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An Analytical Study Of Recognition And Enforcement Of Foreign Arbitral Awards In The GCC States

By

Abdullah Mubarak Aldelmany Alenezi

LLB, LLM

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UK

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ABSTRACT

This study is concerned with the recognition and enforcement of foreign arbitral awards under the relevant regimes in the GCC states, both local law and international conventions. The easy enforceability of arbitral awards is considered one of the main factors in the success of international commercial arbitration. Thus this thesis not only attempts a comprehensive analysis of the requirements of and procedures for recognition and enforcement of foreign awards in the GCC States, but also evaluates whether the GCC's laws and practices comply with best international practice standards, especially as embodied in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The thesis comprises of seven chapters. The first chapter examines the legal framework of the GCC States, and provides a brief history of the rules governing arbitration and the recognition and enforcement of foreign arbitral awards. Chapter two looks at general principles regarding recognition and enforcement of foreign arbitral awards. Chapter three covers jurisdictional elements in the recognition and enforcement of arbitral awards in the GCC States. Chapter four examines the procedural steps demanded by each state for the enforcement of an award, looking particularly at the impact of relevant international conventions on these issues. Chapter five deals with the evidence which must be tendered and the conditions that must be satisfied in order to obtain the recognition and enforcement of foreign arbitral awards in the GCC States. Chapter six examines the grounds on which a respondent may apply to dismiss an application for recognition and enforcement of a foreign arbitral award. Chapter seven then deals with the grounds on which a foreign arbitral award must be refused enforcement. The concluding chapter summarises the problems thrown up by the study, and suggests a common way forward for the legal systems of the states of the Arabian Gulf in dealing with these issues.

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Abbreviation

ADRLJ	The Arbitration and Dispute Law Journal
Am Bus L J	American Business Law Journal
Am J Comp L	American Journal of Comparative Law
Am J Intl Arb	American Journal of International Arbitration
Am Rev Intl Arb	American Review of International Arbitration
Arab L Q	Arab Law Quarterly
Arb Intl	Arbitration International
Boston Univ Intl L J	Boston University International Law Journal
Colum J Transnat'l L	Columbia Journal of Transnational Law
Croatian Arb YB	Croatian Arbitration Yearbook
Disp Resol J	Dispute Resolution Journal
ECOSOC	The United Nations Economic and Social Council
Fordham Intl L J	Fordham International Law Journal
GCC	The Cooperation Council for the Arab States of the Gulf
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	The International centre for Settlement of Investment Dispute
ILA	International Law Association
Intl Arb L R	International Arbitration Law Review
Intl Comp & Comm L Rev	International Company and Commercial Law Review
Intl Lawy	The International Lawyer
IRSAL of 1985	The Implementation Rules of Saudi Arbitration of 1985
J Intl Arb	Journal of International Arbitration

Introduction

Background

In May 1981 Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates established an economic and political policy-coordinating organisation called the Cooperation Council for the Arab States of the Gulf (GCC). The legal systems of the nations that comprise the GCC have undergone dramatic and progressive change and development in the past 25 years, and continue to do so. This has been very beneficial to foreign investors and businessmen, decreasing risk and unpredictability and increasing conventional legal protections.¹ The GCC aims to effect coordination, integration and inter-connection between Member States in all fields, strengthening ties between their peoples, formulating similar regulation in fields such as economy, finance, trade, customs, tourism, legislation and administration, as well as fostering scientific and technical progress in industry, mining, agriculture, water and animal resources, establishing scientific research centres, setting up joint ventures, and encouraging cooperation of the private sector.²

The GCC acknowledges key concerns of foreign companies trading in the area. Therefore, there has been growing cooperation among members on issues such as intra-GCC investments, standards setting, and intellectual property protection. It established a Customs Union in March 2005, while Member States have sought to lessen differences between their regulations and laws, paving the way towards total unification. In 1995, the GCC approved an agreement on the execution of judgements, appointments of attorneys, and serving of legal notices. In 1996 an Instrument for a Unified Personal Law for the GCC was ratified. Instruments for a Unified Civil Law and a Unified Penal Code were ratified in 1997, while unification occurred in relation to criminal procedure in 2000, and in relation civil evidence in 2001.³

¹ For an overview of legal structures in the GCC countries see www.legal500.com

² Article 4 of the GCC Charter.

³ *Ibid.*

Moreover, in order to strengthen the arbitration system and the recognition and enforcement of arbitral awards, the GCC established the GCC Commercial Arbitration Centre (CAC) in 1995 in Bahrain Gulf Co-operation Council Commercial Arbitration Centre (GCC Centre) and promulgated a Charter and Arbitral Rules of Procedure.⁴ The CAC provides a mechanism for the commercial dispute settlement between parties within the GCC and between GCC parties and parties from elsewhere. In addition, all GCC States have been ratified the Convention on Enforcement of Judgment Delegations and Judicial Notices in the GCC states

Aims and Objectives of Thesis

Since the discovery of oil in most the GCC States in the 1930s, there has been a massive increase in trade and commerce between these states and the rest of the world, especially the West, thus generating a wealth of international contracts. These contracts generally contain arbitration clauses, as both governments and the private sector consider that the arbitration is one of the most valued methods of conflict resolution in international commerce in the GCC States.

An arbitration does not necessarily end with the award. Although most of arbitral awards are voluntarily complied with by the parties involved, sometimes the successful party must seek judicial assistance to enjoy the relief granted by the award. If the losing party fails to comply voluntarily with the award, then the winning party will be obliged to seek to enforce the award in a country where assets of the losing party are located. In fact, the easy enforceability of arbitral awards is considered one of the main factors in the success of international commercial arbitration. If an arbitral award had no effective enforcement mechanism, the value of international commercial arbitration would be significantly diminished.

Determining whether or not foreign arbitral awards are generally enforceable in will partly depend on the role and the attitude of the courts in the state(s) where enforcement is sought, but above all on the adequacy of the legal framework governing the issue. The main objectives of this study are therefore, (i) to provide a detailed and comprehensive account of how foreign arbitral awards are recognised and enforced in

⁴ See www.gcc-sg.org

the GCC States; (ii) to identify and analyse areas of controversy; (iii) to point out the weaknesses of the GCC laws on the issue; (iv) to examine the potential attitude of the GCC Courts regarding issues of recognition and enforcement not so far raised; (v) to cast light on unexplored corners, highlight unanticipated problems, and suggest ways forward for the legal system(s) in question.

Currently, all GCC States are signatories to the key treaty governing the reciprocal enforcement of arbitral awards, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention. Its purpose is to promote arbitration and to facilitate the recognition and enforcement of arbitral awards. It has been ratified by 145 states.⁵ Therefore, its provisions will be central to the thesis. In addition, the GCC States have ratified various other conventions, while their national laws also contain provisions governing the enforcement of foreign arbitral awards.

The Importance of the Thesis

GCC States will play an increasing role in the world because they possess huge oil reserves, while on the other hand are still developing countries that need various products from industrialised countries. In an increasingly economically interdependent world, the importance of an effective legal framework for the facilitation of international trade and investment is widely acknowledged. Because international trade has a strong relation with arbitration, this should mean that arbitration will grow steadily in these States. The enforcement of foreign arbitral awards is in many respects linked with the main arbitration process, especially the issue of the grounds for refusing enforcement. Therefore, this thesis will inform and enrich the GCC States system with new ideas and legal perspectives. In turn the clarification and development of an effective arbitration law will help win the confidence of foreign companies and encourage foreign investment. Moreover, the examination of the jurisprudence of the New York Convention will assist courts considering whether to enforce foreign awards

⁵ There were 145 member states on 9 August 2010. See United Nations, 'United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Law', <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> at 9 August 2010.

in the GCC states. Finally, this is the first comprehensive study of recognition and enforcement in GCC States, and thus the thesis will provide a valuable resource.

Methodology of the Thesis

This study is library based, drawing on the libraries of the Universities of Stirling and of Glasgow, as well as the National Library of Scotland. Also accessed are electronic databases such as Kluwer Arbitration, UNCITRAL Web Site, Westlaw, LexisNexis and Hein Online etc for cases, articles, legislation, the *travaux preparatoires* of the New York Convention, the working documents of UNCITRAL, reports and official information. Inter-library loan facilities were also regularly used.

The research method is mainly analytical and comparative. The pertinent provisions of the relevant regimes governing the issue of recognition and enforcement of foreign arbitral awards in the GCC States are analysed. The process of recognition and enforcement of foreign arbitral awards is mainly subject not only to relevant international conventions but other provisions such as the law governing the arbitration agreement or the *lex fori*. It is therefore necessary to determine the effects of the various provisions. In addition, some of the relevant regimes, especially the New York Convention, contain ambiguous or incomplete provisions, so it is necessary to analyse controversial issues, and to consider the opinions of scholars and judges in order to suggest the best way forward.

It is also useful to employ the comparative research method whereby the approach to a particular issue in two or more legal systems is considered. The approach of GCC States and various western countries is contrasted to discover similarities, dissimilarities, strengths and weakness, in order to determine the optimal approach.

Given the researcher's practical experience, the study will highlight some hypothetical questions which might arise during the process of recognition and enforcement.

Scope of thesis

This concentrates on the recognition and enforcement of foreign arbitral awards in the GCC States under the various regimes governing this question. However, because some aspects of recognition and enforcement are subject to the national laws of the place of enforcement it is also necessary to study national GCC arbitration and other laws. The thesis deals with non-GCC States laws only for illustrative and comparative purposes. The same is true of foreign court decisions on aspects of the New York Convention which are unclear. Sometimes a prevailing view will emerge, which suggests the correct interpretation of the convention, pointing the way for GCC courts.

The Structure of the Thesis

This thesis consists of seven chapters. The first attempts an outline of the legal systems of the GCC states, followed by a brief history of the rules governing arbitration, recognition and enforcement of foreign arbitral awards and the regimes that are currently in force, thus providing a general idea of the GCC's legal systems.

Chapter II looks at general principles regarding recognition and enforcement of foreign arbitral awards. It examines the meanings and aims of the terms 'recognition' and 'enforcement', and assesses whether they are separable or inseparable. It also explores the definition of the term "award," and which type of an award will be recognised and enforced under the relevant regimes governing the enforcement and recognition of foreign arbitral awards. Finally, it deals with questions relating to where an award is made, and when an award is are considered to be a foreign award.

Chapter III deals with the basic elements of jurisdiction in the recognition and enforcement of arbitral awards in the GCC States, as well as issues relating to the court's discretion to grant recognition and enforcement. First, it briefly determines the competent authority dealing with recognition and enforcement. Secondly, it examines and analyses the role of that authority in dealing with enforcement. Thirdly, it considers how the decision of that authority may be challenged. Fourthly, it looks at time limits relating to recognition and enforcement.

Chapter IV is concerned with significant questions relating to the rules of procedure. First, it will examine the question of which provisions govern the rules of procedure - whether national law or otherwise. Secondly, it will examine of the modes of procedure that have been adopted in the GCC States, and the procedural form that ought to be followed by the winning party in order to enforce a foreign arbitral award. Thirdly, it will determine the procedural rules to be followed by an applicant for enforcement. Finally, it will seek to establish whether the existing procedural rules are adequate, and capable of ensuring enforcement of all categories of foreign arbitral awards in accordance with the conventions that apply in the GCC States.

Chapter V will deal the evidence which must be tendered and the conditions that must be satisfied in order to obtain the recognition and enforcement of foreign arbitral awards in the GCC States. It will first identify and examine the compulsory evidence that should be tendered, and will then discuss the evidence that is required under conventions that apply in the GCC States. Finally, it will discuss the conditions governing the recognition and enforcement of foreign arbitral awards set out under GCC laws.

Chapter VI examines in depth the grounds on which a respondent may apply to dismiss an application for recognition and enforcement of a foreign arbitral award.

Chapter VII then deals with the grounds on which a foreign arbitral award must be refused enforcement. The first section deal with ground of ‘non-arbitrability’ of the dispute under the law of the enforcing, while the second concerns the ‘public policy’ of the that state.

Chapter One

An Overview of the Legal System of GCC Countries

1.1 Introduction

When an arbitral award is rendered, if it appears the losing party does not intend to comply with it, the winning party must consider how the award might be enforced. In international arbitrations this might involve considering in which country enforcement is to be sought, if enforcement is not feasible in the country where the award was made. Practically, enforcement would be sought in country where the losing party has property available to meet the award. If there is more than one such country, the question is how likely the courts of a given country are to enforce a foreign arbitral award. Thus those who might wish to enforce a foreign arbitral award in any of the GCC States may wish to know how its legal systems operate. Accordingly, this chapter will attempt to give an outline of the legal systems of the GCC states, followed by a brief history of the rules governing arbitration, particularly the recognition and enforcement of foreign arbitral awards, concluding by examining the regimes that are currently in force. These issues will be considered state by state.

1.2 Kuwait

Kuwait is an absolute monarchy, which has been ruled by the Al Sabah family since Kuwaitis appointed a Sabah ruler in 1752.⁶ During most of the 19th century control of Kuwait was contested between the Ottoman and British empires.⁷ Then in 1889, the Sheikh of Kuwait signed a protection treaty with Britain, and the country remained a British protectorate until gaining independence in 1961.⁸ Since independence, Kuwait has attempted to develop an integrated modern legal system. An important step in this

⁶ Abdul Reda, A., 'A summary of the legal and judicial system in the state of Kuwait' (1991) 6 *Arab Law Quarterly* 267.

⁷ *Ibid.*

⁸ *Ibid.*

regard was taken by Sheikh Abdullah al-Salem al Sabah (Kuwaiti ruler 1950-1965) who changed the form of government to a constitutional monarchy.⁹

The primary sources of Kuwaiti law are:

- I. Shari'a: according to Kuwaiti constitution, 'the Islamic Shari'a shall be a main source of legislation';¹⁰
- II. Constitutional law: in accordance with the principle of eminence of constitution, all authorities must respect provisions of the constitution in all their acts and practices; thus all legislative acts must be in harmony with constitutional principles;¹¹
- III. Legislation: the right to promulgate the law is exercised by the National Assembly.¹²

The legal system in Kuwaiti law is basically civilian, much influenced by Egyptian law, which in turn is mainly derived from French law. This is clear, as the Kuwait Civil Code lists the sources which judges should follow in rendering judgements.¹³ These formal sources are: (i) provisions of specific legislation;¹⁴ (ii) the texts of the Civil Code; (iii) Islamic jurisprudence; (iv) custom.¹⁵ The code does not restrict the courts to any particular Muslim jurisprudence, however, and the judges are only bound to apply that Muslim jurisprudence which is most in accord with the situation and the interests of the country.¹⁶ It has been noted that use of this phrase ("which is most in accord with the situation and the interests of the country") gives the courts the flexibility needed to apply the opinion that is most suitable to modern transactions.

⁹ For more information see Amin, S. H., *Middle East Legal Systems*, (Royton Limited, 1985), p 274- 277.

¹⁰ See Constitution of the State of Kuwait Article 2.

¹¹ Abdulaal, M., *Constitutional law*, (Dar Alnahdah Al Arabia 1992), p.98-105.

¹² Articles 65, 66, 71, 79 and 109 of the Kuwaiti constitution.

¹³ In addition, this is confirmed by, for example, the Commercial Code, where Article 96 provides that "except as stipulated in this book, the provisions stipulated in the Civil Code shall apply to commercial obligations and contacts."

¹⁴ See Decree law No. 67 of 1980 promulgating the Civil Code Article 3 which provides that "the provisions of the Civil Code shall not be prejudicial to the provisions of specific legislation."

¹⁵ See Civil Code Article 1 As amended by Decree Law No. 15 of 1996.

¹⁶ *Ibid.*

1.2.1 Constitution of Kuwait

The Constitution of Kuwait was issued on 11 November 1962 after being drafted by a constituent council.¹⁷ It is based on principles of democracy,¹⁸ public freedom¹⁹ and equality before the law.²⁰ The Constitution came into force on January 29, 1963, when the first National Assembly convened, and has never been amended. Thus, it is the oldest document governing constitutional law in the GCC.

The Constitution comprises 183 articles divided into five parts: the State and the system of government; Fundamental constituents of the Kuwaiti society; Public rights and duties; Powers; General and transitional provisions.

1.2.2 Components of the System of Government

The system of government is based on the principle of the separation of Constitutionality of Powers, as Article 50 provides that: “the system of Government is based on the principle of separation of powers functioning in co-operation with each other in accordance with the provisions of the Constitution. None of these powers may relinquish all or part of its competence specified in this Constitution.”

There follows a brief examination of these authorities, which consist of the National Assembly, the executive authority and the judicial authority.

1.2.2.1.1 National Assembly²¹

The National Assembly of Kuwait²² deals with legislation and oversees the executive regarding the implementation of laws.

Laws are not issued unless approved by the National Assembly and ratified by the Emir.²³ The Assembly consists of 50 members elected by direct, secret, general election.

¹⁷ Abdul Reda, A., ‘A summary of the legal and judicial system in the state of Kuwait’ p 272.

¹⁸ Article 6 of Kuwait’s constitution provides that “The system of government in Kuwait shall be democratic, under which sovereignty is resident in the people, the source of all powers. Sovereignty shall be exercised in the manner specified in this Constitution.”

¹⁹ *Ibid.* Article 7 provides “Justice, Liberty and equality are the pillars of society; co-operation and mutual help are the firmest bonds between citizens.”

²⁰ *Ibid.* Article 8 provides “The state safeguards the pillars of society and ensures security, tranquillity and equal opportunities for citizens”.

²¹ The first attempt to create a democratic institution in Kuwait was the elected Legislative Assembly formed in 1938 with 14 members.

²² The National Assembly of Kuwait, Known as the *Majlis Al- Umma* (House of the Nation).

The Ministers, who are not elected, are members of the National Assembly by virtue of their office.²⁴ Members of the National Assembly are free to express any views or opinions in the Assembly or in its committees.²⁵ The Assembly is charged with discussion and ratification of the public budgets and the final annual accounts. The Assembly also oversees the government through various means, such as submitting questions, the establishment of commissions of inquiry and interrogation of ministers. This supervision can lead to the withholding of a vote of confidence for a minister and lead to his resignation.²⁶

1.2.2.1.2 Government

Executive power in Kuwait is vested in the Council of Ministers which consists of the Prime Minister and Ministers. The Emir appoints the Prime Minister and relieves him of office; he also appoints Ministers and relieves them of office upon the recommendation of the Prime Minister. Ministers are appointed from the members of the National Assembly and from elsewhere. No more than one-third of Ministers shall be drawn from members of the National Assembly.²⁷

The Council of Ministers has control over state departments, formulates the general policy of the government, pursues its execution and supervises the conduct of work in Government departments.²⁸ The Prime Minister and his ministers are responsible to the Emir and the National Assembly.²⁹

1.2.2.1.3 The Judiciary

The constitution of Kuwait in Article 163 provides for the administration of justice. Judges are not answerable to any higher authority, and no interference whatsoever is allowed with the conduct of justice. The law guarantees the independence of the

²³ Constitution of Kuwait Article 79

²⁴ *Ibid.* Article 80.

²⁵ *Ibid.* Article 110.

²⁶ *Ibid.* Articles 99 and 100.

²⁷ *Ibid.* Article 56.

²⁸ *Ibid.* Article 123.

²⁹ *Ibid.*

judiciary and makes judges irremovable.³⁰ The right to litigate is guaranteed to all citizens according to the procedures prescribed by law.³¹

The Supreme Council of the Judiciary³² is responsible for regulating the Judiciary in Kuwait, and Law No. 19 of 1959 (amended in Law No. 19 of 1990) regulates the organization and function of the judiciary. The Supreme Council of the Judiciary comprises seven members: the President and Deputy of the Court of Cassation, the President and Deputy of the Court of Appeal, the Attorney General, the President of the Al-Kulliyah Court, and the Deputy of the Ministry of Justice.³³

The Court hierarchy essentially has three tiers - the Court of First Instance, the Court of Appeal and the Court of Cassation. Additionally, the Constitutional Court was also established to interpret the provisions of the Constitution and resolve any disputes relating to the constitutionality or otherwise of ordinary legislation and delegated legislation.³⁴

1.2.3 Laws governing Arbitration

The first official reference to arbitration in Kuwaiti legislation was in the Regulation of Internal Commerce in 1938, repealed by Law No.2 of 1960. This provided for the establishment of a Commission of Commerce. Article 1 states that the Commission of Commerce should comprise five members whose duty is to solve any disputes between merchants through the application of the law or by arbitration.³⁵ In addition, *Medjella Al-Adlieah*, which is the Ottoman Law, applied in Kuwait in 1938, provided for arbitration under articles 1841-1846, until repealed by a Decree issued under the Civil Code. In 1960 the Civil and Commercial Procedures Law No. 6/1960 (CCP) was expanded to include a section on arbitration,³⁶ which remained in force until repealed by the present law governing arbitration.

³⁰ Reference is made to the independence of the judiciary in Law No. 10 passed in 1995 & 1996.

³¹ *Ibid.* Article 166.

³² *Ibid.* Article 186.

³³ Article 16 No. 19 of 1990.

