between the Shari'ah law and key aspects of the laws governing international trade, particularly the laxity enabled by Article V of the 1958 New York Convention. The main objective of the thesis has been to examine and evaluate the provisions of Article V of the 1958 New York Arbitration Convention in the light of both the relevant theoretical discussions as well as various practical interpretations and applications of Article V by the relevant courts of the signatory states.

The New York Arbitration Convention has had a long life of its application, ranging from over five decades in many of the signatory states to the nearly two decades of its applicability in Saudi Arabia. The fundamental objective of the Convention is to render foreign awards simpler, less susceptible to challenges based on different national laws, and thereby enforceable worldwide more extensively and easily. The Convention significantly cites certain exceptional grounds on which enforcement of foreign award may be declined in its Article V, though no refusal is allowed beyond the confines of Article V.

The research question of the thesis revolved around the examination, evaluation and the interpretation and application of Article V of the New York Arbitration Convention in Saudi Arabia according to the Shari'ah rules, Saudi arbitration laws and the practices of Saudi courts. However, Saudi Arabia's apparent unreliable attitude towards the enforcement of foreign awards is based largely upon the perceived conflict between the New York Arbitration Convention and the spirit of the Shari'ah rules that are followed in Saudi Arabia. Since Article V (2) (b) of the Convention states that the recognition and enforcement of an award may be refused by a competent authority on the ground of its being contrary to the public policy of the country in question, it implies that any foreign awards deemed to be contrary to Islamic principles and to flout the Shari'ah will not be enforced in Saudi Arabia.

The thesis had sought to examine in particular the enforcement of foreign awards in Saudi Arabia, with especial investigation into the grounds for refusal as provided for in Article V of the New York Arbitration Convention. The thesis also involved a study of how Saudi Arabia upholds sensitivity to the mandates of Shari'ah laws and conducts arbitration under the aegis of international conventions. The research indicated that enforcement of foreign awards in Saudi Arabia is difficult, even after Saudi Arabia's adherence to the New York Arbitration Convention in 1994 and accession to WTO in 2005. The peculiar nature of the Shari'ah laws renders compliance by Saudi Arabia to international arbitration awards a complicated matter.

Article V (2) (b) of the New York Convention has played the role of providing a safe harbour to Saudi Arabia, allowing it to refuse to recognize arbitration awards that it deems contrary to public policy. Article V (b) (2) allows Saudi Arabia to embrace the international community and its rules for international dispute resolution and enforcement, without rejecting its own history and public policy. The research highlighted that the exceptions provided under Article V of the New York Arbitration Convention may be perceived as limiting the enforceability of awards, and thereby, undermining the effectiveness of the provisions of the Convention. The elements of uncertainty introduced by Article V also have an unnerving impact on the other signatory nations to the Convention.

It is also pertinent that though the research focused on Saudi Arabia, there are several other nations that also take recourse to various sections of Article V to refuse arbitration awards.

Nations like Egypt, Syria, and Oman -- and members of the Muslim world in particular -- want to be affected by Shari'ah laws, since the Shari'ah is a religious code revered across national boundaries by Muslims. Indeed, Oman makes a refusal to recognize and enforce an award the default unless there is a positive determination that the award complies with the nation's public order, as per Article 58(2) b of Oman's Law of Arbitration in Civil and Commercial Disputes of July 1, 1997 (Fry, 2009).

The following excerpt from a court ruling highlights the wider prevalence and ramifications of the topic under review.

The Court noted that according to Articles V(1)(c) and V(2)(b) NYC, Egyptian Courts should reject the enforcement of foreign awards where they contravene public policy in Egypt and not where they only contravene mandatory legal rules. It held that where only part of an award contravenes public policy, Egyptian Courts should enforce those parts of the award, which are not in contravention with public policy. It also stated that Egyptian Courts should refrain from reviewing the merits of the award. The Court found that the Egyptian legal rule allowing a maximum interest rate of 5% in commercial matters constituted a rule of public policy and granted enforcement to the order for payment of interest after limiting the interest rate to the 5% maximum.⁸⁷⁰

Indeed, the thesis has discussed the notable case of *Laminoirs-Cableries de Lens, S. A. v Southwire Co.* (p. 75) wherein the losing party had cited public policy in the United States to escape the enforcement of the award. The research underscored the porosity that characterizes the NYC, and which invites frequent use of the exceptions provided under Article V (2) by the KSA, as illustrated in umpteen cases, including *Northrop Corporation v Triad International Marketing*.