³⁴ Amin, S.H., 'Some Aspects of the Legal and Judicial system in Kuwait', (1987) 7 (4) *Islamic and Comparative Law Quarterly*, 269.

³⁵ Sarkhoh, Y., *The General Basis of International Commercial Arbitration*, (1st edn, 1996), p.28.

³⁶ Chapter III. Arbitration was covered in Articles 254 to 266.

Most recently, the code of Civil and Commercial Procedure regulated arbitration under Chapter Twelve, Articles 173 to 188.³⁷ These provisions do not distinguish between national and international arbitration. However, it is deemed that any arbitral award rendered outside Kuwait is foreign, even if it applies Kuwaiti law and the arbitrators and parties are Kuwaiti nationals³⁸

Furthermore, Article 177 of the Code of Civil and Commercial Procedure (repealed by Law No. 11 of 1995) allowed the Ministry of Justice to establish one or more arbitration panels, chaired by a judge and two members selected from the roll of arbitrators. These arbitration panels dealt with disputes between parties who applied in writing to come before them. However, the practical implementation of the provisions of this article showed that little use was made of this type of arbitration, so that Law No. 11 of 1995 on Judicial Arbitration of Civil and Commercial Matters was issued.³⁹ This allowed for the creation of arbitration panels consisting of three judicial counsellors and two arbitrators to be selected by the parties.⁴⁰ These panels have jurisdictions over the following matters: (i) settlement of disputes referred by the parties;⁴¹ (ii) disputes arising out of contracts entered into after the implementation thereof and under which disputes shall be settled by way of arbitration, unless the contract or the set of arbitration rules provide otherwise;⁴² (iii) exclusive jurisdiction over disputes arising between Ministries, governmental authorities, juristic persons of public law and companies whose capital is entirely held by the State, or amongst these bodies;⁴³ (iv) settlement of claims to arbitration submitted by private individuals or corporations against Ministries, governmental authorities, or juristic persons of public law.⁴⁴ These authorities must submit to arbitration unless the dispute had previously been referred to the courts.⁴⁵

³⁷ Issued by Law NO.4 of 1980

³⁸ El-Ahdab, A., *Arbitration with the Arab Countries* (Kluwer Law International, The Hague, London, and Boston 2nd edn 1999), p.291.

³⁹ The explanatory memorandum of Law No.11 of 1995.

⁴⁰ Law No. 11 of 1995 on Judicial Arbitration in Civil and Commercial Matters Article 1.

⁴¹ *Ibid.* Article 2 (1).

⁴² *Ibid.*

⁴³ *Ibid.* Article 2 (2).

⁴⁴ *Ibid.* Article 2 (3).

⁴⁵ For more information regarding this law see El-Ahdab, A., *Arbitration with the Arab Countries* p.292-294.

In addition, the aim of making arbitration an alternative manner of dispute settlement; can be found in several laws such as: (i) Article 13 of the Decree Law regulating the Kuwait Stock Exchange Market which lays down that arbitration must be used to settle all disputes regarding the Kuwait Stock Exchange;⁴⁶ (ii) arbitration that is engaged in by the Chamber of Commerce;⁴⁷ (iii) Kuwait Free Zones Law;⁴⁸ (iv) Competition Law;⁴⁹ (v) Direct Foreign Capital Investment Law;⁵⁰ and (vi) B.O.T Law.⁵¹

1.2.4 Provisions governing enforcement of foreign arbitral awards

Kuwait has also ratified many international conventions governing the enforcement of foreign arbitral awards in Kuwait. Thus Kuwait was at the forefront of the GCC States in approving of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 by Law No.10 of 1978.⁵² It should be noted that even before Kuwait's accession to the New York Convention foreign awards were relatively easily enforced in Kuwait. In fact, the Kuwaiti government enforced foreign arbitral awards made against it, even though there were some difficulties in the enforcement of awards made in its favour.⁵³ Therefore, Kuwait's accession to the Treaty would establish a balance between the position of Kuwait and the position of other States, especially those not bound by any agreement for the enforcement of awards.⁵⁴ Thus, Kuwait only recognises and enforces arbitral awards made in the territory of another contracting State.⁵⁵

⁴⁶ This Article provides that 'An arbitration committee shall be set up within the market, by a resolution passed by the market committee. It shall be chaired by a member of the judiciary, to be selected by the supreme judiciary council. The committee's duty shall be the settlement of all disputes relevant to dealings effected in the market. Dealing in the market shall be deemed to be an acknowledgment of acceptance of arbitration, which fact shall be stated in the papers of said dealings. Awards made by the committee shall be binding on both parties to a dispute. The resolution setting up the committee shall lay down the proceedings for reference and settlement of the dispute'.

⁴⁷ Chamber of Commerce Law 1958, Article 11

⁴⁸ Law No. 26 of 1999 on Kuwait Free Zones Article 14, which refers to disputes arising between the projects established in the free zones or between them and the party managing these zones or other contracted authorities and administrative bodies related to the work activity.

⁴⁹ Law No. 10 of 2007 Regarding the Protection of Competition Article 24

⁵⁰ Law No. 8 of 2001 Regulating Direct Foreign Investment in the State of Kuwait Article 16

⁵¹ Law No. 7 of 2008 Governing Building, Operation and Transfer (BOT) Article 15.

⁵² Entered into force on 27 July 1978. Kuwait applies the reciprocity reservation. Article 1 states that 'Kuwait reserves implementation of the Convention to the recognition and enforcement of arbitral awards made in the territory of other contracting States'.

⁵³ Explanatory Memorandum of the Decree Law No. 10 of 1978

⁵⁴ El-Ahdab, A., *Arbitration with the Arab Countries* p.312.

⁵⁵ Decree Law No. 10 of 1978 Article 1.

On March 4, 1979, Kuwait ratified the Washington Convention on the Settlement of the Investment Disputes between States and Nationals of other States of 1965 (ICSID). Kuwait has also ratified the Convention on Enforcement of Judgment Delegations and Judicial Notices in the GCC states in 1998⁵⁶ as well as the Convention of the League of Arab Nations concerning the enforcement of judgments and awards.⁵⁷

Moreover, Kuwaiti national law permits the enforcement of foreign arbitral awards by virtue of Articles 199 and 200 of the Code of Civil and Commercial Procedure.

1.3 Saudi Arabia

The basis of the modern state of Saudi Arabia began in 1902 when Abdul Aziz Al-Saud took control of Riyadh and unified most of the Arabian Peninsula; this stage is considered to be the third period of the rule of the Saud Family.⁵⁸ In 1932, King Abdul Aziz al-Saud changed the country's name to the Kingdom of Saudi Arabia.⁵⁹

While Saudi Arabia has no formal constitution, rudimentary constitutional principles are mentioned in the Basic Law which was adopted in 1992. This lays down that the *Holy Qur'an* and *Sunah* is the constitution of the country, which is governed on the basis of Islamic law (*Shari'a*).⁶⁰ Saudi Arabia is a monarchy ruled by the sons and grandsons of King Abd Al Aziz Al Saud.⁶¹ There are no political parties or national elections, but the country held its first municipal elections in 2005.⁶²

The Basic Law mentions three authorities; Judicial, Executive and Regulatory. However, the system of government in the Kingdom of Saudi Arabia is not clearly based on the principle of separation of powers. The Council of Ministers has full legislative and executive powers.

⁵⁶ Law No.44 of 1988

⁵⁷ On 20/5/1962.

⁵⁸ The first period began in the early 18th century when Prince Mohammad Ben Saud agreed to support and espouse the teachings of Sheikh Mohammed ibn Abd al Wahhab, Islamic scholar, who started a new movement. He called all Muslims to cleanse the Islamic faith from distortions. This period continued until it was invaded and destroyed by Ottomans and their Egyptian allies. The second period started when Turki bin Abdullah Al-Saud transferred his capital to Riyadh in 1818. This state lasted until 1891 when it succumbed to Al Rashid.

⁵⁹ The Royal Decree No. 2716 of 17/05/1351 Hegira (18/09/1932)

⁶⁰ Basic Law, Article 1.

⁶¹ *Ibid.* Article 5.

⁶² Background note, Saudi Arabia [electronic resource] [Washington, D.C.] U.S. Dept. of State, Bureau of Near Eastern Affairs. <<http://www.state.gov/r/pa/ei/bgn/3584.htm>>

The sources of law in the Kingdom Saudi Arabia are based primarily on the following:

- I. The Shari'a (Islamic law) consisting of principal sources - the *Holy Qur'an*, the *Sunnaah* (traditions of the prophet Muhammad), and supplementary sources such as juristic preference;
- II. State regulations made to deal with modern legal problems arising from rapid development in diverse domains;
- III. Custom and practice: this source can be found in modern commercial practice and international trade.⁶³

1.3.1 Components of the System of Government

1.3.1.1 The judiciary

A new Judicial Law, which came into effect in 1975, introduced several principles such as the independence of judges, and rights to equal treatment and access to the courts for all.⁶⁴ However, the judiciary is not fully independent as the five full-time members of Supreme Judicial Council are appointed by Royal order.⁶⁵ In addition, the law permits the intervention of the Minister of Justice in the affairs of the Supreme Judicial Council.⁶⁶

There are different kinds of courts in Saudi Arabia:⁶⁷

1. *Shari'a* courts, which have jurisdiction to make decisions regarding all disputes and crimes, except those exempted by law. The judicial system consists of four levels in *Shari'a* courts; the Supreme Judicial Council; the Appellate Courts; General Court and Summary Courts.⁶⁸

⁶³ Amin, S.H., *Middle East Legal Systems*, p313.

⁶⁴ The Law of Judiciary, Royal Decree No. (M/64) Articles 1- 4; also Basic Law Article 46 and 47.

⁶⁵ The Law of Judiciary, Royal Decree No. (M/64) Article 6.

⁶⁶ The Law of Judiciary, Royal Decree No. (M/64) Article 20 states that "A decision of the General Panel shall become final when approved by the Minister of Justice. If the Minister does not approve the decision, he shall remand it to the General Panel for further deliberation. If the deliberation does not result in reaching a decision acceptable to the Minister of Justice, the matter shall be referred to the Supreme Judicial Council for determination, and its decision shall be final". See also Articles 9,11,22,24,27,48,55,63,70,71,73,74,83 and 87.

⁶⁷ El-Ahdab, A . *Arbitration with the Arab Countries*, p.545.

⁶⁸ The Royal Decree on the Judiciary Law No (M/64) of 14 Rajab 1395, [23 July 1975], Article 26.

2. The Board of Grievances '*Diwan Al-Mathalem*'.⁶⁹ This has jurisdiction over disputes between government agencies and private individuals as well as disputes relating to forgery, corruption and trademarks.⁷⁰
3. The Committee for the Settlement of Commercial Disputes.
4. Moreover, apart from the above courts; there are a number of judicial and quasi-judicial institutions with specialized jurisdictions. The most important of them are represented in the Chambers of Commerce and Industry, the Committee on Commercial Paper, the Supreme Commission on Labour Disputes, the Commission on the Impeachment of Ministers, and separate councils for civil servants, military personnel, and government employees.⁷¹

Any jurisdictional disputes involving a *Shari'a* court and another tribunal or committee are resolved by the Conflicts of Jurisdiction Committee. This is composed of two members of the Supreme Judicial Council and one member of the tribunal or committee in question. This Committee also has jurisdiction to decide a dispute which arises in respect of enforcement of two conflicting final judgments, one of which is rendered by the *Shari'a* Court and the other by another body.⁷²

With regard to the judgment sources, the Saudi Courts are bound to make their decisions by relying on several sources: (i) *Shari'a* Law; (ii) the regulations of the Saudi Arabian government; (iii) the precedent of judgments of the specific court itself.⁷³

1.3.1.1.2 Executive Authority⁷⁴

Executive power is vested in the Council of Ministers, the most powerful body in Saudi Arabia, the king being Prime Minister.⁷⁵ The Council of Ministers consists of:

1. A Prime Minister;

⁶⁹ These courts exist in Riyadh, Dammam, and Jeddah.

⁷⁰ Royal Decree No. (M/51) of 17-7-1402 Hegira.

⁷¹ Bilal, A., '*Criminal procedure in Saudi Arabia*' (Dar Alnhdah Alarabiyh, (1411 [1990]) pp 858-917, See also United Nation development programme <<http://www.undp-pogar.org/countries/judiciary.asp?cid=16>>

⁷² Article 29-32 The law of Judiciary Royal Decree No. (M/64) of 1975.

⁷³ See, Royal Decree No. (M/21) 20 JumadaI 1421 [19/8/2000] regarding the law of Procedure before *Shari'ah* Courts Article 1. See also, Khelaif, F., *Islamic Law and Judiciary Developments in the Saudi Arabia in the 12th Century*, thesis University of London, 1996, p 65 and 113

⁷⁴ The first step toward the established modern form of government was by Decree of 9 October 1953, creating a Council of Ministers.

⁷⁵ The Basic Law of Governances Article 56.

2. Deputy Prime Ministers;
3. Ministers with Portfolios;
4. Ministers of State appointed as members of the Council of Ministers by Royal Decree;
5. Councillors of the King, appointed members of the Council of Ministers by Royal Decree.⁷⁶

The Council of Ministers is in charge of drawing up the internal, external, financial, economic, and educational and defense policies and supervising their implementation, as well as supervising general affairs of the State. It also reviews the resolutions of the consultative council (*Shura* Council) and has a vote on draft laws and regulations. It has executive power and is the final authority in financial and administrative affairs of all ministries and other government institutions. In addition, ‘the government may not sign any loan agreement without approval from the council of Ministers.’⁷⁷

1.3.1.1.3 The Consultative Counsel⁷⁸

All members of the Council are appointed and dismissed by the King. It would appear that the *Majlis Ash-Shura* only acts in an advisory capacity, without being able to bind the government. Article 15 provides that: “The *Majlis Ash-Shura* shall express its opinion on general policies of the State referred by the Prime Minister.”⁷⁹ Specifically, the Council shall have the right to do the following:

1. Discuss the general plan for economic and social development;
2. Study laws and regulations, international treaties and agreements and concessions, and make whatever suggestions it deems appropriate;
3. Interpret laws;
4. Discuss annual reports forwarded by ministries and other governmental institutions, and make whatever suggestions it deems appropriate.⁸⁰

In addition, the right to propose new laws or to amend laws already in force is limited to any group of ten members of the *Majlis Ash-Shura*. Such proposal must be submitted to

⁷⁶ Article 12 of the Law of the Council of Ministers No. (A/13) 3/3/1414 Hegira [1993].

⁷⁷ *Ibid.* Articles 19, 21, 24 and 25.

⁷⁸ The Consultative power, Known in Saudi Arabia as the *Majlis Ash-shura*.

⁷⁹ The law of the Consultative Council No (A/91) 27/08/1412 Hegira [1992]

⁸⁰ *Ibid.* Article 15.

the chairman of the Council, who shall submit the proposal to the King without tender or discussion of this proposal by all *Majlis Ash-Shura* members.⁸¹

1.3.2 The Law Governing Arbitration

The first provisions regulating arbitration issues were the rules of the Commercial Court Act issued in 1931.⁸² These dealt with certain aspects of arbitration agreements, the appointment of arbitrators, time limits, arbitral proceedings and the approval of arbitral awards by the court before their enforcement.⁸³ They also required that arbitration agreements must take a particular form, which included being ratified by a notary public before their implementation. Arbitration clauses in contracts were null if signed before the dispute arose, and any breach of the rules as to formality would invalidate an arbitration agreement.⁸⁴

The Act of Commercial Companies was issued in 1965. It dictated the establishment of the Board for Settlement of Commercial Disputes, which rejected the arbitration provisions of the Commercial Court Act of 1931.⁸⁵ This consequently led to controversy, and the state followed the advice of its Islamic scholars, as explained by a Saudi academic thus:

“The state, following the advice of his *Ulemas*,⁸⁶ who wished to unify the legal system in the framework of the *Shari’a* courts and who refused any codification, suppressed the Commercial Court.

The suppression of this court did not lead to the repealing of the 1931 Act and, despite the issue in 1965 of the Commercial Companies Act which created the Board for the Settlement of Commercial Disputes, the Commercial Courts Act remained in

⁸¹ *Ibid.* Article 23.

⁸² Royal Decree No. 22 dated 15/1/1350 H (2 June 1931) issuing the law of the Commercial Court Regulation.

⁸³ *Ibid.* Articles 493-497.

⁸⁴ El-Ahdab, A. *Arbitration with the Arab Countries.*, p. 548.

⁸⁵ *Ibid.*

⁸⁶ Islamic Scholars.

force and the provisions relating to arbitrations continued to have theoretical existence.”⁸⁷

The Labour and Workmen Regulation 1969⁸⁸ permitted employers and employees to submit their disputes to arbitration instead of to the Primary Commission.⁸⁹ The arbitration provisions in this act determined different regulations for initiating arbitration and different time limits for rendering an award from those found in the Arbitration Regulation of 1983 and its implementation rules (explained below).⁹⁰

Later regulation of arbitration came through the Chambers of Commerce and Industry Regulation, issued by Royal Decree in 1980.⁹¹ This Act permitted the Chamber of Commerce to ‘be an arbitrator in charge of settling commercial disputes amongst merchants should the parties thus agree and entrust it with this mission’.⁹² It would appear that this kind of arbitration is more successful than the arbitration laid down in the Labour and Workmen Regulation of 1969.⁹³

The Arbitration Regulation of 1983 was the first proper Arbitration Act in Saudi Arabia and the GCC States.⁹⁴ In 1985, the implementation of the rules of the Regulation was issued by the Council of Ministers Resolution No.7/2021/M.⁹⁵ Its main characteristics are as follows: (i) it does not distinguish between national and international arbitration.

⁸⁷ Hushan, M., *The Arab Gulf Countries*, A paper presented to the Euro-Arab Arbitration Conference held in Port El Kantaoui, Tunisia, 24-27 September 1985, London, Published by Lloyd’s of London Press Ltd, 1987, pp.22-23.

⁸⁸ It was approved by the Council of Ministers through Decree No.745 dated 23-24/11/1389 Hegira and was issued by virtue of Royal Decree No.(M/12) of 06.09.1389H(15 November 1969).

⁸⁹ The Labour and Workmen Regulation 1969, Article 183.

⁹⁰ Turck, N., ‘Dispute Resolution in Saudi Arabia’, (1988) 22 *International Lawyer*, p.431

⁹¹ Royal Decree No (M/6) of 22/4/1400 Hegira (1980); the first Chamber of Commerce and Industry in Saudi Arabia was established in Jeddah in 1946.

⁹² *Ibid.* Article 3.

⁹³ Hushan, noted that: “Certain Chambers of Commerce and Industry and more precisely the Chamber of Jeddah also practised optional arbitration even though the ‘arbitral award’ generally remained not binding. The success of the arbitration proceedings with the Chamber of Commerce is mainly due to the fact that these proceedings enable the parties to reach amicable solutions which lead to an agreement between the parties. On the other hand, should an award be made, its forced enforcement was based on the conviction of the prince of the region that the award was fair. But the position adopted by the Board for Settlement of Commercial disputes is very clear in this respect. It refuses the principle of arbitration unless it be a Shari’a arbitration ... which requires that the arbitrator fulfil the same conditions as a judge and that only the Shari’a be applied to the dispute. However, the Chambers of Commerce and Industry did continue their arbitration activity and this activity even extended to International arbitration. To this effect, a National Commission for International Arbitration was created within the Council of the Federation of Saudi Chambers of Commerce and Industry” p.4.

⁹⁴ Issued by the Royal Decree No. M/46. Of 7/12/1403 Hegira. (25 April 1983).

⁹⁵ Dated 9/8/1405. Hegira (27 May 1985), with effect from 28 June 1985.

- (ii) It does not limit arbitration as a means of dispute resolution to commercial matters.
- (iii) It recognizes the validity of both arbitration clauses and arbitration agreements.⁹⁶
- (iv) It confers power to supervise the arbitral process on the Saudi Courts.⁹⁷
- (v) It provides that government bodies may only resort to arbitration after approval by the President of the Council of Ministers.⁹⁸

1.3.3 Law governing recognition and enforcement of foreign arbitral awards

The national law of Saudi Arabia does expressly deal with the enforcement of foreign arbitral awards. However, as a practical matter, foreign awards are enforced by the Board of Grievance which has jurisdiction to enforce foreign judgments and arbitral awards.⁹⁹

Regarding international conventions, the Kingdom of Saudi Arabia has become a party to many international conventions which can govern the enforcement of a foreign arbitral award in Saudi Arabia. The first was the Convention of the Arab League of Nations Concerning the Enforcement of Judgments and Awards, which was ratified in 1954. This convention allows Saudi Arabia to enforce an arbitral award made in any other contracting state.¹⁰⁰ In 1980, Saudi Arabia subscribed to the Washington Convention.¹⁰¹ However, Saudi Arabia reserved the right to not submit all disputes relevant to petroleum and national sovereignty to the arbitration of ICSID. It has also ratified the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC states.¹⁰² In January 1994, Saudi Arabia subscribed to the New York Convention, an important step forward for international arbitration in Saudi Arabia.¹⁰³

⁹⁶ El-Ahdab, A., *Arbitration with the Arab Countries*, p.569 notes that the main characteristic of the Arbitration Regulation 1983 was the recognition of the validity and binding force of arbitration clauses.

⁹⁷ *Ibid.* p. 553-554.

⁹⁸ The Arbitration Regulation, Article 3.

⁹⁹ Article 8 (1) (g) of Royal Decree No. M/51 dated 17/7/1402 H / 11 May 1982.

¹⁰⁰ This Convention will be replaced in the other states by the Riyadh Convention of Judicial Co-operation of 6th of April 1983. However, Saudi Arabia has still not ratified the Riyadh Convention.

¹⁰¹ The World Bank Group 'List of Contracting State and other Signatories of the Convention' <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>

¹⁰² Royal Decree No. M/3 of 28/4/1417.

¹⁰³ Royal Decree No (M/11) of 16/07/1414 Hegira [29/12/1993]; the Kingdom of Saudi Arabia will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

1.4 Bahrain

The beginning of the modern political history of Bahrain started with the rule of the Al-Khalifa family in 1783.¹⁰⁴ An agreement between the Sheikh of Bahrain and the UK for the cessation of plunder and piracy was signed in 1820,¹⁰⁵ and Bahrain subsequently became a British protectorate when the Sheikh signed an agreement with Great Britain in 1880, remaining so until the country gained full independence 1970.¹⁰⁶

In March 1999, Sheikh Hamad ibn Isa al-Khalifah succeeded his father as head of state and worked to make Bahraini society more democratic and open. Such changes have included giving all Bahraini citizens the right to vote in a National Charter Referendum on 2001 and the New Constitution on 2002. The referenda led to the state becoming a constitutional monarchy and the official renaming of the country as the Kingdom of Bahrain in February 2002.¹⁰⁷

The new constitution of the Kingdom of Bahrain comprises 125 articles divided into five parts; the State; basic constituents of society; public rights and duties; public authorities' general provisions and financial affairs.

The sources of law in the Kingdom of Bahrain are based primarily on the following:

- I. Islamic law: Article 2 of a new Constitution provides that 'the Islamic Shari'a is a principal source of legislation';
- II. Constitutional law: all legislative acts must be in accordance with constitutional provisions;
- III. Legislation: the law will not be promulgated 'unless it is approved by both the Consultative Council and the Chamber of Deputies, or the National Assembly, as the situation demands'.¹⁰⁸

¹⁰⁴ Kingdom of Bahrain Shura Council's Website <<http://www.shura.gov.bh>>

¹⁰⁵ Amin, S. H., *Middle East Legal Systems*, p.19-20

¹⁰⁶ *Ibid*, p.19.

¹⁰⁷ Constitution of the Kingdom of Bahrain, Article 1.

¹⁰⁸ *Ibid*, Article 70.

The legal system in Bahrain is based on a Civil Law system; as such the primary source of law is a statutory code. This is clear, as the Civil Code lists the sources which courts should follow in rendering judgements. These formal sources are: (i) provisions of specific legislation;¹⁰⁹ (ii) the texts of the civil code;¹¹⁰ (iii) custom;¹¹¹ (iv) Islamic jurisprudence;¹¹² (v) the rules of equity.¹¹³

1.4.1 Components of the System of Government

The new constitution is based on the separation of executive, legislative, and judicial powers, ‘while maintaining cooperation between them in accordance with the provisions of this Constitution’. None of the three authorities may assign any part of its powers stated in the Constitution. However, limited legislative delegation for particular period and specific subjects is permissible, whereupon the powers shall be exercised in accordance with the provisions of the Delegation Law’.¹¹⁴ Nevertheless, the King has the right to exercise part of these powers, e.g. to issue legislation¹¹⁵, to hold the ministers answerable,¹¹⁶ to appoint and dismiss the Prime Minister and ministers¹¹⁷, to appoint and dismiss members of the Consultative Council¹¹⁸, to chair the Higher Judicial Council, to appoint judges,¹¹⁹ to conclude treaties by Decree¹²⁰ and to appoint and dismiss civil servants, military personnel, and political representatives in foreign States and with international organizations.¹²¹

¹⁰⁹ See Decree law No. 19 of 2001 promulgating the Civil Code Article 3, which provides that “the provisions of the Civil Code shall not be prejudicial to the provisions of specific legislation”.

¹¹⁰ See Civil Code Article 1 (a).

¹¹¹ See Civil Code Article 1 (b).

¹¹² *Ibid*

¹¹³ *Ibid*

¹¹⁴ Article 32 Para. A. of the Constitution of the Kingdom of Bahrain

¹¹⁵ Article 32 Para. B. and 39 of the Constitution of the Kingdom of Bahrain

¹¹⁶ Article 33 Para. C. of the Constitution of the Kingdom of Bahrain

¹¹⁷ Article 33 Para. D. of the Constitution of the Kingdom of Bahrain

¹¹⁸ Article 33 Para. F. of the Constitution of the Kingdom of Bahrain

¹¹⁹ Article 33 Para. H. of the Constitution of the Kingdom of Bahrain

¹²⁰ Article 37 of the Constitution of the Kingdom of Bahrain

¹²¹ Article 40 of the Constitution of the Kingdom of Bahrain

1.4.1.1.1 The Executive Authority

The Council of Ministers consists of the Prime Minister and a number of ministers. It is responsible for protecting State interests, and following through the implementation of general government policy.¹²²

1.4.1.1.2 The Legislative Authority

The Legislative Authority consists of the National Assembly, which comprises two Chambers: (I) the Consultative Council (*Majlis as-Shura*) composed of forty members appointed by the King. (II) The Chamber of Deputies, which comprises forty directly-elected members.¹²³ The term of the Chamber of Deputies is four years. Any five members of the Chamber of Deputies have the right to question any minister, a question of confidence may be put forward only at his wish or upon an application signed by at least ten members of the Chamber of Deputies. A vote of no confidence in a minister must be decided by a majority of two-thirds of the Chamber of Deputies.¹²⁴

The right to render the draft laws can be exercised by the King or the Council of Ministers or any member on the National Assembly. Article 70 of Constitution provides that the promulgation of laws should be ‘approved by both the Consultative Council and the Chamber of Deputies, or the National Assembly as the situation demands, and ratified by the King’.¹²⁵

1.4.1.1.3 The Judicial Authority

Judicial powers are addressed in Chapter Four of the Constitution. Article 104 and 105 state that the judiciary is to be an independent body whose functioning and organization are to be regulated by law.

The court system is organised into two branches: the Shari’a courts and the civil courts.¹²⁶ The civil courts feature three levels, starting with the Junior and Senior Civil

¹²² Article 47 of the Constitution of the Kingdom of Bahrain

¹²³ Articles 51, 52 and 56 of the Constitution of the Kingdom of Bahrain

¹²⁴ Articles 65 and 66 of the Constitution of the Kingdom of Bahrain

¹²⁵ For more information regarding the process of the issuing of laws see the Constitution Articles 35, 38, 70,81,82,83,84,85,86 and 92.

¹²⁶ Radhi, H., *Judiciary and Arbitration in Bahrain: A Historical and Analytical Study*, (Kluwer Law International, 2003), p.104

Courts, the High Civil Court of Appeal and the Court of Cassation.¹²⁷ The Civil Law Courts are authorized to settle all commercial, civil, and criminal cases, and all cases involving disputes related to the personal status of non-Muslims.¹²⁸ The Shari'a courts also consist of three levels and have jurisdiction to hear all issues related to the personal status of Muslims.¹²⁹

The new constitution established the Constitutional Court,¹³⁰ which consists of a president and six members, appointed by royal decree for nine years, on-renewable.¹³¹ The court has jurisdiction to settle disputes relating to the constitutionality of laws and regulations.¹³²

1.4.2 Laws governing Arbitration

Officially, arbitration in Bahrain was adopted before the First World War in that a 'customary council' was in charge of resolving disputes relating to water sites according to local customs.¹³³

The Kingdom of Bahrain recognises arbitration as a means of settlement of commercial disputes. The Code of Commercial and Civil procedure regulates arbitration in Articles 223 to 243,¹³⁴ while Bahrain applies the provisions of the UNCITRAL Model Law on International Arbitration in all international commercial arbitrations unless the parties decide otherwise.¹³⁵ In addition, there are several laws referring specifically to arbitration, albeit not in great detail. For instance, the Chamber of Commerce and Industry of Bahrain has the right to solve the disputes submitted to them by arbitration.¹³⁶ Also, the Act of Establishment and Organisation of the Stock Exchange specifically mentions arbitration as the method for settling disputes¹³⁷ Article 13 deals with the establishment of an Arbitration Commission which will be responsible for

¹²⁷ Article 6 Decree Law No.42 of 2002 the issuance of the Judicial Authority Law.

¹²⁸ *Ibid.*

¹²⁹ Article 13 Decree Law No.42 of 2002 the issuance of the Judicial Authority Law.

¹³⁰ Article 106 of Constitution of the Kingdom of Bahrain

¹³¹ Article 3 of Decree Law No.27 of 2002 on the establishment of a Constitutional Court

¹³² Article 16 of Decree Law No.27 of the 2002 establishment of a Constitutional Court

¹³³ El-Ahdab, A., *Arbitration with the Arab Countries* p.101.

¹³⁴ Decree Law No. (12) Issuing the 1971 Act of Commercial and Civil Procedure.

¹³⁵ Decree Law No. 9 Issuing the 1994 Act of International Commercial Arbitration

¹³⁶ Article 11, Bahraini Chamber of Commercial and Industry Act, 1967

¹³⁷ Decree Law No. 4 of 1978 With Respect to the Establishment and Organisation of the Bahrain Stock Exchange.

settling all disputes relating to transactions concluded at the Exchange. Moreover, arbitration in collective labour disputes is prescribed in the Labour Law.¹³⁸ Article 138 states that any dispute arising between an employer and all his workers shall be settled by conciliation and arbitration.¹³⁹

1.4.3 Law governing recognition and enforcement of foreign arbitral awards

Articles 252 and 253 of the Code of Commercial and Civil Procedure deal with the enforcement of foreign arbitral awards. Also, article 35 of the Bahraini International Arbitration Act provides: “An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Article and of Article 36.”

Bahrain approved accession to the New York Convention in 1988,¹⁴⁰ ratified both the Washington Convention¹⁴¹ and the Convention on Enforcement of Judgment Delegations and Judicial Notices in the GCC states in 1996.¹⁴²

1.5 Oman

Oman is an absolute monarchy which has been ruled by the Al Bu Said family since the middle of the eighteenth century. In 1891, the Sultanate of Oman signed a series of friendship treaties with Great Britain. Although Oman was, virtually, under British protection, the UK did not acknowledge that officially and Oman never became a British colony.¹⁴³ Oman remained isolated until 1970, when Sultan Qaboos deposed his father.¹⁴⁴ Although the Sultan has led a comprehensive revival in the areas of administration and politics as well as in economic, social and cultural development,¹⁴⁵ it

¹³⁸ Decree Law No. 23 of 1976 to promulgate the Labour Law for the Private Sector.

¹³⁹ The Labour Law also contains further provisions for arbitration, which are set out in Chapter Sixteen, Articles 133 to 139.

¹⁴⁰ Decree Law No. (14) of 1988. Bahrain has made three reservations to this convention. It will not be a cause for the recognition of Israel. It will apply only to recognition and enforcement of awards made in the territory of another contracting State. It Convention will apply only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

¹⁴¹ The World Bank Group ‘List of Contracting State and other Signatories of the Convention’ <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>

¹⁴² Decree Law No. (9) Of 1996.

¹⁴³ Amin, S. H., *Middle East Legal Systems*, p.284-285; El-Ahdab, A., *Arbitration with the Arab Countries* p.475

¹⁴⁴ Amin, S. H., *Middle East Legal Systems*, p.286.

¹⁴⁵ A country study: Oman Library of Congress Call Number: DS247.A13 P47 1994

can still be said that Sultanate of Oman was late in developing its legal structure when compared to the other Gulf States.¹⁴⁶

The Basic Law of the Sultanate of Oman was issued on November 6, 1996 by Royal Decree No.101/96; so that Oman was the last country in the GCC to acquire a written constitution.¹⁴⁷ Article 5 of the Basic Law states that ‘the system of government in Oman is a hereditary sultanate, in which succession passes to a male descendant of Sayyid Turki bin Said bin Sultan’. The Basic Law comprises 81 articles divided into seven parts, covering the State and the System of Government, Principles Guiding State Policy, Public Rights and Duties, the Head of State, the Oman Council and the Judiciary.

The sources of law of Oman are based primarily on the following:

- I. Islamic Law: The Basic Law emphasises that the ‘Islamic Shari’a is the basis of legislation’.¹⁴⁸
- II. Constitution: Article 79 of the Basic Law provides that ‘Laws and procedures which have the force of law must conform to the provisions of the Basic Law of the State’.
- III. Legislation: the right of issuing and ratifying laws is exercised by the Sultan.¹⁴⁹

1.5.1.1 Components of the System of Government

The Basic Law provides for three powers: Executive, Legislative and Judicial. However, as the first two are invested in the Sultan, there is limited separation of powers.

1.5.1.1.1 The Executive Authority

The Sultan is the executive power who represents the country in all respects, serving as the Prime Minister and presiding over the Council of Ministers.¹⁵⁰ The Council of

<http://rs6.loc.gov/frd/cs/omtoc.html>

¹⁴⁶ Amin, S. H., *Middle East Legal Systems*, p.286.

¹⁴⁷ The Basic Law was the first written expression of constitutional law in Oman. For an evaluation of the Basic Law see Siegfried, Nikolaus A., ‘Legislation and legitimisation in Oman: the basic law’ *Islamic Law and Society*, (2000) 7 (3) p. 359-397.

¹⁴⁸ The Basic Law, Article 2.

¹⁴⁹ *Ibid*, Article 42.

¹⁵⁰ *Ibid*.

Ministers assists the Sultan in his work.¹⁵¹ The Sultan appoints and dismisses Deputy Prime Ministers, Ministers and those of other ranks. He also appoints and dismisses Under-Secretaries, General Secretaries and those of other ranks.¹⁵²

1.5.1.1.2 The Legislative Authority

The Oman Council comprises two parts, the *majlis al-shar* and the Council of State.¹⁵³ The *Shura* Council is composed of representatives from all parts of the Sultanate and the members elected.¹⁵⁴ However, the members of the Council of State are appointed directly by the Sultan.¹⁵⁵ The Oman Council works mainly in an advisory capacity.¹⁵⁶

1.5.1.1.3 The Judicial Authority

The independence of the judiciary is guaranteed in Articles 60 and 61 of the Basic Law. Royal Decree No. 90 of 1999 which came into force in June 2000 establishes three levels of courts in Oman: Preliminary Courts; Appeal Courts and Supreme Court. Under the new system, all kinds of cases can be heard in these courts, except administrative cases which are heard by the Administrative Court, an independent judicial body with the power to review all decisions made by government bodies.¹⁵⁷

1.5.2 Laws governing Arbitration

Before 1984, arbitration in Oman was governed by the *Ibadit* School which held that arbitration agreements were valid but not binding, although actual arbitral awards were binding on the parties.¹⁵⁸ In 1984 a Sultanate Decree issued the Regulation concerning the Board for the Settlement of Commercial Disputes Articles 59 to 68 of which regulated arbitration.¹⁵⁹ In 1997, a new Act on arbitration in civil and commercial matters was issued by Sultanate Decree No. 47/97, which repeals the all provisions

¹⁵¹ *Ibid*, Article 43.

¹⁵² *Ibid*, Articles 41-56.

¹⁵³ *Ibid*, Article 58.

¹⁵⁴ Royal Decree No. 86/97 on the Formation of the Council of Oman Issued on 16th Sha'aban 1418 AH, corresponding to 16th December 1997 AD, Articles 21 and 22.

¹⁵⁵ *Ibid*, Article 11.

¹⁵⁶ *Ibid*, Articles 18 and 29.

¹⁵⁷ Royal Decree 91/99 established the Administrative Court. See also Article 4 of Royal Decree 91/99; Article 8 of the Judicial Authority Law of 1999.

¹⁵⁸ El-Ahdab, A., *Arbitration with the Arab Countries* p.469.

¹⁵⁹ Issued by Sultanate Decree No. 84/32 of April 12, 1984

which are contrary to it. The new Omani arbitration law is mainly based upon the UNCITRAL Model Law.

Moreover, the law for the Regulation and Privatisation of the Electricity and Water Related Sector was issued by Royal Decree No. 78 of 2004. This provides that arbitration can follow ‘an appeal instituted by any person who has the capacity and interest pursuant to this Law in any matters which may be referred to arbitration or which are not within the jurisdiction of the Competent Omani Court pursuant to the provisions of this Law’.¹⁶⁰

1.5.3 Laws governing the recognition and enforcement of foreign arbitral awards

Recognition and enforcement of a foreign arbitral award in Oman can arise under national law or applicable international conventions. Prior to the issue of Royal Decree No.13/97, no formal provisions authorised courts to recognise and enforce foreign judgments or arbitration awards. However, this Decree rectified that situation,¹⁶¹ until it was repealed by the Royal Decree Issued on Civil and Commercial Procedure Code. In 2002, the new Code of Civil and Commercial Procedures set out under Articles 352 and 353 provisions which dealt with the enforcement of the foreign arbitral awards.¹⁶²

In addition, Oman acceded to the New York Convention 1958 on February 25, 1999 and this entered into force on May 26 1999 without any reservations.¹⁶³ It also ratified the Washington Convention on May 5, 1995.¹⁶⁴ In addition, it has ratified the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC states.¹⁶⁵

¹⁶⁰ The law for the Regulation and Privatisation of the Electricity and Water Related Sector, Articles 128 to 131.

¹⁶¹ El-Ahdab, A., *Arbitration with the Arab Countries*, p 503.

¹⁶² Royal Decree No. 29/2002 on Promulgating the Code of Civil and Commercial Procedure.

¹⁶³ UNCTIRAL ‘Status; 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>

¹⁶⁴ The World Bank Group ‘List of Contracting State and other Signatories of the Convention’ <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>

¹⁶⁵ Royal Decree No. (17) Of 1996.

1.6 Qatar

Qatar is a monarchy which has been governed by the ruling Al Thani family since the mid 19th century.¹⁶⁶ In 1916 the Sheikh of Qatar and Britain signed a protection treaty under which Britain promised to protect Qatar from all aggression by sea and to lend their good offices in case of a land attack. In return, the Sheikh of Qatar agreed not to dispose of any of his territory except to Britain and not to enter into relations with any other foreign government without the approval of Britain. The treaty continued until of September 3rd, 1971 when Qatar became a fully independent state.¹⁶⁷

Qatar adopted a new constitution on April 30, 2003, which was approved by referendum, and promulgated to take effect on June 9, 2005, replacing the provisional constitution of 1970. The new constitution has stressed that ‘the rule of the State is hereditary in the family of Al Thani and in the line of the male descendants of Hamad Bin Khalifa Bin Hamad Bin Abdullah Bin Jassim.’¹⁶⁸ It provides for the basic order of society, organizes the authority of the State, incorporates the participation of the people and guarantees rights and freedoms for citizens. It comprises 150 articles divided into five parts: the State and the Bases of the Rule; the Guiding Principles of Society; Public Rights and Duties; Organization of Powers and Final Provisions.

The sources of law in Qatar are based primarily he following:

- I. Islamic law: the new constitution provides that ‘Islamic Shari’a is the main source of its legislations’;¹⁶⁹
- II. Constitutional law: all legislative acts must be in accordance with constitutional provisions;
- III. Legislation: the legislative authority is exercised by the Al-Shoura Council.

The legal system in Qatar is based on a Civil Law system; as such the primary source of law is a statutory code. This is clear, as the Civil Code lists the sources which courts

¹⁶⁶ Al-Khtaib, F. and Al-Abdulla, S.M., *The State of Qatar: A Financial and Legal Overview*, (2001) VIII (3) *Middle East Policy*, September.p.110.

¹⁶⁷ Amin, S. H., *Middle East Legal Systems*, p.299.

¹⁶⁸ Article 8 of the Qatar Constitution

¹⁶⁹ Article 1 of the Qatar Constitution

should follow in rendering judgements. These formal sources are: (i) provisions of specific legislation;¹⁷⁰ (ii) the texts of civil code;¹⁷¹ (iii) Islamic Law;¹⁷² (iv) custom;¹⁷³ (v) the rules of equity.¹⁷⁴

1.6.1 Components of the System of Government

It is clear that the new constitution adopts the principle of a separation of powers. Article 60 lays down that ‘the system of government is based on the separation of powers and shall be exercised in collaboration with the manner specified in this Constitution’.

1.6.1.1.1 The Legislative Authority

‘The Legislative Authority shall be vested in the Al-Shoura Council’.¹⁷⁵ This consists of 45 members, of whom 30 are elected by direct, secret ballot. The Emir appoints the remaining 15 from amongst the Ministers or any other persons.¹⁷⁶ The Al-Shoura Council has the right to exercise legislative powers, approve the general policy of the government, approve the budget, and exercise control over the Executive Authority.¹⁷⁷

1.6.1.1.2 The Executive Authority

The Executive Authority is exercised by the Emir, assisted by the Council of Ministers.¹⁷⁸ This comprises the Prime Minister and other Ministers. The formation of the ministry shall be by an Emir’s Order on a proposal by the Prime Minister.¹⁷⁹ The Ministers are responsible for implementing general government policy, and administering all internal and external affairs in accordance with the provisions of the Constitution and the law.¹⁸⁰ The Prime Minister and Ministers are responsible to the Emir for the implementation of government policy.¹⁸¹

¹⁷⁰ See Civil Code Article 33.