9.2 Recommendations Emerging from the Thesis

The primary recommendation that emerges from this thesis is that the cause of international arbitration will be significantly furthered if there are clear mandates acceptable to all the signatory nations regarding the enforceability of its awards. With regard to the public

⁸⁷⁰ New York Convention Guide, Egypt / 21 May 1990 / Court of Cassation / Harbottle Company Limited v. Egypt for Foreign Trade Company / 815/52
http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=967 accessed 10 March 2013.

policy exception provided under Article V 2 (b) of the New York Arbitration Convention, it would seem simplistic to suggest that it be deleted altogether, and the implementation of awards be made mandatory for all member nations. The importance of arbitration has been stressed by Lucius Eastman, the President of the American Arbitration Association from 1927-1933, and 1935-1937, as follows:

I think voluntary arbitration is to all of us less of a procedure than it is a symbol of the peace on earth and goodwill toward men which exists in the hearts of all Americans in this great struggle for freedom which now encompasses the world. Many of us believe that in arbitration, we have a concept that stands out in opposition to war. We believe that a science of arbitration can be equally well organized and intelligently administered and that under the banner of arbitration the scattered forces of those who strive for peace can be united. To be effective, the concept of voluntary arbitration must be vitalized. We must organize it scientifically. We must through education and actual performance bring its potential values home to every American and through them to the world of which they is becoming so large a part.⁸⁷¹

However, as the last sentence of the above quote shows, international awards, and global trade are not just economic issues, but also involve matters of education and values, in other words, of public policy. Therefore, it seems presumptuous to virtually attempt to dictate values to entire nations and people under the guise of smoother arbitrations or greater international trade. The global agencies ought to continue the process of integration of various economies in a manner that inspires their trust and without offending public sensitivities.

However, Kristin T. Roy makes a valid suggestion, which this researcher might echo, of perhaps amending Article V (2) (b) of the New York Arbitration Convention slightly to provide that a signatory, upon finding a foreign award to be contrary to its public policy, could seek nullification of the award only through a third and neutral body, such as the American Arbitration Association (AAA). Such a measure would add the vital elements of objectivity and impartiality in a nation's invoking the provisions of Article V (2) (b) to refuse an award.

The recommendations that from this thesis includes arriving at a healthy balance between the three factors of nationalism, internationalism, and objectivity, as depicted in the following figure.

871 Kristin Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 (3) Fordham International Law Journal, Volume 957, 958 < <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1425&context=ilj> > accessed 11 March 2013.

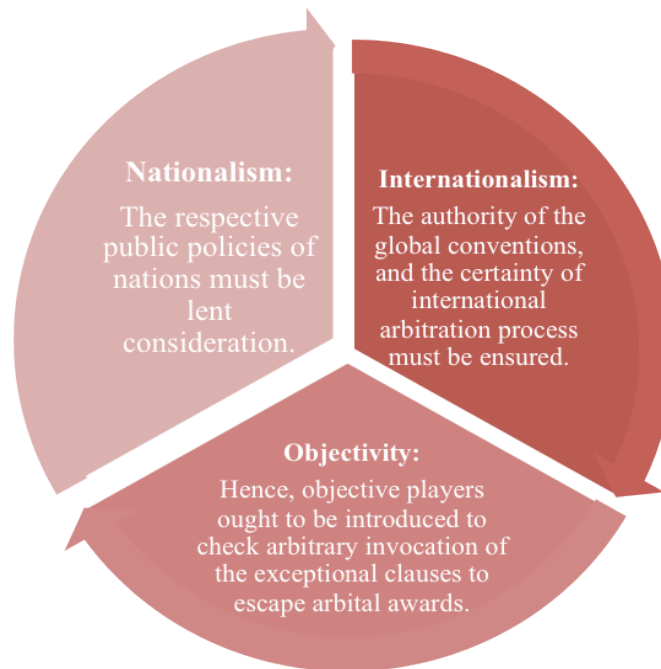


Figure 1: Balancing Nationalism, Internationalism and Objectivity

However, the relevance and necessity of the various provisions of Article V of the New York Arbitration Convention cannot be viewed only through the prism of Saudi Arabia, since there are several other member-nations that also routinely invoke the public policy clause to reject awards. Hence, a holistic perception on the risks or merits of Article V of the Convention would better address the issue of whether Article V ought to be modified or deleted altogether, and the Saudi Arabian experience alone cannot suffice to answer this, since it remains only one of 149 member states of the Convention.