¹⁷¹ *Ibid*, Article 1 (a).

¹⁷² *Ibid*, Article 1 (b).

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

¹⁷⁵ Article 61 of the Qatar Constitution

¹⁷⁶ Article 77 of the Qatar Constitution

¹⁷⁷ For more information on legislative authority see Articles 76 to 116.

¹⁷⁸ Article 62 and 120 of the Qatar Constitution

¹⁷⁹ Article 118 of the Qatar Constitution

¹⁸⁰ Article 121 of the Qatar Constitution

¹⁸¹ Article 123 of the Qatar Constitution

1.6.1.1.3 The Judicial Authority

Articles 130 and 131 of the Qatar Constitution state that there is to be an independent judiciary whose organisation and functions are to be determined by the law. Law No.10 of 2003 governing the judiciary authority took effect on 1st October 2004.¹⁸² Recently, Qatar has had a single judicial structure consisting of three levels; the Court of Justice; the Appeal Court of Justice and the Court of Cassation. The new constitution also provides for the establishment of special courts for settling disputes pertaining to the constitutionality of laws and regulations as well as a competent body entrusted with the settlement of administrative disputes.¹⁸³ However, these courts do not yet exist.

Based on Article 137 of the new constitution, Law No 10 of 2003 provides for the establishment of a High Judicial Council which comprises the head, senior deputy head and senior judge of the Cassation Court, the head senior deputy head and senior judge of the Court of Appeal, plus the head of First Instance court. The High Judicial Council is charged with giving opinions pertaining to judicial matters and proposing special legislation for the development of the judicial system.

1.6.2 Laws governing Arbitration

The first indication of arbitration in the law of Qatar state was Law No 4 of 1963 on the Qatari Chamber of Commerce¹⁸⁴ which established a commission for settlement of commercial disputes by way of amicable settlement.¹⁸⁵ The Code of Commercial and Civil Procedure now regulates arbitration in Articles 190 to 210.¹⁸⁶ It should be noted that the Code does not distinguish between national and international arbitration.

1.6.3 Laws governing the recognition and enforcement of foreign arbitral awards

The Code of Civil and Commercial Procedure provides that foreign arbitral awards are enforceable under the same conditions which apply to foreign judgments.¹⁸⁷ Qatar has also ratified without any reservations the New York Convention as from 30 March

¹⁸² Published in the Official Gazette on the 1st October 2003

¹⁸³ Article 140 and 138

¹⁸⁴ The Qatari Chamber of Commerce used to operate within the structure of Government agencies until the promulgation of Statute no. (11) Of 1990 which empowered the Chamber to operate independently.

¹⁸⁵ El-Ahdab, A., *Arbitration with the Arab Countries* p. 513.

¹⁸⁶ Law No. (13) Of 1990 issued in the Official Gazette No 13 of 1/9/1990.

¹⁸⁷ Article 381 of the Code Civil and Commercial Procedure

2003.¹⁸⁸ It has also ratified the convention on the enforcement of judgment delegations and judicial notices in the GCC states,¹⁸⁹ but has still not signed the Washington Convention.

1.7 United Arab Emirates

The United Arab Emirates is a federation of seven Emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Um Al Quwain, Fujairah and Ras Al Khaimah) established on 2 December 1971. Prior to that, these Emirates were under the protection of Britain, which was effected through treaty agreements dating back to the Perpetual Treaty of Maritime Truce signed in 1850.¹⁹⁰

1.7.1 Federal Constitution

The UAE adopted a Provisional Constitution on 2 December 1971 and made this permanent in 1996.¹⁹¹ Articles 120 and 121 of the constitution assign responsibility to the federal government in areas such as foreign affairs, security and defence, nationality and immigration issues, education, public health and currency. The individual Emirates exercise powers and jurisdiction in all matters not assigned to the Federation by the Constitution.¹⁹²

The Constitution comprises 152 articles divided into ten parts: Union and the basic principles and objectives; the fundamental social and economic basis of the Union; Freedom, rights and public duties; the Union authorities; Union legislation, decrees and the authorities having jurisdiction therein; the Emirates; the distribution of legislative and executive powers between the Federation and the United Arab Emirates; financial affairs of the Union; armed forces and security forces and final and transitional provisions.

The sources of law in the UAE are based primarily on the following:

¹⁸⁸ UNCITRAL 'Status; 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards'

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>

¹⁸⁹ Decree Law No. 16 of 1996.

¹⁹⁰ Al Tamimi, E., *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (the Hague: Kluwer Law International, 2003) p.1

¹⁹¹ The Provisional Constitution was signed on 18/7/1971 by Abu Dhabi, Dubai, Sharjah, Ajman, Um Al Quwain and Fujairah. Ras Al Khaimah joined on 10/2/1972.

¹⁹² The UAE Constitution, Articles 116 and 122.

- I. Islamic law: the UAE Constitution declares that Islamic *Shari'a* is the main source of legislation;¹⁹³
- II. Constitutional: the provisions of the UAE Constitution shall prevail over the Constitutions of the member Emirates of the Union. 'In case of conflict, that part of the inferior legislation which is inconsistent with the superior legislation shall be rendered null and void to the extent that removes the inconsistency';¹⁹⁴
- III. Legislation: The Supreme Council of the Union has authority to approve various Union laws before their promulgation.¹⁹⁵ For example, labour relations and social security, real estate and expropriation in the public interest, extradition of criminals, banks, insurance of all kinds, major legislation relating to penal law, civil and commercial transactions and company law, procedures before the civil and criminal courts and technical and industrial property and copyright.¹⁹⁶

1.7.2 Components of the System of Government

The Constitution establishes the principal instruments of Federal authority as follows:

¹⁹⁷

1. The Supreme Council of the Union.
2. The President of the Union and his Deputy. The President of Union and his Deputy are appointed from among Supreme Council Members by election.¹⁹⁸
The President of the Union has the power to appoint a Prime Minister and a Council of Ministers.¹⁹⁹
3. The Council of Ministers of the Union.
4. The National Assembly of the Union.
5. The Judiciary of the Union.

¹⁹³ *Ibid*, Article 7.

¹⁹⁴ *Ibid*, Article 151.

¹⁹⁵ *Ibid*, Article 47 Para 2.

¹⁹⁶ For more information, see Articles 120 and 121 of the UAE Constitution.

¹⁹⁷ Article 45 of the UAE Constitution

¹⁹⁸ *Ibid*, Article 51.

¹⁹⁹ *Ibid*, Article 54.

1.7.2.1.1 The Supreme Council

The Supreme Council is the highest constitutional authority in the UAE and consists of the seven rulers of the Emirates.²⁰⁰ It has the right to formulate general policy in all matters invested in the Union by this Constitution, ratifies all federal laws before their promulgation and ratifies treaties and international agreements.²⁰¹ Its decisions on substantive matters require a majority of at least five votes, provided that this majority includes the votes of the Emirates of Abu Dhabi and Dubai. Decisions on procedural matters are taken by a majority vote.²⁰²

1.7.2.1.2 Executive Authority

The Council of Ministers is the executive body; consisting of the Prime Minister, his Deputy and a number of Ministers. It is in charge of dealing with all domestic and foreign affairs which are within the competence of the Union, and under the supreme control of the President of the Union and the Supreme Council.²⁰³

1.7.2.1.3 The National Assembly

The National Assembly of the Union consists of 40 members,²⁰⁴ the number of representatives for each Emirate being based on the size of the Emirate.²⁰⁵ Article 69 of the Constitution gives each Emirate the right to determine the method of selection for the citizens who represent it in the Union National Assembly.²⁰⁶ The powers of the National Assembly are limited to discussion and approval of the Union budget and of proposals for federal bills presented by Cabinet Ministers.²⁰⁷

²⁰⁰ *Ibid*, Article 46.

²⁰¹ *Ibid*, Article 47.

²⁰² *Ibid*, Article 49.

²⁰³ *Ibid*, Article 60.

²⁰⁴ Article 68 of the UAE Constitution These seats are distributed as follows: Abu Dhabi and Dubai, both 8 seats; Sharjah and Ras Al Khaimah, both 6 seats; Ajman, Umm Al Quwain, and Fujairah, all 4 seats.

²⁰⁵ Al Tamimi, E., *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, p. 3

²⁰⁶ The method of selection that applies to determine the members of the National Assembly through the recommendation of the rulers of Emirates. Essam Al Tamimi, p. 3.

²⁰⁷ Al-Muhairi, B., *The Development of the UAE Legal System and Unification with Judicial System*, (1996) 11 *Arab L Q*, p.120.

1.7.2.1.4 The Judiciary Authority

The UAE features both Federal and local courts.²⁰⁸ However, the Constitution allows for any Emirate to transfer all or part of the jurisdiction of local judicial authority to the UAE Federal Judicial Authority.²⁰⁹ All of the Emirates except Dubai and Ras Al Khaimah have done so.²¹⁰

The Federal Supreme Court has power to render judgments in following subjects:²¹¹

1. Miscellaneous disputes among member Emirates, or between one or more Emirate and the government of the Union, when such disputes are remitted to the Court on the basis of a request from any one of the interested parties;
2. Examination of the constitutional legality of Union and local laws;
3. Interpretation of the provisions of the constitution;
4. Interrogation of ministers and senior officials of the union appointed by decree;
5. Crimes directly affecting the interests of the Union;
6. Conflict of jurisdiction between Union judicial and local judicial authorities;
7. The Federal Law of the Union Supreme Court No.10/1973 adds the jurisdiction to interpret international treaties and agreements. Thus questions relating to the New York Convention should be referred to the Supreme Court.²¹²

The federal court system consists of three levels: Primary Courts, Appeal Courts, and the Supreme Court.²¹³ The Federal courts and Local courts are divided into civil courts, criminal courts and Shari'a courts.²¹⁴

The legal system in the UAE is a Civil Law system; as such the primary source of law is a statutory code. This is clear, as the Civil Code lists the sources which courts should follow in rendering judgements. These formal sources are: (i) provisions of specific

²⁰⁸ Al Tamimi, E. *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, p.4.

²⁰⁹ Article 105 of the UAE Constitution

²¹⁰ Al Tamimi, E. *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, p.4.

²¹¹ For more information about the Supreme Court Jurisdiction see Article 99 of the Constitution and Article 33 of the Federal Supreme Court Statute (Federal Law No. 10/1973).

²¹² This matter will be discussed in the next chapter.

²¹³ Article 9 of the Federal Judicial Authority Law, (Federal Law No. 3/1983)

²¹⁴ Al Tamimi, E. *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, p. 11; It should be noted that establishing a structure of Federal Courts is pursuant to the decision of the Minister of Justice as stated in Article 14 of the Federal Courts concerning the establishment of the Federal Courts Law, (Federal Law No. 6/1978).

legislation;²¹⁵ (ii) the texts of civil code;²¹⁶ (iii) Islamic Law: at this stage, the civil code lists (in order of priority) the various Islamic jurisprudences that should be used. Thus, the judge consults two schools, Maliki and Hanbli. If he finds no answer therein, then he consults the Shafi’I and Hanafi schools, as the matter may require;²¹⁷ and (iv) custom: if the custom is peculiar to a particular Emirate, the judge applies to that Emirate.²¹⁸

1.7.3 Law governing Arbitration

Until 1992, there was no federal law regulating the arbitration process in the UAE. However, there are four federal laws which touch on arbitration; it should also be noted that these provisions deal with arbitration that regulates special disputes. These are the following:

1. Article 13 of Law No.11 of 1973 states that “arbitral awards made within one of the Emirate members of the Union are enforceable in the other Emirates of the Union...” The Article also provides five conditions under which enforcement can be resisted.²¹⁹
2. Federal law has established the higher commission of arbitration to resolve labour disputes.²²⁰
3. The Federal Law on the Union of Chambers of Commerce and Industry Article 5, Para.10 empowers the Chambers to resolve commercial and industrial disputes through arbitration.²²¹
4. Federal Law No. 4 of 2000 on the Emirates’ Securities and Commodities Board provides that the body has power to issue regulation concerning arbitration in disputes arising out of dealings in Securities and Commodities.²²² The Board has issued decision No. 1 of 2001 on the regulation of arbitration in disputes arising

²¹⁵ See Transaction Civil Code Article 22.

²¹⁶ *Ibid*, Article 1.

²¹⁷ *Ibid*.

²¹⁸ *Ibid*

²¹⁹ Federal Law No.11.on the organization of judicial relations between the Emirates of the Union. Issued on 2/08/1973

²²⁰ Federal Law No.8 of 1980 on labour relationship organization

²²¹ Federal Law on the Union of Chambers of Commerce and Industry No. 5 /1976

²²² Federal Law No. 4 of 2000 on the Emirates’ Securities and Commodities Board, Article 4.

out of dealings in securities and commodities.²²³ This regulation applies in the Abu Dhabi and Dubai financial markets.²²⁴

There are also local rules governing the arbitration process: the Code of Civil Procedure (Law No.3/1970) in Abu Dhabi, and the Code of Contracts, issued on 22 June 1971 in Dubai, the latter also having being adopted by Sharjah.²²⁵

In March 1992, the UAE was the last GCC state to adopt new provisions governing the arbitration process; these were issued by Federal Law No.11 of 1992 of the Civil Procedure Code.²²⁶ The provisions relating to arbitration in the Code are Articles 233 to 281. Moreover, the Federal Law in Article 1 repeals all previous laws, decrees, orders and measures in place and the special civil procedure.

1.7.4 Law governing the recognition and enforcement of foreign arbitral awards

Article 236 of the UAE Federal Law No.11 of 1992 on Civil Procedure provides that foreign arbitral awards are enforceable under the same conditions as apply to the enforcement of foreign judgments under article 235. The UAE has also incorporated many international conventions granting leave to enforce arbitral award into Federal legislation. In 1981, it ratified the Washington Convention.²²⁷ In 1999, it issued Federal Decree No. 53 of 1999 to ratify the Convention on the Riyadh Arab Judicial Cooperation,²²⁸ and in 1996, it ratified the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC states.²²⁹ Finally, in 2006 it was the last GCC State to accede to the New York Convention, an important step forward for granting the enforcement of foreign arbitral awards in the UAE.²³⁰

²²³ The regulation comprises 55 Articles divided into eight chapters: general provisions; the request for arbitration; arbitration commission; arbitration proceedings; rendering of the award; ending arbitration proceedings; challenge to the award; fees of arbitration.

²²⁴ Al Tamimi, E. *A Practical Guide to Litigation and Arbitration in the United Arab Emirates*, p.147.

²²⁵ El-Ahdab, A., *Arbitration with the Arab Countries* p.715.

²²⁶ Issued in the UAE Official Gazette, No.235 3/3/1992.

²²⁷ The UAE submitted ratification on 23/12/1981 and this entered into force on Jan. 22, 1982. See The World Bank Group 'List of Contracting State and other Signatories of the Convention' <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>

²²⁸ Issued in the UAE Official Gazette of 29/4/1999

²²⁹ Federal Decree No.41/1996, issued in the UAE Official Gazette of 30/6/1996.

²³⁰ Federal Decree No.43/2006, Issued in the UAE official Gazette of 28/6/2006.

1.8 Summary

This chapter shows that all GCC countries have similar characteristics; they are ruled by hereditary monarchies and have enjoyed political stability for a long period, as well as being highly dependent on the petroleum sector, and owning the majority of the world's oil reserves. Their legal systems have largely been put in place over the last fifteen years, when Saudi Arabia and Oman adopted new constitutions, and Bahrain and Qatar replaced their old constitution with more progressive ones. However, these constitutions are not of the same standard. Only Kuwait, Qatar and Bahrain have adopted separation of powers. Members of legislative authorities exercise their capacities to the full only in Kuwait, Qatar, and Bahrain, while it is only in Kuwait that all members of the body are elected. Although in Qatar, Bahrain and Oman some of the members are elected.

Islamic law acts as the basis for the State in Saudi Arabia and Oman, but it is also deemed a principal source of legislation in the other GCC Countries. Kuwait, Bahrain, Qatar, and the UAE are civil law countries and follow a civil law system.

The judicial systems in all GCC countries are substantially independent systems, and based on three levels. However, Saudi Arabia has adopted a system of several courts which may give rise to conflict between courts and may extend the period of litigation in Saudi courts. In addition, judges in all GCC countries are independent, subject only to the law, and may not be put out of office unless they break the law.

All GCC Countries have laws governing arbitration, in particular Bahrain which has adopted the UNCITRAL Model Law on International Commercial Arbitration, and Omani law which is based mainly on the Model law. The national laws of all GCC countries except Saudi Arabia include provisions governing recognition and enforcement of a foreign award. In addition, these countries have ratified the most important international arbitration conventions such as the New York Convention 1958 and the Washington Convention 1960. Moreover, these countries have the same historical experience regarding arbitration of contracts of oil concessions, as several well-known arbitral awards rendered in the context of international arbitration were between GCC States' governments and international companies.

Chapter Two

General Principles Regarding Recognition and Enforcement of Foreign Arbitral Awards

2.1 Introduction

This chapter will examine the meanings and aims of the terms 'recognition' and 'enforcement', and assess whether the terms are separable or inseparable. It will also explore the definition of the term "award," and which type of an award qualifies as being subject to recognition and enforcement procedures under the relevant regimes governing the enforcement and recognition of foreign arbitral awards. Finally, this chapter will deal with questions relating to determining where an award is made, and when an award is are considered to be a foreign award.

2.2 Definition of recognition and enforcement of foreign arbitral awards

2.2.1 Inseparability or separability of the terms 'recognition' and 'enforcement'

In most cases, the terms "recognition" and "enforcement" are used as if they were always inextricably linked.²³¹ However, they have different meanings and can be used for different purposes within the context of the enforcement process.²³²

The New York Convention mentions the terms together in articles IV and V. The same terms can be found in Article 35 of the Model Law and in the English Arbitration Act

²³¹ See, e.g., Lew, J., Mistelis, L. and Kroll, S., *Comparative International Arbitration*, (Kluwer Law International, The Hague; London, 2003) Paras 26-29; Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, (4th edn, Sweet & Maxwell, London, 2004) Para 10; Tweeddale, A. and K., *Arbitration of Commercial Disputes: International and English Law and Practice*, (Oxford University Press, 2005) p 408.

²³² See e.g., Redfern, A., and Hunter, M., op. cit., Para 10-10; Lew, J., Mistelis, L. and Kroll, S. op. cit., Paras 26-29; Soo, G., 'International enforcement of arbitral awards' (2000) 11(7) *International Company and Commercial Law Review*, p. 253; Tweeddale, A. and K., op. cit., p. 408; Mellwrath and Savage, *International Arbitration and Mediation: A Practical Guide*, (Kluwer Law International , 2010) Para 6-047.

1996.²³³ In effect, the reason these terms are generally used together is that awards cannot be enforced without recognition by the court which orders their enforcement;²³⁴ thus, these terms cannot be separated. In such cases, it is not easy to distinguish between recognition and enforcement. In this regard, Redfern and Hunter suggested that the precise distinction is between ‘recognition’ on the one hand, and ‘recognition and enforcement’ on the other.²³⁵

Yet the terms can be used separately²³⁶ because an award may be recognised without being enforced,²³⁷ and thus they may be considered as two different stages of the parties’ set of rights and obligations.²³⁸ This can be seen under the New York Convention itself, where Article III refers to these terms as if they were separate with regard to the conditions that can apply to each.²³⁹ Moreover, the Model Law in Article 36 refers to the terms as if they are separable but linked. The Riyadh Convention is more precise when it provides in Article 34, “documents relating to the request for *recognition or enforcement*.”²⁴⁰ Vietnamese law provides a good example of the distinction between these terms through applying different procedures for recognition and enforcement. Thus the Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards, article 10 (1) stipulates that an application for recognition must be submitted to the Ministry of Justice, whilst an application for enforcement must be submitted to the People’s Court.²⁴¹ Furthermore, in the case of *Dallal v Bank Mellat*²⁴² the English courts recognised that a decision of the Iran-US Claims Tribunal was rendered by a competent foreign arbitration tribunal regarded it as unenforceable under the New York Convention, because its jurisdiction derived from a special treaty rather

²³³ In part III they are used as interchangeable terms, whereas they are used as two separate terms in s. 120, 103, and 104. See also Redfern, A., and Hunter, M., op. cit., Para 10-10.

²³⁴ See, Redfern, A., and Hunter, M., op. cit. Para 10-10; Lew, J., Mistelis, L. and Kroll, S., op. cit., Paras 26-29; Anglade, L. ‘Challenge, Recognition and Enforcement of Irish and Foreign International Arbitral Awards under the Irish Arbitration (International Commercial) Bil’ (1998) 9 (5) *Intl Comp & Comm L Rev*, pp. 128, 132.

²³⁵ *Ibid.*

²³⁶ Di Pietro, D. and Platte, M., *Enforcement of international arbitration awards: the New York Convention of 1958* (1st edn, London: Cameron, 2001) p.22.

²³⁷ Redfern, A., and Hunter, M., op. cit., Para 10-10; Tweeddale, A. and K., op. cit., p. 408.

²³⁸ Di Pietro, D. and Platte, M., op. cit. p. 22; Gaillard, E. and Di Pietro, D., (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, (Cameron, 2008) p. 93.

²³⁹ The New York Convention Article III.

²⁴⁰ See also the Geneva Convention of 1927 which states in Article 1 ‘to obtain such recognition or enforcement’.

²⁴¹ Nicholson, P. and Nguyen, Thi Minh, ‘Commercial Dispute and Arbitration in Vietnam’ (2000) 17 (5) *Journal of International Arbitration*, p.4

²⁴² *Mark Dallal v Bank Mellat* [1986] 2 W.L.R. 745.

than an arbitration agreement. In light of the above, the terms ‘recognition’ and ‘enforcement’ may be used separately. However, these matters are subject to the attitude of local regimes where the winning party raises the award.

2.2.2 Meanings and purposes of recognition and enforcement

Recognition is generally a defensive process.²⁴³ It tends to arise when an application for a remedy made to a court by a losing party is met by a plea by the winning party that the dispute has already been determined by an arbitral award.²⁴⁴ To prove this defence, the winning party will furnish the award to the court and demand that the court recognise the award as valid and binding upon the parties for any or all of the issues dealt with in the arbitration.²⁴⁵ This situation occurred, for example, in *Peoples’ Insurance Co of China v Vysanthe Shipping Co Ltd*,²⁴⁶ as, while the Chinese Court had given its judgment on the merits, the relevant issues had also been decided by an arbitral award which had been enforced in London against PICC. PICC sought to a claim against the winning party before the High Court in England, but the court recognised that the arbitral award meant that the matter was *res judicata*.

On the other hand, enforcement is normally a judicial process that follows recognition and ensures that the terms of the award are carried out.²⁴⁷ Enforcement, therefore, goes a step further than recognition by introducing an element of compulsion²⁴⁸

The purpose of recognition of an arbitral award then can be a mere defensive shield, a means of preventing the losing party from asking a court to adjudicate on a dispute on the basis that a disputes decided by an arbitral award is *res judicata*.²⁴⁹ For example, the English Arbitration Act 1996, s. 101(1), states that the award is recognised “as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.” Recognition can also be used to block any attempt to enforce another arbitral award obtaining from the losing party in the same

²⁴³ Redfern, A., and Hunter, M., op. cit., Para 10-11.

²⁴⁴ Redfern, A., and Hunter, op. cit., Para 10-11; Lew, J., Mistelis, L. and Kroll, S., op. cit., Para 26-11

²⁴⁵ Redfern, A., and Hunter, M., op. cit. Para 10-11.

²⁴⁶ *Peoples’ Insurance Co of China v Vysanthe Shipping Co Ltd* [2003] EWHC 1655 (Comm.).

²⁴⁷ Lew, J., Mistelis, L. and Kroll, S., op. cit., Para 26-12; Di Pietro, D. and Platte, M., op. cit. p.22.

²⁴⁸ Redfern, A., and Hunter, M., op. cit. Para 10-12.

²⁴⁹ Redfern, A., and Hunter, M., op. cit., Para 10-13.

dispute. In *OTV v Hilmarton*,²⁵⁰ OTV won the first arbitral award which was enforced by a French court. When a second arbitral award granted Hilmarton's claim, Hilmarton sought to enforce in France, but the Supreme Court refused to enforce that award, on the basis that the first award had determined the dispute.

On the other hand, enforcement allows the winning party to ask a court to enforce the award against the assets of the losing party. Thus while recognition is a shield, enforcement is used as a sword.²⁵¹ The local court in this regard will take positive action against the assets of the losing party, applying legal sanctions.²⁵² The type of sanctions differ from country to country but may include seizure of property and freezing of bank accounts in cases where there is a refusal to comply voluntarily.²⁵³

2.2.3 The position of GCC countries

Regarding the terminology used in GCC laws, generally national provisions regulating the enforcement of foreign awards do not refer to 'recognition' except in tandem with except 'enforcement'. However, Bahrain speaks of 'recognition' and 'enforcement'. Its International Arbitration law refers to the terms as if they were inseparably linked. They are mentioned in the title of Article 36: 'Grounds for refusing recognition or enforcement'. The text of the article also stresses the terms as being inseparably linked when referring to: 'Recognition or enforcement of an arbitral award, irrespective of the country in which it was made'.

To the researcher's knowledge there is no case law in GCC states dealing with the term 'recognition' alone. However, hypothetically, the concept of recognition can be used by GCC courts without enforcing an award. This can occur under the New York Convention and the Riyadh Convention when one party sues another in a GCC court in relation to a matter already decided by an arbitral award. In this case, the winning party (defendant) can object that the dispute has already been determined and request the national court to recognise an award in deciding that any or all of the issues dealt with in the arbitration were *res judicata* and cannot be litigated. In this situation, is the

²⁵⁰ *Omnium de Traitement et de Valorisation (OTV) v Himarton* (1997) XXII YBCA 696 (Supreme Court, 10 June 1997) pp 696-698.

²⁵¹ Redfern, A., and Hunter, M., op. cit., Para 10-13;

²⁵² Redfern, A., and Hunter, M., op. cit. Para 10-13; Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 26-12.

²⁵³ Redfern, A., and Hunter, M., op. cit., Para 10-13; Lew, J., Mistelis, L. and Kroll, S., op. cit., Para 26-12.

recognition obtained automatically or only upon a formal application? It seems clear it may be obtained automatically. Kuwaiti evidence law, for example, states that the court shall, of its own initiative, render judgement on the strength of this probative force.²⁵⁴ This means that recognition is not necessarily being requested by the defendant. However, it seems that this position will not pertain with foreign awards. This is due to the fact that recognition under the New York Convention is subject to the conditions laid down in Article III and IV, which require that if a party wishes the award to be recognised and enforced, he must furnish two documents: the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. Thus, if the party fails to supply these documents, the national court will not recognise the foreign award. It should also be pointed out the enforcement under GCC national laws can go a step further than recognition, through introducing an element of compulsion. Should the losing party refuse to comply voluntarily, and the winning party applies for such assistance, the Judge of Execution can use legal sanctions against the former, including applying for an order committing him to prison.²⁵⁵

2.3 Meaning of foreign awards

Important consequences stem from the definition of a foreign award, as only such an award will qualify for recognition and enforcement under the relevant international conventions. Therefore, the meanings of that term arising from international conventions or the national regimes of GCC Countries will be examined.

2.3.1 Award

First of all, however, it is important to define what is meant by an ‘arbitral award’, since only a genuine award can be the subject of recognition and enforcement.

There is no definition of the term award in the New York Convention,²⁵⁶ the UNCITRAL Model Law, the Arab Convention or the GCC Convention. Neither can a

²⁵⁴ See, e.g., Kuwait: Article 53 of the Law of Evidence in Civil and Commercial Matters; Bahrain: Article 99 of the Law of Evidence in Civil and Commercial Matters.

²⁵⁵ See, for example, in the UAE, Article 324 of the Federal Law No.11 of 1992 on the Civil Procedure; And in Kuwait, Article 292 of the Code of Civil and Commercial Procedure.

²⁵⁶ Article I (2) states that “arbitral award” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted their

definition be found in the laws of the GCC countries. However, in the process of drafting the Model Law, the following definition was suggested:

“‘Award’ means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.”²⁵⁷

This proposal shows that the definition may cover not only the final award but also partial or interim awards, which can be made at any time during the arbitration proceedings, irrespective of nomenclature. However, because the suggested text gave rise to significant disagreement, it did not succeed.²⁵⁸ Sometimes courts or scholars attempt to define ‘award. Thus a French court defined an arbitral award as “the document issued by the arbitrators which resolves in a final manner the dispute submitted to them, whether on the merits of case, or the jurisdiction of the tribunal, or procedural grounds, and which brings the case to an end.”²⁵⁹ In the same vein, Fouchard, Gaillard and Goldman defined an arbitral award “as a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings”.²⁶⁰

Some commentators support the idea of adopting a universal definition of the term ‘award’. Thus Domenico and Martin²⁶¹ argue that “the definition of what qualifies as an

dispute. It was noted that the convention does not define the term arbitral award, so that, it will depend on the law of the state in which it is to be enforced whether a particular decision is to be regarded as an arbitral award. From the partial point of view, it is probably not necessary to define the term in the text of the convention ... the convention should perhaps be expanded to include arbitral settlements.” See UN Doc. E/2822, 31 January 1956, Annex I, at 10.

²⁵⁷ See United Nation Commission on International Trade Law, Working Group on International Contract Practices, ‘Report of the work of its seventh session’, UN Doc. A/CN.9/246, 6 March 1984. See also Broches, A., “Recourse against the Award; Recognition and Enforcement of the Award,” *UNCITRAL’s Project for a Model Law on International Commercial Arbitration, ICCA Congress Series No.2* (1984), p.208;

²⁵⁸ *Ibid.*

²⁵⁹ See the Court d’Appel de Paris, in the case of *Sardisud* 26 March 1994. Cited in, Delvolve, J., Pointon, G., Rouche, J., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, (Kluwer Law International, 2009) Para 302.

²⁶⁰ Gaillard, E. and Savage, J., (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, (Kluwer Law International, The Hague; 1999). Para 1353.

²⁶¹ Di Pietro, D. and Platte, M., op. cit. p.30.

arbitral award is important since only this type of decision can benefit from recognition and enforcement under the [New York] Convention.” However, in practice there is no universal standard.²⁶² For example, provisional and protective awards can be recognised and enforced in Holland, France and Belgium, but not in Germany, England or Switzerland.²⁶³ Thus, the meaning of the term ‘award’ differs from country to country. Some countries allow arbitrators to render more than a final award and some do not. For this reason, if an award were defined in any international convention it would be a more complicated issue, as that would mean that any award which did not conform to the definition could not be recognised and enforced. In this respect, it can be said that one of the reasons that the New York Convention is now applied in 144 countries²⁶⁴ because it has left the definition of the term ‘award’ and similar issues to the discretion of domestic legislation. Thus, we can say that there is no single definition of the term ‘award’.

Consequently, in the absence of a single definition of the term, the Conventions leaves the national courts of each contracting state to define the award according to their own law.²⁶⁵ This rule is clearly found under ICSID arbitration. The Washington Convention under Article 54 (3) provides that “execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.”

2.3.2 Position in the Arab Gulf Countries

First of all, it should be noted that the terminology used concerning awards in GCC arbitration legislation is not uniform. The terms ‘decision’ and ‘award’ are sometimes used in the same code. For example, the arbitration provisions of the UAE’s Federal Law No.11 of 1992 on the Civil Procedure uses the term ‘arbitral award’, but Article 213, paragraph 3, uses the term ‘decision’. Similarly, in both the Omani law of Arbitration in Civil and Commercial Dispute and the Saudi Arabia Arbitration

²⁶² Gaillard, E. and Savage, J., op. cit. Paras 1348- 1357.

²⁶³ See, Poudret, J. and Besson, S., *Comparative Law of International Arbitration*, (Sweet & Maxwell Ltd, 2007) Para 852.

²⁶⁴ United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (29/5/2010).

²⁶⁵ Gaillard, E. and Savage, J., op. cit. Para 1668; Gaillard, E. and Di Pietro, D., op. cit. p 141; Van den Berg, A.J., *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, (Kluwer Law International and Taxation, 1981), p. 49; Bocjstiegel, K. and Kroll, S., *Arbitration in Germany: The Model Law in Practice*, (Kluwer Law International, 2007) pp. 511-512.

Regulation of 1983 both terms are used. Yet in Bahrain, Kuwait and Qatar only the term ‘arbitral award’ is used.

No GCC regime defines the term award; nor have the courts attempted such a definition. However, the laws in the GCC give indications which may assist in defining what sort of awards could be recognised and enforced under GCC regimes.

According to GCC laws, except in the UAE, it is clear that arbitral tribunals are generally authorised to render various types of awards.²⁶⁶ These awards are generally final awards, interim measure awards, additional awards, and partial or interim awards. Do the previous awards qualify to be the subject matter of recognition and enforcement procedures under the relevant regimes governing the enforcement and recognition of foreign arbitral awards?

To the researcher’s knowledge the enforcing courts in GCC states have not yet dealt with an issue in which a foreign arbitral award could be the subject matter of a recognition and enforcement procedure.

Nonetheless, it is essential to identify exactly which arbitral awards can be classified as awards. Indeed, there are a number of criteria in which the classification of a decision as an arbitral award can have vital importance; in particular, to distinguish awards from other decisions rendered by arbitral tribunals which cannot be considered as genuine awards.

First, it should be noted that decisions issued by an arbitral tribunal on issues concerning procedure which are characterised as procedural orders do not qualify for

²⁶⁶The Codes of Civil and Commercial Procedure in Kuwait Article 184, Bahrain Article 240, and Qatar: Article 203, as well as the Saudi Arabia Arbitration Law Article 18, state that ‘all awards made by arbitrators, even if made for investigative measures, must be registered...’ This text, according to several commentators, leads to the arbitrators being authorised to render various decisions without their being specified, including decisions for carrying out investigation procedures. See, e.g., El-Ahdab, A., *Arbitration with the Arab Countries*, pp 111 and 602; Radhi, H. A., *Judiciary and Arbitration A Historical and Analytical Study*, (Kluwer Law International, 2003) p. 175. Moreover, in Kuwait under Article 173 of the Code of Civil and Commercial Procedure, arbitrators are allowed to cover urgent matters if the parties so agree. In Oman, Article 42 of the Law of Arbitration in Civil and Commercial Disputes Arbitration clearly refers to the arbitral tribunal being able to render provisional decisions or pass decisions in respect of part of the claims made prior to making the final decision.

consideration as genuine awards.²⁶⁷ Procedural orders aim to organise the arbitration procedure by providing the parties with directions for the development of the arbitral process and are issued without any formality or reasoning.²⁶⁸ According to Kuwait, Bahrain, Qatar, Oman, Saudi Arabia and the UAE, the arbitral tribunal can render decisions on issues concerning procedure, which are characterised as procedural orders.²⁶⁹ This is true of several decisions rendered by arbitral tribunals, such as the exchange of written evidence, the production of documents, the arrangements for the conduct of the hearing, and the hearing of witnesses or for carrying out investigation procedures. Therefore, pursuant to the prevailing view, the enforceability of procedural orders under the Conventions should be dismissed out of hand,²⁷⁰ and it can be said that procedural orders cannot be recognised and enforced by GCC Courts.

Moreover, it may be suggested that an award which qualifies as proper for the purpose of recognition and enforcement should be final. As noted by Redfern and Hunter,²⁷¹ “in practice, the term ‘award’ should be reserved for decisions that finally determine the substantive issues with which they deal.” In this respect, it should be borne in mind that the expression ‘final award’ is used in two senses. The more common refers to an award marking the end of the proceedings and settling all aspects of a dispute between the parties.²⁷² A clear indication of this is found under Bahrain International Commercial Arbitration Law, which provides that “the arbitral proceedings are terminated by the

²⁶⁷ See, e.g., Gaillard, E. and Di Pietro, D. (eds), op. cit. p 155; Redfern, A., and Hunter, M., op. cit. Para 8-6; Lew, J., Mistelis, L. and Kroll, S. op. cit. Para 24-5; Gaillard, E. and Savage, J. op. cit. Para 1355; Poudret, J. and Besson, S., op. cit. Para 879; Tweeddale, A. and K., op. cit. p.434.

²⁶⁸ See, Redfern, A., and Hunter, M., op. cit. Para 8-6; Lew, J., Mistelis, L. and Kroll, op. cit. Para 24-5.

²⁶⁹ See, e.g. in Kuwait: Articles 179 182 of the Code of Civil and Commercial Procedure; Bahrain: Article 238 of the Code of Civil and Commercial Procedure; Qatar: Articles 200 and 203 of the Code of Civil and Commercial Procedure; Oman: Articles 25, 28, 30, 32, and 33 of the Law of Arbitration in Civil and Commercial Disputes; in Saudi Arabia: Article 18 of the Arbitration Law, and Articles 22, 27, 29, 31, 32 of the Implementation Rules of the Saudi Arbitration Law; in the UAE: Articles 208, 211 and 212 of the Code of Civil Procedure.

²⁷⁰ See, e.g., Gaillard, E. and Savage, J., op. cit., Paras 1350 and 1357; Redfern, A., and Hunter, M., op. cit. Para 8-6; Lew, J., Mistelis, L. and Kroll, op. cit., Paras 24-3 and 24-31; Gaillard, E. and Di Pietro, D., op. cit. pp 142-144; Poudret, J. and Besson, S., op. cit. Para 852; Tweeddale, A. and K., op. cit.p.434. For court decisions see, e.g., *Marks 3-Zet Ernst Marks GmbH & Co. KG v Persstek, Inc.*, No. Civ. 05CV-121-JD, 2005 WL 1899330 (DNH 9 August 2005); *Resort Condominiums International Inc v Ray Bolwell and Resort Condominiums Pty Ltd* (1995) XX YBCA 628 (Queensland Supreme Court, 29 October 1993).

²⁷¹ Redfern, A. and Hunter, M., op. cit. Para 8-6.

²⁷² See, e.g., Gaillard, E. and Savage, J., op. cit. Para 1359; Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 24-16.

final award ... [and] the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings ...”²⁷³ The same meaning is also found under Omani law.²⁷⁴

Yet the expression ‘final award’ may also be used to describe awards which finally settle some aspects of the dispute which have validly come within the jurisdiction of the arbitral tribunal.²⁷⁵ Omani law, for example, provides that “it shall be permissible for an arbitral tribunal to render awards which are... only part of the relief and remedies sought, prior to the rendering of the award ending the dispute as a whole.”²⁷⁶

A final award has important legal consequences, the main one being that the award has a *res judicata* effect, which means that its merits cannot be reopened, not even with the tribunal’s agreement, nor can the award be subject of an ordinary challenge in the courts of the place of where it was made.

In addition, can a partial award qualify to be recognised and declared enforceable? A partial award is an effective way of determining matters that are separately entertained from the rest of the issues submitted to the jurisdiction of the tribunal.²⁷⁷ This is true of decisions such as jurisdiction, the governing law, declaratory relief, or liability or quantification of damages.²⁷⁸ Omani law clearly indicates that, domestically, it at least understands partial award in respect of jurisdiction by providing that “the arbitral tribunal shall rule in respect of a plea questioning the tribunal’s jurisdiction ... prior to determining the substantive issues, and it shall be permissible for it to join them with substantive issues in order to determine them together.”²⁷⁹ The same provision is found under Bahrain International Commercial Arbitration Law.²⁸⁰ In the rest of the GCC states, the law is silent with regard to partial awards, but, legislation in all these states lays down that ‘all awards made by the arbitrators, even though issued in an investigatory procedure, shall be filed with the clerk of the court originally having jurisdiction over this dispute.’ As mentioned earlier, according to several commentators,

²⁷³ International Commercial Arbitration Law, article 32.

²⁷⁴ The Law of Arbitration in Civil and Commercial Disputes, Article 48.

²⁷⁵ See, e.g., Gaillard, E. and Savage, J., op. cit. Para 1359; Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 24-17; Gaillard, E. and Di Pietro, D., op. cit. p.150.

²⁷⁶ The Law of Arbitration in Civil and Commercial Disputes, Article 42.

²⁷⁷ See Lew, J., Mistelis, L. and Kroll, S., op. cit., Para 24-19.

²⁷⁸ For more information, see Gaillard, E. and Di Pietro, D., op. cit. pp. 151-156.

²⁷⁹ The Law of Arbitration in Civil and Commercial Disputes, Article 22.

²⁸⁰ International Commercial Arbitration Law, Article 16.

this provision allows the arbitral tribunal to render partial awards. According to the prevailing view which considers partial awards as genuine arbitral awards, partial awards qualify to be recognised and enforced under the relevant regimes governing the enforcement and recognition of foreign arbitral awards.²⁸¹ This view also applies in ICSID arbitration. Article 53, paragraph 2 of the Washington Convention states that “for the purposes of this section, “award” shall include any decision interpreting, revising or annulling [an award] . . .”

GCC laws contain different rules in respect of provisional or conservatory measures. However, this is a debatable question. In Kuwait, Bahrain and Oman, the arbitral tribunal is empowered to render any provisional measures necessitated by the nature of the dispute.²⁸² Article 17 of the Bahraini International Commercial Arbitration Law, for example, provides that “unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.” In the rest of the states, the law does not authorise the arbitral tribunal to render such awards where such awards should be rendered by the national courts.