Hence, the primary recommendation that emerges from this thesis with regard to the NYC, and particularly its Article V (2) is to perhaps retain certain exceptional grounds for the rejection of the enforcement of awards, but to provide clearer and more stringent guidelines in the matter. The present porosity is gleefully exploited by several nations, both Islamic and non-Islamic, and the KSA has perhaps been no guiltier than other nations of wanting to both hunt with the hounds and run with the hares, as it were, by both claiming to support international arbitration but brazenly escaping its tenets by artfully wielding its enabling provisions.

Another key recommendation that may be stated for the NYC is to include an element of objectivity in its Article V (2) by involving independent appraisal and evaluation of the key grounds under which the different member-states seek to escape the awards. Hence, Article V (2) allows disparate nations to remain under the unifying umbrella of an international convention, but its provisions may be modified so that the Convention becomes more competent to realize the common objectives of all its members, including the KSA.

The institution of an objective and independent agency to supervise the invoking of Article V (2) by the member-nations ought to be a relatively simple matter, and would be in the interest of all the members. Such an independent agency may be entrusted with the task of evaluating every nation's use of Article V (2) and ensuring that it has been employed with reason and because it was necessary. Membership of such an overseeing agency may be drawn from the NYC members, and this move may be welcomed by all the members, including KSA, since it would prevent an arbitrary and an unfair recourse to Article V (2) by all the members.

The Kingdom of Saudi Arabia would do well to continue to streamline its laws as harmoniously as it can with the New York Arbitration Convention. This would merely be a continuation of the process of integration with the global economy that was formally agreed upon, with Saudi Arabia acceding to the WTO in 2005. Such integrative measures will further serve to promote the multilateral trade that the Kingdom is able to engage in and benefit from. If the KSA pursues its present policies that are characterized by exploiting the intrinsic porosity of Article V (2) of the NYC, as well as unduly seeking to secure the interests of Saudi nationals, the international community will be discouraged from engaging in free and generous trade with the KSA, largely for fear of arbitrary and injustice, and this will eventually rebound upon the Saudi economy.

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Appendix I: The Saudi Arbitration Law of 1983

Article 1:

It may be agreed to resort to arbitration with regard to a specific, existing dispute. It may also be agreed beforehand to resort to arbitration in any dispute that may arise as a result of the execution of a specific contract.

Article 2:

Arbitration shall not be accepted in matters wherein conciliation is not permitted. Agreement to resort to arbitration shall not be deemed valid except by those who have the legal capacity to act.

Article 3:

Government bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This provision may be amended by a Resolution of the Council of Ministers.

Article 4:

An arbitrator is required to be experienced and of good conduct and reputation and full legal capacity. In case of multiple arbitrators, they shall be odd in number.

Article 5:

Parties to a dispute shall file the arbitration instrument with the authority originally competent to hear the dispute. The said instrument shall be signed by the parties or their officially delegated attorneys-in-fact and by the arbitrators, and it shall state the subject matter of the dispute, the names of the parties, names of the arbitrators and their consent to have the dispute submitted to arbitration. Copies of the documents relevant to the dispute shall be attached.

Article 6:

The authority originally competent to hear the dispute shall record applications of arbitration submitted to it and shall issue a decision approving the arbitration instrument.

Article 7:

Where parties agree to arbitration before the dispute arises, or where a decision has been issued sanctioning the arbitration instrument in a specific existing dispute, the subject matter of the dispute may only be heard in accordance with the provisions of this Law.

Article 8:

The clerk of the authority originally competent to hear the dispute shall be in charge of all notifications and notices provided for in this Law.

Article 9:

The dispute shall be decided on the date specified in the arbitration instrument unless it is agreed to extend it. If parties do not fix in the arbitration instrument a time limit for decision, arbitrators shall issue their award within ninety days from date of the decision approving the arbitration instrument; otherwise, any litigant who so desires may submit the matter to the authority originally competent to hear the dispute, which may decide either to hear the subject matter or extend the time limit for a further period.

Article 10:

Where parties fail to appoint the arbitrators or one party abstains from appointing the arbitrator(s) who are to be chosen solely by him, or where one arbitrator or more refuses to work, or withdraws, or a contingency arises which prevents him from undertaking the arbitration or if he is dismissed and there is no special stipulation by the parties, the authority originally competent to hear the dispute shall appoint the arbitrator(s) as necessary, upon request of the party interested in expediting the arbitration, in the presence of the other party or in his absence, after being summoned to a session to be held for this purpose. The number of arbitrators appointed shall be equal or complementary to the number agreed upon among the parties. The decision in this respect shall be final.