These orders are essentially temporary in nature, but are deemed necessary in respect of the subject matter of the dispute. However, the prevailing view is that the New York Convention, for example, does not apply to awards which are effectively interim measures.²⁸³ It is thus debatable whether awards granting interim measures will be enforced by GCC courts, especially under the New York Convention. Such awards, at best, are only enforceable at the place of arbitration. However, even if it is agreed that a national court would regard an interim measure as a genuine award qualifying for enforcement, it is improbable that a national court would enforce an interim measure

²⁸¹ See, e.g., Di Pietro, D. and Platte, M., op. cit., pp.31-56; Gaillard, E. and Savage, J., op. cit. Paras 1357, 1360-1362; Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 26-38; Gaillard, E. and Di Pietro, D., op. cit. pp 151-155; Poudret, J., and Besson, S., op. cit. p.818. See also, *Resort Condominiums International Inc v Ray Bolwell and Resort Condominiums Pty Ltd* (1995) XX YBCA 628 (Queensland Supreme Court, 29 October 1993) 641.

²⁸² Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 17 of the International Arbitration Law; Oman: Article 24 (1) of the Law of Arbitration in Civil and Commercial Disputes.

²⁸³ See, e.g., Lew, J., Mistelis, L. and Kroll, S., op. cit. Paras 24-24 at 24-28; Gaillard, E. and Di Pietro, D., op. cit. pp.155-156. See also, *Resort Condominiums International Inc v Ray Bolwell and Resort Condominiums Pty Ltd* (1995) XX YBCA 628 (Queensland Supreme Court, 29 October 1993) 641; *Merck & Co Inc (USA) et al v Technoquimicas SA (Colombia)*, (2001) XXVI YBCA 755 (Colombian Supreme Court, 26 January and 1 March 1999).

granted by a court of a foreign country without an agreement providing for reciprocity. The prevailing position adopted by national courts is that an interim award is not yet enforceable under the New York Convention,²⁸⁴ which means that there is no requirement of the principle of reciprocity for the enforcement of this kind of this award by the GCC courts. While, the important role played by interim measures has strongly encouraged the argument for an extended reading of the New York Convention aimed at including interim measures within its scope,²⁸⁵ practically such an outcome would have to rely on a supplementary convention to the New York Convention.²⁸⁶

On the other hand, the classification of an interim measure as an award may also have an impact on the application of certain provisions in GCC states other than international conventions and national laws. This can occur with interim measures to be carried out abroad when they are issued by the GCC Arbitration Commercial Centre.²⁸⁷ Article 27 of the arbitral rules of the Centre provides that “the tribunal may take, at the request of either party, interim measures in respect of the subject-matter of the dispute, including the measures for the preservation of the contentious goods, such as ordering the deposit of the goods with third parties or sale of the perishable items thereof in compliance with the procedural rules in the country where the interim measure is adopted.”²⁸⁸ The question of the right of the arbitral tribunal and the extent of their ability to enforce an interim measure when the place of arbitration is abroad can be considered in tandem with Article 14 of the Charter of the GCC Arbitration Commercial Centre and Article 35 of the arbitral rules. Article 14 of the Charter of the GCC Arbitration Commercial Centre provides that the agreement “to refer the dispute to the Centre’s Arbitral Tribunal and the ruling of this tribunal in respect of its competence *shall preclude* the reference of the dispute *or any action pursued upon hearing it before any other judicial authority in any state. It shall also preclude* any challenge against the arbitration award *or any of actions required for hearing it before any other judicial authority in any*

²⁸⁴ Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 24-27.

²⁸⁵ For more information see Gaillard, E. and Di Pietro, D., op. cit. pp.155-156.

²⁸⁶ Veeder, V., “Provisional and Conservatory measures” in: *Enforcing Arbitration Awards under the New York Convention - Experience and Prospects* (United Nations, New York, 1999), p.21; Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 23-95.

²⁸⁷ Arbitral Rules of Procedure adopted by the GCC Commercial Co-operation Committee (Ministers of Commerce in the GCC States) in November 1994 in Riyadh, Saudi Arabia.

²⁸⁸ Such authority is indeed more progressive than, e.g., Article 23 (2) of the ICC rules, which came into effect on 1 January 1998 and provides that ‘Before the file is transmitted to the Arbitral Tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures.’

state.”²⁸⁹ Moreover, Article 35 (1) on arbitral rules provides that “an award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.” These texts clearly refer to the exclusive authority related to issuing an interim measure, which should be only exercised by an arbitral tribunal rather than national courts, and when such awards issued by the arbitral tribunal relate to interim measures, this will have a *res judicata* effect. Consequently, interim measures rendered by the GCC Arbitration Commercial Centre qualify as awards for recognition and enforcement as a foreign award in the GCC States.

Other criteria considered in conjunction with the meaning of an award

As mentioned previously, an arbitral award qualifies for recognition and enforcement in GCC courts only if it is a genuine award. To determine this, we must distinguish an arbitral award from other types of award rendered by an arbitral tribunal which may not be properly considered as awards. However, there are other conditions that may contribute to characterising a decision as genuine in order for it to be enforced. These conditions mainly refer to formal characteristics inherent in the concept of an award and the award must result from an identification of an arbitral tribunal.

Identification of arbitral tribunal: The arbitral award must be delivered by the arbitral tribunal. In this regard, Di Pietro²⁹⁰ explains that “the identification of the actual means of dispute resolution is not affected by the name or title employed to describe it”. Therefore, other types of binding decisions rendered by third parties, such as decisions taken in the course of arbitral tribunal proceedings by an arbitral institution, the Italian *Arbitrato Irrituale*, decisions achieved in adjudication, expert determination or other various forms of ADR, such as mediation and conciliation, cannot constitute arbitral awards.²⁹¹

²⁸⁹ In addition, Article 2 (1) of the Arbitral Rules provides that ‘An Arbitration Agreement made in accordance with the provisions of these Rules before the Centre shall preclude the reference of the dispute before any other authority or it shall also preclude any challenge to arbitration award passed by the Arbitral tribunal’.

²⁹⁰ Gaillard, E. and Di Pietro, D., op. cit. p.134.

²⁹¹ For more information see, Gaillard, E. and Di Pietro, D., op. cit. pp.139-150. See also Born, G., *International Commercial Arbitration*, (Kluwer Law International 2009) p.2351; Gaillard, E. and Savage, J., op. cit. Para 1354, Poudret, J, and Besson, S., op. cit. Para 879.

Formal characteristics: A decision issued by an arbitral tribunal must be in such a form as to constitute an award conforming to the meaning of the New York Convention and other relevant regimes' international conventions.²⁹² As a general rule, GCC laws expressly require that an award must be in writing and signed by the majority of arbitrators to constitute an award.²⁹³ Consequently, oral awards or an award instrument not signed by a majority of arbitrators cannot be considered as a genuine arbitral award and will not be subject to the relevant regimes relating to the enforcement of foreign awards.

2.3.3 Foreign

The scope of relevant regimes is applied only to foreign and/or non-domestic arbitral awards. Enforcement of an award in the country that is the seat of the arbitration is usually governed by different provisions which usually contain easy process; thus it is important to determine where an award is made.

2.3.3.1 Determining where an awards is made

The determination of where an award is made is a debatable matter and there is no simple answer to this question. This issue arises due to different criteria having been adopted, whether by national courts or national laws, in this respect.

It is important to determine where an award is made. In some cases, when all the aspects of the arbitration are entirely restricted to one state, this question usually leads to the same answer.²⁹⁴ However, there are often factors implicating more than one state in international arbitrations. Usually, the arbitral hearing takes place in one state but it can be held in more than one state and, in any event, written submissions may be sent to the arbitrator at the place of his or her usual residence. This could well be different from the state where the hearings are held. The arbitrator may sign the award in the state where the hearings are held or may sign it elsewhere, such as in the state of his or her

²⁹² See, e.g., Born, G, op. cit. pp.2352-53; Bockstiegel, K. and Kroll, S., op. cit. pp. 511-12.

²⁹³ Kuwait: Article 183 of the Code of Civil and Commercial Procedure; Bahrain: Article 239 of the Code of Civil and Commercial Procedure; Qatar: Article 202 of the Code of Civil and Commercial Procedure; Oman: Article 43 (1) of the Law of Arbitration in Civil and Commercial Disputes; in Saudi Arabia: Articles 16 and 17 of the Arbitration Law, and Article 41 of the Implementation Rules of the Saudi Arbitration Law; in the UAE: Article 212 (5) of the Code of Civil Procedure.

²⁹⁴ See *S.a.s. Parolari Giovanni (Italy) v. Antypas Bros. Ltd. (Ethiopia)*, (1985) X YBCA, pp. 480 – 482; *Seller of soybean flour v. Buyer of soybean flour*, (1992) XVII YBCA, pp. 491 – 499.

residence. If the arbitrator signs the award in his home state, it may be deemed to be made in the state where the hearing is held.

In such circumstances how can it be determined where an award is made? According to Mann, the place where the award is made is deemed to be the seat of arbitration. In a brief note, he asserted:

“It is submitted that an award is ‘made’ at the place at which the arbitration is held, i.e., at the arbitral seat. It is by no means necessarily identical with the place or places where hearings are being held or where the parties or the arbitrators reside. It is rather the place fixed in the contract or the submission or the minutes of the hearing or is found to be the central point of the arbitral proceedings. It is the place which in the case of institutional arbitration will always be certain, which otherwise will only in the rarest of cases be open to doubt, and which is no reported case seems ever to have been questionable, for, as experience shows, where there could be any doubt, the arbitrators will almost invariably determine the place by agreement with the parties or if necessary by their own ruling recorded in the minutes.”²⁹⁵

The view that an award is considered as rendered at the seat of the arbitration seems to be sensible in the context of the international arbitration process when arbitrators who stay in different states may well have agreed on the final terms of the award by telephone, fax or email.²⁹⁶ This view has also been adopted by some arbitration rules and some national laws.²⁹⁷ In this regard, it is important to point out that the concept of

²⁹⁵ Mann, F. A., *Note and Comments on Cases in International Law, Commercial Law and Arbitration*, (Oxford: Clarendon Press, 1992), pp. 28-29. See also, Poudret, J. and Besson, S., op. cit. Para 885.

²⁹⁶ Redfern, A., and Hunter, M., op. cit. Para 2-22.

²⁹⁷ See, e.g., the UNCITRAL Arbitration Rules, Article 16 (4) (“the award must be made at the place of arbitration”); ICC Rules Article, Article 25 (3) (“an award is deemed to be made at the place (or seat) of the arbitration and on the date stated therein”); Model Law, Article 31 (3) (“the award shall state its date and the place of arbitration as determined in accordance with articles 20 (1). The award shall be deemed to have been made at that place.”); English Arbitration Act 1996, ss.53 (“unless otherwise agreed by the parties, where the seat of the arbitration in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.”); Netherlands Arbitration Act 1986, Article 1037 (1) (“if the place of Arbitration has

the arbitration seat is a purely legal notion, not a geographic or physical location dictated by convenience and circumstance.²⁹⁸

Despite the foregoing analysis, there is an alternative view that an award is made at the place it is signed, notwithstanding any other factor such as the autonomy of parties to determine the seat of arbitration. However, the place where the award was signed will lead to a reverse result, when the arbitrators have the power to determine where an award should be made and thus give a totally different character to an arbitral award, notwithstanding the autonomy of the parties or arbitration rules, even if the arbitrators themselves act unwittingly. In the context of international arbitration awards, these are often signed when each member of the tribunal has returned to his home country. In the case of a tribunal consisting of three arbitrators, the award in its final form may be signed in three different states, so that it is made at the place where the final signatory happens to be. This view was taken in England by the House of Lords in *Hiscox v Outhwaite* [1992] 1 A.C 562; but this has since been overtaken by the 1996 Arbitration Act. In this case, although the parties agreed that London was the seat of the arbitration, the arbitration hearings were held in England, using English procedural rules, before an English arbitrator, the court held that the award was made in France where the arbitrator physically signed it.²⁹⁹ One arbitrator made an interesting observation after this decision, recalling one arbitration where “he was requested by the parties to travel to the seat of arbitration (some seven hours flight from his office) simply to sign his final award which had been drafted at his office”.³⁰⁰ According to both of these aforementioned views, an award made outside the country where enforcement is sought is considered to be a foreign award.

Conversely, some jurisdictions have reached different results, relying on other criteria for determining whether an award which is admittedly made outside the place where enforcement is sought is foreign. In this view, an award made abroad can be regarded as

not been determined, either by the parties or the arbitral tribunal, the place of making the award, as stated in the award, is deemed to be the place of arbitration.”).

²⁹⁸ Born, G., op. cit. pp.1248-49; Redfern, A., and Hunter, M., op. cit. Para 2-24. The English 1996 Arbitration Act, ss 3 provides that “the seat of the arbitration” means the juridical seat of the arbitration ...” also, the Paris Court of Appeal in *Societe Procedes de prefabrication pour le beton v Libye*, for example, indicates that “the seat of arbitration is a purely legal notion carrying with it important consequences.” Cited in, Born, G., op. cit. pp. 1248-49.

²⁹⁹ *Hiscox v Outhwaite*, [1992] 1 AC 562,

³⁰⁰ Pryles, M., ‘Reservation Available to Member States: The Reciprocal and Commercial Reservations’, in Gaillard, E. and Di Pietro, D., op. cit. p.168.

domestic and not foreign. For example, in India, the Supreme Court held that an award made in England was deemed to be domestic in a case where the law governing the arbitral procedure was Indian law, although the parties agreed that London was the seat of arbitration. The court concluded that “an award is foreign not merely because it is made in the territory of a foreign state, but because it is made in such a territory under an arbitration agreement not governed by the law of India.”³⁰¹ In addition, Pakistani courts concluded that an award made abroad was considered as domestic if the law applicable to the substance of the dispute was Pakistani law.³⁰² It should be borne in mind that if national courts adopt such a view, there is a danger that they might assert jurisdiction to set aside an award rendered abroad, which would contradict the Convention’s basic purpose of facilitating the international enforceability of arbitral awards. According to Born,³⁰³ “this interpretation directly undermines the Convention’s [New York Convention] regime for the recognition of foreign and/or non domestic awards, while purporting materially to expand the circumstances in which courts may annul foreign awards.”

The description of an award as foreign or national depends on the criteria that can be used so to characterise an award. Thus, it is common to have different criteria according to the view of the conventions or legal systems dealing with this matter. In order to define the meaning of foreign, an examination must be made of the conventions that apply in GCC countries, and also the national laws. Therefore, to determine when an award can be considered foreign in the GCC States, one must examine the issue of the place of arbitration in these states.

2.3.3.2 Importance of dealing with this matter

The determination of where an award is made is a vital matter. Thus, when considering an application for enforcement of the award, the judge must determine whether the award is national or foreign. The answer to this question will determine which court is competent to receive the application. The judge will also attempt to determine the country in which an award was rendered. This is important as not all foreign awards are

³⁰¹ *National Thermal Power Corp v The Singer Co* (1993) XVIII YBCA 403 (Indian Supreme Court Civil Appeal, 7 May 1992) 409. See also, *Nirma Ltd v Lurgi Energie und Entsorgung GmbH* (2003) XXVIII YBCA 790 (High Court, 19 December 2002) 797-804.

³⁰² See, e.g., *Hitachi Ltd v Rupali Polyester* (2000) XXV YBCA 486 (Pakistan S.Ct. 1998) 507.

³⁰³ Born, G., op. cit. p.2376.

enforceable in each GCC country, and it is vital to know whether the country in which the award was made is party to relevant international convention or not. In addition, for example under the New York Convention, the enforceability of an award can be influenced by the place where it is made. Pursuant article V (1) (a) and (e) recognition and enforcement of an award may be refused on the basis that the arbitration agreement was not valid “under the law of the country where the award was made,” or that the award itself had been “set aside or suspended” by a court of the country in which it was made.

2.3.3.3 International conventions

The international convention most relevant for most foreign awards is certainly the New York Convention which expresses itself of relate to the ‘recognition and enforcement of foreign arbitral awards’. The Convention applies two criteria to characterize when an award is foreign. One is a territorial criterion and the other a functional criterion,³⁰⁴ referring not only to ‘awards made in the territory of a state other than the state where its recognition and enforcement are sought’ but also to ‘arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought’.³⁰⁵

It is important to note that the scope of the Convention does not depend on the nationality of the parties to the arbitration, or whether the subject matter of the award is “international”, or the law applied is foreign, but only applies to “foreign” awards, that is to say, all awards made in a country other than that where enforcement is sought.³⁰⁶ In other words, “Article 1 (1) [of the New York Convention] should be taken as self-standing: if an award has been made elsewhere than the enforcement forum, that is both sufficient and necessary to trigger the application of the Convention”.³⁰⁷

The term “foreign” under the New York Convention is also generally interpreted as covering awards that are not considered “national.”³⁰⁸ Thus, the last sentence of Article 1 (1) states that the convention “shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” In

³⁰⁴ Lew, J, Mistelis, L and Kroll, S., op. cit. Para 26-41.

³⁰⁵ The New York Convention, Article 1 (1).

³⁰⁶ Gaillard, E. and Savage, J., op. cit. Para 1668; Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 26-43.

³⁰⁷ Petrochilos, G., *Procedural Law in International Arbitration*, (Oxford University Press, 2004) p. 352.

³⁰⁸ Gaillard, E. and Savage, J., op. cit. Para 1668.

fact, the second criterion was added because Civil Law States, e.g. France, Germany and Italy, insisted that an award made in these States under foreign law is considered as a non-domestic award.³⁰⁹ In Germany and France, the nationality of an award depends on the law governing the arbitral procedure.³¹⁰ The German delegate stated that if the parties have agreed to conduct arbitration in London under German law, the arbitral award rendered would be considered a domestic award in Germany.³¹¹ Consequently, the second criterion was added to settle this debate.

How to define the concept of “non-domestic”? What constitutes a “non-domestic” award under the Convention? The second criterion for determining the applicability of the Convention is more complex than the first criterion of what constitutes a “foreign” award.³¹² Van den Berg declares that “the question of what constitutes a non-domestic award within the meaning of the New York Convention is one of the most complicated issues posited by this Treaty.”³¹³ Nevertheless, the determination of the “non-domestic” character of an arbitral award for recognition and enforcement under the New York Convention depends totally on the basic principles applied in the national law of contracting states, and is also subject to definition by the attitude of the court where recognition and enforcement is sought.³¹⁴ It should also be pointed out that, unlike definitions of the term “foreign” arbitral awards where the Convention is clear-cut (“arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought”), the “non-domestic” definition is discretionary.³¹⁵ This can be inferred from the word “considered” in Article 1 (1) of the Convention.

However, since the Convention entered into force, it has become clear that the scope of “non-domestic” awards can arise essentially in three different categories of arbitral

³⁰⁹ Mok, Y.-J. ‘The principle of reciprocity in the United Nations Convention on the Recognition and Enforcement of foreign Arbitral awards of 1958’, (1989) 127 *Case Western Reserve Journal of International Law*, p. 2.

³¹⁰ UN Doc. E/CONF. 27/SR 4

³¹¹ UN Doc. E/CONF. 26/SR 6

³¹² See Van den Berg, A. J., ‘Consolidated Commentary’ (2003) XXVIII YBCA 562; Born, G, op. cit. p.2377.

³¹³ Van den Berg, A. J., ‘When Is an Arbitral Award Non-Domestic under the New York Convention of 1958?’ (1985) 6 *Pace L. Rev.*, pp. 25, 26

³¹⁴ Born, G., op. cit. p.2380

³¹⁵ Van den Berg, A. J., ‘Consolidated Commentary’ (2003) XXVIII YBCA 562.

awards.³¹⁶ The first category refers to an award made in the state of enforcement in arbitration involving the interests of international commerce, or an award relating to a dispute involving a foreign element.³¹⁷ For example, Article 1492 of the New Code of Civil Procedure defines an award rendered in France, but involving interests of international commerce, as international, and enforces it under the procedure of New York Convention in the same way as awards made outside France.³¹⁸ In addition, this category arises from the implementation of legislation in the US and its interpretation by the courts for the benefit of the enforcement of the New York Convention.³¹⁹ For instance, in *Deiulemar Compagnia di Navigazione, S.p.A. (Italy) v Transocean Coal Company, Inc. (US) and Anker Trading S.A. (Switzerland)*³²⁰ although the seat of arbitration was the U.S., and the award rendered in New York City, a U.S. District Court deemed the award non-domestic. Thus, it was subject to the New York Convention under U.S.C. Sect. 202 of Chapter Two of the FAA, which provides that if a ‘relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states’ it will be deemed to fall under the Convention. The second category refers to an award made in the state of enforcement under the procedural law of another state.³²¹ The third category refers to an award that is considered as “a-national” in that it is not governed by any arbitration law.³²²

Articles 1 and 3 of the Convention also allow contracting States to ratify the Convention with reservations, so that they may decide to recognise and enforce only awards made in the territory of another Contracting State.³²³

The Riyadh Convention on Judicial Co-operation 1983 lays down the procedure for ‘recognising and enforcing arbitral awards in each of the contracting countries’.³²⁴

³¹⁶ Born, G., op. cit. p.2380

³¹⁷ See, Van den Berg, A. J., ‘Consolidated Commentary’ (2003) XXVIII YBCA 562; Born, G., op. cit., 2380.

³¹⁸ Gaillard, E. and Savage, J., op. cit. Para 1560-61.

³¹⁹ Born, G., op. cit. p.2380

³²⁰ *Deiulemar Compagnia di Navigazione, S.p.A. (Italy) v Transocean Coal Company, Inc. (US) and Anker Trading S.A. (Switzerland)* (2005) XXX YBCA 991(US District Court, 30 November 2004), pp. 994-95.

³²¹ Van den Berg, A. J., ‘Consolidated Commentary’ (2003) XXVIII YBCA 562; Born, G., op. cit. p.2380

³²² Van den Berg, A. J., ‘Consolidated Commentary’ (2003) XXVIII YBCA 562, 569-571; Born, G., op. cit. p.2380

³²³ The GCC countries making reservations in this respect are Bahrain, Kuwait and Saudi Arabia.

³²⁴ The Riyadh Convention, Article 37.

However, this text does not properly indicate when an award can be considered to be foreign, because it refers to the application of the same provisions that apply to judgments. Thus awards would be defined as a foreign if ‘made by the courts of one the contracting countries’.³²⁵ In addition, the Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC states 1996 adopted the same approach as the Riyadh Convention. Awards can be considered foreign in this Convention if they are issued by the arbitral tribunal in one of the contracting states.³²⁶ The same criteria also apply in the Convention of the Arab League on the Enforcement of Judgments of 1952.

³²⁷

2.3.3.4 Positions of GCC national legislation regarding the notion of “foreign” awards

GCC national laws contain different views relating to the question of determining when an arbitral award would be considered “foreign.”

Kuwaiti arbitration law suggests that any arbitral award rendered outside Kuwait is considered to be a foreign award.³²⁸ But when is an arbitral award rendered in Kuwait? Article 183 of the Civil and Commercial Procedure Code 1980 answers this by stating that the award is deemed to have been rendered as from the date it was signed by the arbitrators. Kuwaiti law also requires that arbitral awards be rendered by a majority opinion in writing.³²⁹ Therefore, the criterion determining whether an award is considered national or foreign is the place where an arbitral award is signed. Thus, for an arbitral award to be considered a foreign award it must have been signed outside Kuwait.

From these provisions it can be seen that the concepts adopted by Kuwaiti law to determine whether an arbitral award is national or foreign are overly simplistic.³³⁰ For

³²⁵ *Ibid*, Article 31 Para (a).

³²⁶ The Convention on the Enforcement of Judgment Delegations and Judicial Notices in the GCC states, Articles 12 and 1

³²⁷ The Convention of the Arab League, Article 3

³²⁸ The Civil and Commercial Procedure Code No. 38 of 1980, Article 182.

³²⁹ *Ibid*, Article 183.

³³⁰ Similarly, the view of Kuwait law can be seen in *Hiscox v. Outhwaite* [1992] 1 A.C. 562. In this case, although the arbitration took place in England, the arbitrator signed the award in Paris. The winning party sought to enforce the award in England, but the House of Lords decided that the award was made in France where it was signed. It also holds that such an award is simultaneously capable of being regarded as foreign and domestic for the purposes of enforcement proceedings under the New York Convention.

example, if the parties were Kuwaiti citizens, Kuwaiti law was the applicable law in the dispute, the parties agreed that arbitration take place in Kuwait and deliberation of award be made in Kuwait, and the arbitral tribunal consisted of three Kuwaiti arbitrators, but the majority of arbitrators signed the award outside Kuwait, then the award would be considered foreign. In this context therefore, the nationality of an award cannot be decided by the parties or arbitrators choosing Kuwait as the place of arbitration in order for the award to be regarded as Kuwaiti.

In the UAE, Law No.11 of 1992 on Civil Procedure provides that ‘the arbitrator’s award shall be rendered in the UAE; otherwise the rules applicable to foreign awards shall be applied.’³³¹ It also provides that “the award shall be deemed to have been rendered as from the date it was signed by the arbitrators.”³³² This is similar to Kuwaiti law, and thus it can be said that an award is considered to be foreign if it is signed by the majority of arbitrators outside the territory of the UAE, even if the parties have chosen the UAE as the place of arbitration, the UAE law is applicable law of the dispute, and all parties and all arbitrators are Emirates citizens.

In the Kingdom of Bahrain, the National Arbitration Law clearly adopts the criterion of the seat of the arbitration to determine whether awards are national or foreign. Article 237 of Civil and Commercial Code provides that “if the arbitration agreement was made in Bahrain, the law of Bahrain must be applied in all aspects of the dispute, unless the parties agree otherwise *and provided that the arbitration takes place in Bahrain.*”³³³ This provision is a clear-cut in referring to the criterion of the seat of arbitration to determine whether an arbitral award is national or foreign in that it requires “*that the arbitration takes place in Bahrain.*” Therefore, it can be said that Bahraini national law considers the seat of arbitration to determine whether an arbitral award is national or foreign. Consequently, an arbitral award can considered as foreign if the seat of arbitration is outside the territory of the Kingdom of Bahrain even if the parties or arbitrators are Bahrainis or even if Bahraini law is the applicable law.³³⁴ For example, if

³³¹ The Code of Civil and Commercial Procedure, Article 212 Para.4

³³² The Code of Civil and Commercial Procedure, Article 212 Para.7

³³³ The Code of Civil and Commercial Procedure, Article 237 Para. 3

³³⁴ Radhi, H. A., *Judiciary and Arbitration: A Historical and Analytical Study* (Kluwer Law International, 2003) p.184.

a case equivalent to the facts of *Hiscox v. Outhwaite* were heard in the Bahraini court, it may be supposed that the court would consider the award as national.

According to the Bahraini International Arbitration Act, an arbitral award is considered to be national if the seat of arbitration was in Bahrain.³³⁵ As regards recognition and enforcement of awards, Articles 35 and 36 deal with the application of the recognition and enforcement of arbitral awards, irrespective of whether the arbitral awards are Bahraini or foreign.³³⁶ Thus it can be said there is no distinction between national awards or foreign awards regarding recognition and enforcement under International Arbitration Law. However, to enforce an arbitral award made outside Bahrain State under this law, arbitration must be relevant to international and commercial matters.³³⁷ The law determines arbitration as international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States, or the place of contract performance, or the place of the subject matter of the business or the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.³³⁸ Regarding the term 'commercial', Article 1 Para 5 gives a broad interpretation, in order to cover matters arising from all relationships of a commercial nature, whether contractual or not.³³⁹

In Saudi Arabia, the law does not stipulate which arbitral awards are considered foreign,³⁴⁰ nor are there general provisions governing the enforcement of a foreign award. However, the law governing arbitration gives some indication as to when an award may be considered national. Firstly, it states expressly that the Saudi Law of Arbitration must be the applicable law if the parties agree to settle a dispute through

³³⁵ The Bahraini International Arbitration Act, Article 2

³³⁶ Article 1 Para 2 of the Decree Law No. 9/1994 states that "The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State." Also, Article 36 Para 1 of Bahraini International Arbitration Law provides that 'An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Article and of Article 36.'

³³⁷ Article 1 of the Bahraini International Arbitration Act provides that 'This Law applies to international commercial arbitration'.

³³⁸ The Bahraini International Arbitration Act, Article 1 Para 3.

³³⁹ Explanatory note on the Model Law on International Commercial Arbitration, issued by the UNCITRAL secretariat, p.17

³⁴⁰ It should be noted that Article 17 of the Arbitration Law deals with award documents and it is not necessary that an award document contain the place of the rendering of the award or the place of arbitration.

arbitration.³⁴¹ Also, the executive regulation of the Foreign Investment Law No.M/1 5 of 2000 lays down that any ‘disputes arising between the Foreign Investor and his Saudi partners in respect of a licensed investment under The Act’, in cases where an amicable settlement is not reached, must be ‘settled through arbitration according to the Arbitration Act and its executive rules issued by Royal Decree No. 46 Dated 12.7.1403 H’.³⁴²

Secondly, although the seat of arbitration is not stipulated, in practice it should be in Saudi Arabia. This is obvious from the Rule of Competent Authority which requires several steps during the arbitration process in Saudi Arabia. For instance, it approves the arbitration instrument, and makes all notifications and notices provided for in this Law. Also, the time granted to arbitrators to issue their award is ninety days, unless the parties agree to extend the time limit for the decision.³⁴³ Therefore, the arbitrators have to take this into account during an arbitration process in Saudi Arabia if they are applying the Saudi Arbitration Law, as a period of ninety days may be insufficient to follow all the compulsory measures set out in the law, and there is thus a risk that the arbitration will become null and void.

Consequently, the significant element affecting the definition of an award as national is whether Saudi law is the applicable law of the dispute settlement or not. However, the form of text may lead to results not intended by legislator. If parties agree to apply a law other than Saudi law to an arbitration taking place in Saudi Arabia what might be the attitude of Saudi courts? According to the above provision, although such an award is rendered in Saudi Arabia, the local court will not recognise this award as either a national or a foreign award but will deem it a nullity.³⁴⁴ Thus awards are regarded as foreign if Saudi law is not the applicable law, and the seat of arbitration is outside the territory of Saudi Arabia, irrespective of the nationality of parties and arbitrators.

³⁴¹ Article 7 of Royal Decree No. M/46 on the Law of Arbitration lays down that ‘Where parties agree to arbitration before the dispute arises, or where a decision has been issued sanctioning the arbitration instrument in a specific existing dispute, the subject matter of the dispute may only be heard in accordance with the provisions of this Law’.

³⁴² Article 26 of the Executive Regulation of the Foreign Investment Law

³⁴³ The Law of Arbitration, Article 9

³⁴⁴ It can be said that the Kingdom of Saudi Arabia has had a negative attitude toward arbitration. This may be seen from the various compulsory rules that must be applied to obtain arbitration.

In Sultanate of Oman, the Law of Arbitration in Civil and Commercial Procedure Disputes does not directly refer to the concept of a “foreign” award. However, Article 1 of the Law of Arbitration in Civil and Commercial Procedure Disputes provides that *“without prejudice to the provisions of international conventions in force in the Sultanate, the provisions of this law shall be applicable to any arbitration between persons under public or private law, irrespective of the nature of legal relationship on which the dispute is based, if such arbitration takes place in the Sultanate or in case of international commercial arbitration taking place abroad which the parties thereto have agreed to make subject to the provisions of this law.”* This text contains two points which should be taken into consideration to determine when an arbitral award is to be considered as a national or foreign award in Oman.

A first point is that the concept of a “foreign” award firstly should be defined according to international conventions applied in Oman that are aimed at facilitating the recognition and enforcement of arbitral awards. This can be inferred from the words *“without prejudice to the provisions of international conventions in force in the Sultanate”* in Article 1 of the Law of Arbitration in Civil and Commercial Procedure Disputes.³⁴⁵ As we have seen in the case of international convention, in particular in New York Convention, limitations are imposed on the categories of arbitral awards that are subject to the conventions’ protection, which provide that the conventions apply to awards that are either (a) made outside the country where is sought (a “foreign” award), or (b) “not considered as domestic awards”. As regards the second criterion, although Omani law emphasises the arbitration involving an international element under article 3 of the Law of Arbitration in Civil and Commercial Procedure Disputes, the law does not contain provisions to enable the enforcement of an international award under the procedure of the New York Convention in the same way as awards made outside Oman.³⁴⁶ This means that only first criterion (a territorial criterion) is employed to determine when awards are foreign. According to the territorial criterion, a “foreign” arbitral award can be defined for example under New York Convention as “arbitral

³⁴⁵ This view is considered a general principle in all the GCC States. For example, the Kuwait Cassation Court, in several decisions, considered the New York Convention as an integral part of the domestic law, and that the Convention’s provisions stand even if they contradict the Code of Civil and Commercial Procedures. See, for example, Cassation decision No. 166/87 Commercial, dated 8/2/1988 and Cassation decision No. 80/97 Commercial, dated 10/5/1998.

³⁴⁶ Unlike the position in France, which defines an award rendered in France involving interests of international commerce as international award, and enforces it under the procedure of the New York Convention in the same way as awards made outside France.

awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.”³⁴⁷ Accordingly, all awards rendered in proceedings outside Oman are considered to be “foreign” even if Omani law is the applicable law.

A second point refers to a situation where an award is made abroad but can be considered “national” and not “foreign.” This can be inferred from Article 1, which provides that “*the provisions of this law shall be applicable to any arbitration between persons under public or private law, irrespective of the nature of legal relationship on which the dispute is based, if such arbitration takes place in the Sultanate or in case of international commercial arbitration taking place abroad which the parties thereto have agreed to make subject to the provisions of this law.*” In addition, article 28 of the same law provides that “the two parties to the arbitration shall be at liberty to agree upon the place of arbitration within the Sultanate of Oman or *abroad*”. In the light of these texts, an award made outside the Sultanate of Oman is considered to be a “national” award if (1) the arbitration involves international and commercial elements; and (2) the parties have agreed conduct arbitration abroad under Omani arbitration law. Therefore, if neither of these conditions is fulfilled the award would be considered a foreign award. Thus, for example, an arbitral award made outside Oman and rendered on the basis of Omani law, and involving an international but not a commercial element, it would be considered a foreign award. In this regard, it should be noted that definitions of the terms ‘commercial’ and ‘international’ are subject to the law itself, as it explained in Articles 2 and 3.

This analysis shows that arbitral awards made outside Oman would be considered as foreign awards for the purpose of recognition and enforcement under relative international conventions, or in the absence of such conventions, an arbitral award made outside Oman would be considered as foreign if it does not concern international and commercial elements and has been not rendered on the basis of Omani arbitration law.

In Qatar, in Chapter 13 of the Arbitration Provisions in the Code of Civil and Commercial Procedure, article 198 provides that “Arbitrators make their award without being bound by the procedures of this Code, except those in the present Chapter ... *If*

³⁴⁷ New York Convention, Article 1 (1).

the agreement to arbitrate was made in Qatar, Qatari law is necessarily applicable to the dispute, unless the parties agreed otherwise.”³⁴⁸

This texts show that Qatari law admits the theory of seat of arbitration in determining whether an award is considered as a foreign or national. This can be inferred from the words “*If the agreement to arbitrate was made in Qatar.*”³⁴⁹ Thus if the parties agree that arbitration takes place in Qatar state, the award can be considered national, whether it is rendered inside Qatar or not. For example, if arbitration was held in Qatar, but the arbitrator signed the award outside Qatar, the award would still be a national award, because the criterion adopted to determine whether an award is national is the place of arbitration chosen by the parties. Consequently, an award can be considered foreign if the arbitration takes place outside Qatar.

2.4 Summary

It has been shown that the terms ‘recognition’ and ‘enforcement’ have different meanings and can be used for different purposes within the context of the enforcement process. Recognition is generally a defensive process which acts to prevent the losing party from bringing before a court or another arbitral tribunal an action which has been determined by an arbitral award, based on that award having a *res judicata* effect. Enforcement is a positive action to give effect to the mandate of an award in order to make the losing party carry out the award. Thus, it could be said that recognition is a shield, while enforcement is used as a sword.

Defining precisely which arbitral awards are within the scope of application, especially that of the New York Convention, is one of the most important elements which the Convention fails to determine. Thus, the criteria which define when an arbitral award can be classified as an award is an issue relevant to domestic legal systems and the applicable law governing arbitration disputes, leaving the national courts of each contracting state to define the award according to their own law. However, the prevailing trend in both theory and practice is that the term ‘award’ would cover the final and partial awards for admission of recognition and enforcement, while other awards rendered by arbitral tribunals such as procedural orders and interim measures

³⁴⁸ Article 198 Chapter 13, Code of Civil and Commercial Procedure

³⁴⁹ *Ibid.*

would not be so covered. The same view has been adopted by the GCC, but an exception has been found relate to the interim measure rendered by the GGC Arbitration Commercial Centre, which can be enforced by GCC national court as foreign arbitral awards.

It was submitted that the meaning of the term ‘foreign’ under the Conventions refer to an arbitral award rendered outside the territory of the state where recognition and enforcement are sought, Under the New York Convention, the term ‘foreign’ also refers to arbitral awards that are “not considered as domestic awards” in the state where recognition and enforcement are sought. It has been seen that GCC position in this regard are not similar. The laws in Kuwait and the UAE provide for the designation of the place where an arbitral award is signed as a criterion to determine whether an award is considered national or “foreign,” and thus an award is considered as a “foreign” if it is signed abroad, irrespective of any other elements. Conversely, the law in Bahrain and Qatar provide for the criterion of the seat of the arbitration to determine when an award is considered as foreign, and thus if the seat of arbitration is in neither of these states, an award would be considered as “foreign.” In Oman, it was found that the law contains a confused view relating to this question, as it contains a combination of geographical and applicable law. The law provides for the criterion of the seat of the arbitration to determine when an award is considered ‘foreign’ if recognition and enforcement are sought under the Convention, while it provides for the criterion of applicable law if the award is rendered outside Oman.

Chapter Three

Jurisdiction in Recognition and Enforcement of Foreign Arbitral Awards

3.1 Introduction

This chapter examines the basic elements relating to matters of jurisdiction in the recognition and enforcement of arbitral awards in the GCC States, as well as issues relating to the court's discretion to grant the recognition and enforcement of foreign arbitral awards. First, the chapter will briefly determine the competent authority dealing with the recognition and enforcement of arbitral awards. Secondly, it examines and analyses the role of that authority in dealing with the enforcement of foreign arbitral awards. Thirdly, it considers how the decision of that authority may be challenged. Fourthly, it looks at time limits on the recognition and enforcement of foreign arbitral awards.

3.2 What is the competent authority dealing with the recognition and enforcement of foreign arbitral awards?

Generally, the arbitral tribunal itself has no power to enforce its award, apart from making an order giving a party authority to enforce the award. Thus, if the losing party fails to comply voluntarily with the award, then the winning party will seek to enforce the award in any country where the assets of the losing party are located. The competent authority dealing with the recognition and enforcement of foreign arbitral awards differs from country to country. In the main, the competent enforcement authorities are either Judicial authorities or Public offices.³⁵⁰ Most countries give the courts jurisdiction to enforce foreign arbitral awards by issuing an enforcement order, but there may be differences as to which particular court is entrusted with such jurisdiction. For example, in France³⁵¹ and Belgium³⁵² the competent court is the same court which has jurisdiction

³⁵⁰ David, R., *Arbitration in International Trade*, (Kluwer Law Taxation Publishers, Deventer, 1985), pp. 368-369

³⁵¹ See Articles 1477 and 1500 of the French Code of Civil Procedure.

to enforce national awards. Yet in other countries the court with competence to enforce foreign arbitral awards is different to the court which enforces national awards, as can be seen in certain GCC States.

In Oman, prior to the issue of Royal Decree 13/1997, there were no provisions determining the competent authority to deal with the recognition and enforcement of foreign arbitral awards, nor indeed foreign judgments. Articles 119 and 121 of that decree then provided for requisition for exequatur before one of boards of the Preliminary Courts. This was superseded by Royal Decree 29/2003 on Civil and Commercial Procedure Law, Articles 352 and 253 conferring jurisdiction on the Court of First Instance to consider requests for the enforcement of foreign judgments and foreign arbitral awards. National arbitral awards are enforced by the same Court.³⁵³ This court has forty branches spread throughout all the regions of Oman,³⁵⁴ and all rulings are made by three judges.³⁵⁵

In Saudi Arabia, the Board of Grievances (Diwan Al Mazalem) is the competent authority dealing with the recognition and enforcement of foreign arbitral awards,³⁵⁶ whereas the competent authority for the enforcement of local arbitral awards is the court which would originally have been competent to hear the dispute.³⁵⁷ Unlike the Board of Grievances Act 1982,³⁵⁸ the new Board of Grievances Act 2007 clearly indicates that the Board has the jurisdiction to enforce foreign arbitral awards. Article 13 (J) of that Act provides that the administrative court has the authority to make decisions

³⁵² See Article 1719 (1) of the Belgian Judicial Code.

³⁵³ Before 21/11/1999 the Commercial Court was the competent Court. This was repealed by Article 2 of Royal Decree No.90/99 of the Promulgation of Judiciary Authority Law, and Articles 36 and 41 of Civil and Commercial Procedure Law issued in 2003.

³⁵⁴ See the chart of the preliminary Courts attached to Royal Decree No. 90/99 on Judiciary Authority Law.

³⁵⁵ Article 352 of Civil and Commercial Procedure Law

³⁵⁶ The law of the Board of Grievances, Royal Decree No. (M/78), Article 13 (J).

³⁵⁷ The Arbitration Regulation, Article 20.

³⁵⁸ It should be noted that the Board of Grievances Act 1982, which was replaced by the Board of Grievances Act 2007, did not clearly refer to the recognition and enforcement of foreign awards. Article 8(1) provided that “the Board of Grievances shall have jurisdiction to decide requests for the implementation of foreign judgments.” However, the jurisdiction of the Board of Grievances over applications for the enforcement of foreign awards was based on a circular from the President of the Board. The Saudi Government has also designated of the Board of Grievances as competent for the recognition and enforcement of arbitral awards rendered pursuant to the Washington Convention. <<http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm>>

concerning requests for the execution of foreign arbitral awards,³⁵⁹ with rulings being made by three judges.³⁶⁰ As mentioned in Chapter One, the Board of Grievances is an independent judicial body, controlled directly by the King. In addition, the Board of Grievances applies special procedural laws (Procedural Rules before the Board of Grievances, 1989), which differ from those applied in normal courts.