Article 11:

The arbitrator may not be dismissed except by the consent of the parties. The arbitrator so dismissed may claim compensation, if he had already commenced work prior to dismissal, and as long as the dismissal is not attributable to him. An arbitrator may not be challenged from judgment save for reasons that occur or appear after filing the arbitration instrument.

Article 12:

A request to disqualify the arbitrator may be made for the same reasons for which a judge may be disqualified. The request for disqualification shall be submitted to the authority originally

competent to hear the dispute within five days from the day a party is notified of the appointment of the arbitrator or from the day the reasons for disqualification appear or occur. A ruling on the disqualification request shall be made at a hearing specially convened for this purpose to which the parties and the arbitrator whose disqualification is requested are summoned.

Article 13:

The arbitration shall not expire with the death of one of the parties, but the time for the award shall be extended by thirty days unless the arbitrators decide to extend for a longer period.

Article 14:

Where an arbitrator is appointed in place of a dismissed or a withdrawing arbitrator, the date fixed for the award shall be extended by thirty days.

Article 15:

Arbitrators may, by the same majority required for making the award and by a decision giving the grounds for so doing, extend the period fixed for an award due to circumstances pertaining to the subject matter of the dispute.

Article 16:

The award of the arbitrators shall be made by majority opinion, and where they are authorized to settle, the award shall be issued unanimously.

Article 17:

The award document shall contain in particular the arbitration instrument, a summary of statements of the parties and supporting documents, the reasons for the award, its text, date of issue and the signature of the arbitrators. Where one or more arbitrators refuse to sign the award, this shall be recorded in the document of the award.

Article 18:

All awards passed by the arbitrators, even though issued under an investigation procedure, shall be filed within five days with the authority originally competent to hear the dispute and the parties notified with copies thereof. Parties may submit their objections against what is issued by arbitrators to the authority with which the award is filed, within fifteen days from the date they are notified of the arbitrators' awards; otherwise such awards shall be final.

Article 19:

Where one or more of the parties submit an objection to the award of the arbitrators within the period provided for in the preceding Article, the authority originally competent to hear the dispute shall hear the objection and decide either to reject it and issue an order for the execution of the award, or accept the objection and decide thereon.

Article 20:

The award of the arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order may be issued at the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in the *Shari'ah* .

Article 21:

The award made by the arbitrators, after issuance of the order of execution in accordance with the preceding Article, shall have the same force as a judgment made by the authority which issued the execution order.

Article 22:

Arbitrators' fees shall be determined by agreement of parties. Sums not paid to arbitrators shall be deposited with the authority originally competent to hear the dispute within five days after the approval of the arbitration document and shall be paid within one week from the date of the issuance of the order for the enforcement of the award.

Article 23:

Where no prior agreement exists as regards arbitrators' fees and a dispute arises, the authority originally competent to hear the dispute shall decide the matter, and its judgment shall be final.

Article 24:

Resolutions necessary for the implementation of this Law shall be issued by the President of the Council of Ministers pursuant to a recommendation by the Minister of Justice after agreement with the Minister of Commerce and the Chairman of the Board of Grievances.

Article 25:

This Law shall be published in the Official Gazette and shall be effective after thirty days from the publication thereof.

Appendix II: The NYC convention of 1958

Article I

1. This Convention shall apply to the recognition and enforcement of awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term " awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent bodies to which the parties have submitted.

3. When signing, ratifying or acceding to the Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognise 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.

2. The term "agreement in writing" shall include an clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognise awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon, under the conditions laid down in the following articles. there shall not be imposed the substantially more onerous conditions or higher fees or charges on the recognition or enforcement of awards to

which this Convention applies than are imposed on the recognition or enforcement of domestic awards.

Article IV

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

- (a) The duly authenticated original award or a duly certified copy thereof.
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity #, or the said agreement is not valid under the law to which the parties have subjected it.

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings.

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) The composition of the authority or the 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

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

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

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

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

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

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

Article VIII

1. This Convention shall be open 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention of such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following: (a) Signatures and ratifications in accordance with article VIII; (b) Accessions in accordance with article IX; (c) Declarations and notifications under articles I, X, and XI; (d) The date upon which this convention enters into force in accordance with article XII; (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian, and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.