The Board's headquarters are in Riyadh³⁶¹, and it consists of six panels (three in Riyadh and one each in Jeddah, Dammam and Abha).³⁶² The question thus arises as to which panel the winning party should submit his request. According to the Board's rules of procedure, the application should be submitted to its President or Vice President, after which the President transfers the application to the competent panel in the jurisdiction of the defendant, or the branch which has jurisdiction over the defendant.³⁶³

In Qatar, Article 380 of the Code of Civil and Commercial Procedure states that provisions governing the enforcement of foreign judgements are also applicable to arbitral awards. Article 379 provides that the authority which has jurisdiction to enforce a foreign judgment is the same court which deals with foreign arbitral award. The enforcement request has therefore to be submitted before the Court of First Instance, whereas the competent court to enforce local arbitral awards is the court which would originally have been competent to hear the dispute.³⁶⁴ The headquarters of the Court of First Instance are in Doha, the capital of Qatar,³⁶⁵ and rulings are made by three judges.³⁶⁶

In Kuwait a foreign award cannot be enforced until it has been granted an exequatur by a competent court. Article 199 of the Code of Civil and Commercial Procedure provides

³⁵⁹ Article 8 of the Board of Grievances Act 2007, establishes three types of Board of Grievances' courts, organized in the following hierarchical structure: (1) High Administrative court; (2) Administrative Courts of Appeal; (3) Administrative Courts.

³⁶⁰ The Board of Grievances Act 2007, Article 90(3).

³⁶¹ The Board of Grievances act 2007, Article 1.

³⁶² Turck, N., 'Resolution of Disputes in Saudi Arabia' *Arab Law Quarterly*, 3-1991, p.7

³⁶³ The Rules of Procedure before the Board of Grievances, issued by the decision of the Cabinet Ministry, No. 190 dated 16/11/1409H, Article 1.

³⁶⁴ Articles 203 and 204 on Civil and Commercial Procedure Law

³⁶⁵ Article 5 Law No. 10 of 2003 of the Judicial Authority Law

³⁶⁶ Article 11 Law No. 10 of 2003 of the Judicial Authority Law.

that an exequatur must be filed before the Al-Kulliyya Court (the Court of First Instance). However, the competent authority to enforce local arbitral awards is the court which would originally have been competent to hear the dispute if it was rendered according to the arbitration rules set out in the Civil and Commercial Procedure Law,³⁶⁷ and the secretariat of the Court of Appeal if the arbitration was made in accordance with the Law No. 11/1995 on Judicial Arbitration in Civil and Commercial Matters.³⁶⁸ The headquarters of the Al-Kulliyya Court are in Kuwait, the capital city, and rulings are made by three judges.³⁶⁹

In Bahrain, Article 253 of the Code of Commercial and Civil Procedure provides that foreign arbitral awards are enforceable under the same conditions which apply to the enforcement of foreign judgments under Article 252. According to Article 252, the Senior Civil Court has jurisdiction to enforce foreign arbitral awards, whereas the competent court as regards local arbitral awards is court which originally heard the dispute.³⁷⁰ The Senior Civil Court also has jurisdiction over applications to enforce an arbitral award made under the International Arbitration Act.³⁷¹ The headquarters of the Senior Civil Court are in Manama, the capital city,³⁷² and the rulings are made by three judges.³⁷³

In the UAE, Article 236 of Code of Civil Procedure declares that the provisions for the enforcement of foreign judgments under Article 235 are also applicable to foreign arbitral awards. Article 235 (1) lays down that a request for enforcement must be submitted to the Primary Court, whereas the competent court to enforce local arbitral awards is the court which originally heard the dispute.³⁷⁴ The headquarters of the

³⁶⁷ The Code of Civil and Commercial Procedure, Articles 185 and 184.

³⁶⁸ The Judicial Arbitration in Civil and Commercial Matters Law 1995, Article 9.

³⁶⁹ Article 7 Law No. 10 of 1996, amending some provisions of the Law No. 23 of 1990 on the Organisation of the Judiciary.

³⁷⁰ The Code of Civil and Commercial Procedure, Articles 240 and 241.

³⁷¹ Article 35 of the Model Law on International Commercial Arbitration of 1985 provides that “an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the Senior Civil Court ...”

³⁷² Decree Law No.42 of 2002 on the issuance of the Judicial Authority Law, Article 10.

³⁷³ *Ibid.*

³⁷⁴ The Code of Civil Procedure, Articles 213 and 214.

federal Primary Courts are in the capital of the Union; and branches are also to be found in the capitals of each Emirate.³⁷⁵

3.3 The Role of the Competent Authority in Dealing with the Enforcement of Foreign Arbitral Awards

What is the extent of the role of local courts in GCC states in dealing with the enforcement of foreign arbitral awards? Does the court have to enforce such awards as a matter of course, or is it allowed to investigate or re-examine the subject matter which has been determined by the arbitral tribunal? In addition, does the court have a residual discretion to grant enforcement when grounds for refusing enforcement are established? The answer to these questions involves an examination of the international conventions that apply in GCC states, as well as their national laws.

3.3.1 The role under international conventions

As mentioned before, the most important measure in this area is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). All the GCC states have ratified the Convention, and it is under this Convention that most foreign awards made outwith Arab states would be sought to be enforced.

The generally accepted interpretation of the New York Convention is that a court before which the enforcement of a foreign award is sought may not review the merits of the award.³⁷⁶ The main reason for that interpretation is that Article V of the Convention explicitly states that a court may only refuse recognition or enforcement of a foreign award on a limited set of grounds, which does not include review of a mistake in fact or law by an arbitrator.³⁷⁷ In addition, allowing re-examination of an award's merits will undermine the purpose of the Convention, which is aimed essentially at facilitating the recognition of foreign awards. This principle has been unanimously confirmed by

³⁷⁵ Article 11 of Federal Law No 3/1983.

³⁷⁶ Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, pp 265, 269-73.

³⁷⁷ *Ibid*, p.269.

commentators.³⁷⁸ According to one commentator, “it is an almost sacrosanct principle of international arbitration that the court will not review the substance of arbitrators’ decisions contained in foreign arbitral awards in recognition proceedings.”³⁷⁹ In addition, the prevailing trend in practice (in both common law and civil law jurisdictions) has been to adopt this principle.³⁸⁰ For example, the Indian Supreme Court in *Renusagar Power Co. Ltd. v General Electric Co.*³⁸¹ confirmed that courts may only refuse enforcement on the grounds mentioned in Article V, which do “not enable a party ... to impeach the award on its merits.” And a Luxembourg Court stated that “the New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with, as the only reservation, the respect of international public policy. Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal’s award.”³⁸²

The principle of not re-examining the merits of a foreign award does not mean that a court may not look into the award if it is necessary to consider a request to refuse enforcement of an award on one of the grounds listed in Article V.³⁸³ The court may have to investigate the award in order to evaluate the correctness of such a claim, e.g. if a party against claims that enforcement should be refused on the basis of Article V (1)

³⁷⁸ See, e.g., Davidson, F., *Arbitration*, (W Green, Edinburgh 2000) p 392; van den Berg, A.J. *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, pp 265, 269-73; Tweeddale, A. and K., op. cit. p.412; Redfern, A., and Hunter, M., op. cit. Para 10-33; Gaillard, E. and Savage, J., op. cit. Paras 264, 376; Lew, J., Mistelis, L. and Kroll, S., op. cit. Para 26-66; Born, G., op. cit. p.2865; Bockstiegel, K. and Kroll, S., op. cit. pp521-22; Garnett, R. and others, *A Practical Guide to International Commercial Arbitration*, (Oceana Publications, Dobbs Ferry NY 2000) p.130

³⁷⁹ Born, G., op. cit. p.2865.

³⁸⁰ See e.g., *Betzale Schwartzman v Yaakov Harlap* (2009) XXXIV YBCA 1072 (US District Court, 13 April 2009); 1074; *Robert Favez Mouawad v henco Heneine* (2008) XXXIII YBCA 480 (France Court of Appeal, 10 January 2008) 483; *Karaha Bodas Company LLC v Persusahaan* (2008) XXXIII YBCA 574 (Hong Kong High Court, 9 Oct 2007) 583; *Company A v Company S&X* (2008) XXXIII YBCA 534 (Germany Court of Appeal, 8 August 2007) pp 537-38; *Shipowner v Contractor* (2008) XXXIII YBCA 565 (Greece Supreme Court, 2007) pp 567-8; *Antilles Cement Corporation (Puerto Rico) v Transficem (Spain)*, (2006) XXXI YBCA 846 (Spain Supreme Court, 20 July 2004) 851; *Buyer (Austria) v Seller (Serbia and Montenegro)* (2005) XXX YBCA 421 (Austria Supreme Court, 26 January 2005) 427; *Pulsarr Industrial Research B. V. (Netherlands) v Nils H. Nilsen A. S. (Norway)*, (2003) XXVIII YBCA 821 (Norway Enforcement Court, 10 July 2002) 824.

³⁸¹ *Renusagar Power Co. Ltd. v General Electric Co* (1995) XX YBCA 681 (India Supreme Court, 7 October 1993) pp. 689- 691.

³⁸² *Kersa Holding Company v Infancourtage* (1996) XXI YBCA 617 (Superior Court of Justice, 24 November 1993) pp. 624-625.

³⁸³ Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p. 270.

(c), because the arbitrators had exceeded their authority. This is illustrated by the decision of the Italian Court of Appeal of Trento,³⁸⁴ where the respondent asserted that the arbitrators had exceeded their authority by deciding on “technical” matters whereas a clause of the contract provided that such matters should be resolved by the International Chamber of Commerce in Paris. The Court held that while an Italian judge considering the enforcement of a foreign arbitral award is not allowed to examine the merits of the decision, this principle does not apply to the examination of whether the foreign arbitrator has exceeded the limits of his authority and, in particular, to the examination of questions pertaining to his competence. Such matters should be examined by the judge.

The Arab League Convention of 1952, which would govern the enforcement of awards emanating from other Arab states, is clearer than the New York Convention in that it expressly lays down in Article 2 that “the appropriate judicial authorities of the State which is requested to execute the award, shall not be allowed to investigate or review the subject matter of the case”. The Riyadh Convention, which covers largely the same ground as the Arab League Convention of 1952 adopted the same principle in Article 37, which provides that “the competent judicial authority of the contracting State where enforcement is sought cannot examine the subject-matter of the arbitration.”

Similarly, Article 7 of the Convention on the Enforcement of Judgments in the GCC states provides., that “the duty of the judicial authority of the State where enforcement of a judgement [Article 4 provides that an arbitral award shall be enforced in the same manner as a judgement] is sought shall be restricted to ascertaining whether or not the relevant judgement contains the requirements stipulated in this Agreement, without examining the merits thereof’.

The Charter and Rules of the GCC Commercial Arbitration Centre (which has semi-official status) do not expressly provide for this principle, but do say in effect that the competent authority of the GCC state where enforcement is sought cannot re-examine

³⁸⁴ In the case *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S. p. a. SIMER (Società delle Industrie Meccaniche di Rovereto) (Italy)* (1983) VIII YBCA (Italian Court of Appeal of Trento, 14 January 1981) pp. 386-388.

the merits of an arbitral award. Although Articles 15 of the Charter and 36 (1) of the rules lay down that: “An award passed by the tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement,” any party has the right to apply for the annulment of the award when a local court is dealing with its enforcement. Article 36 (2) of the Rules then states that the role of the competent judicial authority is to “order the enforcement of the arbitration award unless one of the litigants files an application for the annulment of the award in the following specific events: (A) if it is passed in the absence of an arbitration agreement or in pursuance of a null agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the agreement; (B) If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed by some of them without their being authorised to hand down a ruling in the absence of others, or if it is passed pursuant to an arbitration agreement in which the issue of the dispute is not specified, or if it is passed by a person who is not legally qualified to issue such award.”³⁸⁵ The words used in text, particularly those referring to “an application for the annulment of the award,” to some extent, lead to confusion regarding the role of the court extends to having the right to reopen the decision of the arbitral tribunal and annul the decision. However it should be pointed out there is nothing within the Charter or the Rules of the Centre permitting a court to become an appellate body in order to review the merits of the award. In addition, with regard to decisions rendered by courts in relation to applications for annulment, it is clear that judgments issued will direct “non-enforcement” rather than “annulment.” Thus, the role of the courts in GCC states in this regard extends only to the verification of the validity of an annulment request, and if it is valid, then the limit of their role will be to “*make a ruling for non-enforcement of the arbitration award.*”³⁸⁶ This means that if a national court passes a ruling for non-enforcement, the arbitral award is still deemed as valid and existent, as stipulated under Article 36 (1) of the Rules, which states that is an award is passed it will become binding and final, and have a *res judicata* effect. In view of the this, it may be said that the role of the courts in GCC states regarding the enforcement

³⁸⁵ Article 36 (2) Arbitral Rules of Procedure. In this regard, it should be noted that the role of GCC courts relating to an award rendered by the GCC Commercial Arbitration Centre is more limited than their role under international conventions, as there are only two grounds for refusing enforcement.

³⁸⁶ *Ibid.*

of awards rendered by the GCC Centre will not extend to reopening the merits that have been decided by the arbitral tribunal, because the court is no longer in the appellate body in this connection for the hearing of such requests which allow the re-examination of the merits of an arbitral award.

Concerning the positions of GCC courts, the aforementioned precept that an award may not be reviewed on its merits has been clearly adopted by the Kuwaiti and Saudi Arabian courts in several cases, even with regard to foreign awards that are subject to the New York Convention.³⁸⁷ In a 2004 decision of the Kuwaiti Cassation Court, the court found that an objection was made on grounds relating to a mistake in fact and law, and therefore the court held that the competent authority in the state where enforcement is sought may not re-examine the merits.³⁸⁸ It appears likely that the same view would be adopted by rest of GCC courts, although this has not as yet been tested in practice.

3.3.2 The role under national law

Should a foreign arbitral award not be subject to enforcement under one of the Conventions, then the role of the court in dealing with such an award is defined by the national laws of the GCC states.

The national laws of Kuwait, Bahrain, Qatar, and the UAE,³⁸⁹ contain similar provisions, and provide that “an order of execution may not be issued unless the following matters have been verified”: -

³⁸⁷ In Kuwait, e.g., Court of Cassation decision No 423/2004 commercial, dated 8/5/2004. In Saudi Arabia, e.g., The Broad of Grievances, 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996); the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997); the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003); the 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994). Quoting, Al-Tuwaigeri, W., Grounds For Refusal of Enforcement of Foreign Arbitral Awards Under The New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia.

³⁸⁸ Court of Cassation decision No 423/2004 commercial, dated 8/5/2004.

³⁸⁹ See, In Kuwait: Article 199 of the Code of Civil and Commercial Procedure; In Bahrain: Article 252 the Code of the Civil and Commercial Procedure; In Qatar: Article 380 of the Code of Civil and Commercial Procedure; and In the UAE: Article 235 of the Code of Civil Procedure.

1. that the courts of the country where the award is enforced do not have exclusive jurisdiction over the dispute [this does not apply in Kuwaiti law] and that the arbitral tribunal who made it has jurisdiction;
2. that the parties to the arbitral proceedings were regularly summoned and represented;
3. that the award has become *res judicata* according to the law of the seat of arbitration;
4. that the award is not contrary to a prior judgment made by a court of the country where the award was made and does not breach the rules of public order and good morals in [the country where enforcement is sought].”

The use of the words “after verification” may obviously lead a court in these states refusing to enforce a foreign arbitral award, if such matters cannot be verified. Yet it is clear that the role of the competent court in enforcing a foreign arbitral award does not extend to any substantive control of arbitral awards, but covers only procedural deficiencies. The court must grant a request for enforcement of if it finds the above conditions established. It does not have the power to re-examine a foreign arbitral award when hearing such an application.³⁹⁰

In Oman, the new Civil and Commercial Procedure Law, issued on 6 March, 2002, governs the conditions that must be fulfilled in order to grant exequatur of a foreign arbitral award. Article 352 provides that an order for enforcement may be issued only after verification of the same conditions as apply in Kuwait, Bahrain, Qatar, and the UAE. However, Article 352 (A) lays down a further condition, i.e. that a foreign arbitral award must “have become final under the law where it was made, and it has not been issued on a fraud.” The first impression of this sentence might be that the Omani court has the right to review the merits of the foreign arbitral award, but in the light of the last line of the second paragraph of Article 352 which makes clear the role of local court by

³⁹⁰ Alsmedan, A., *International and foreign arbitration in Kuwaiti Private International Law*, p.80.

providing that “*it may not render an order of execution unless the following matters have been verified*”, it can be seen that the power of a local court when dealing with this matter extends only to the enforcement or otherwise of a foreign arbitral award. It is clear then that Omani courts have greater leeway to investigate foreign arbitral awards than is the case in the other GCC States.³⁹¹

In Saudi Arabia, as was mentioned in the first section of this chapter, there are no general provisions governing the enforcement of a foreign arbitral award, but the Board of Grievances applies the provisions regarding the enforcement of foreign judgments to requests for the enforcement of foreign arbitral awards. These provisions will therefore be examined in order to comprehend the role of the Board in this regard. Article 6 of the Board’s Rules of Procedure provides that: “Cases for enforcement of foreign judgments shall be filed in accordance with the procedures for filing administrative cases stipulated in Article One of these Rules. The competent circuit shall render its judgment after completion of the case documents and hearing the statements of both parties to the dispute, or their representatives, either by *dismissing the case or enforcing the foreign judgment* on the basis of reciprocity, provided that it is not inconsistent with the provisions of Shari’ah.” This article shows that the role of the Board is confined to “*dismissing the case or enforcing the foreign judgment*,”³⁹² and so it can be said that it does not allow the Board to re-examine the merits when dealing with requests for enforcement of foreign arbitral awards. Affirmation of this can be seen in the Circular of the Head of the Board of Grievances No.7, issued on 15/8/1405 (H). The second clause in the Circular provides that the Board, when considering requests concerning foreign judgments, will not re-open or examine their merits, but that the role of the Board is limited to the supervision of the external requirements of the judgment,³⁹³ i.e. whether an award is final; was rendered in accordance with a valid arbitration agreement, was based upon valid procedure; deals with matters which are capable of being settled by arbitration under Saudi law; lies within the scope of the arbitrator’s

³⁹¹ For more detailed analysis of this matter see Chapter Five, section 1.2.9

³⁹² See, the Review Panel decision in the Board Grievances No. 208/T/2 of 1418 (H). The first panel on decided in enforcing a foreign arbitral award that the award was validity executed. The Review Panel noted that first ruling was supposed to deal with enforcement, not validity of execution. Thus it amended the first decision accordingly.

³⁹³ See, the Broad Grievances decision No.11/D/F/35 of 1417 (H).

authority; and is consistent with Islamic Law.³⁹⁴ Although these requirements show that the Board has the authority to investigate the award in order to evaluate their applicability, it nonetheless may not re-examine foreign arbitral awards, and the role of the board is limited only to rendering or refusing the order for enforcement. It should be noted that the form of the clause shows that the fulfilment of requirements is an absolute pre-requisite for enforcement, which means that the discretion of the Board of Grievances is likely to be exercised in favour of non-enforcement.³⁹⁵

In view of this analysis, it is clear that none of the courts of the GCC, has power to re-examine the merits of awards sought to be enforced under either conventions or national law, their role being limited to enforcing the award or not.³⁹⁶ Therefore, any attempt to re-examine the arbitral award would be contrary to the conventions and national law. This suggests that the role of the court is not to decide on the validity or invalidity of the arbitral award, so that even if the court denies enforcement, the award still has validity. Without doubt this situation inspires confidence that foreign arbitral awards will be enforced in the GCC States.

3.3.3 Do Courts Have Discretion as regards Enforcement?

Two questions will be addressed here. First, is must a court refuse enforcement where a relevant ground of refusal is established, or does it have discretionary power to grant enforcement? Secondly, what power does the court have to grant provisional and partial enforcement of foreign arbitral awards?

³⁹⁴ See, Clause 5 of Circular No. 7 of 1405 (H) issued by the Head of the Board of the Grievances.

³⁹⁵ There will be further analysis of these requirements in next chapter.

³⁹⁶ On the contrary, there are number of national laws which allow judicial review of the merits of a foreign arbitral award. For example, Article 758 of the Argentine National Code of Civil and Commercial Procedure and Articles 273 and 274 of the Iraqi Code of Civil Procedure. See, Born, G. op. cit. pp.857-858.

3.3.3.1 The Use of the Word “may” and its Translation in the Arabic text of the New York Convention

Article V of the New York Convention indicates that enforcement “*may*” be refused when one of the relevant grounds is established.³⁹⁷ The interpretation of word “*may*” under Article V of the New York Convention is that non-enforcement is not mandatory, as the court still has a residual discretionary power to grant enforcement.³⁹⁸ According to Redfern and Hunter, “even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing court is not obliged to refuse enforcement. The opening lines of paragraphs 1 and 2 of Article V say that enforcement ‘*may*’ be refused; they do not say that it ‘*must*’ be refused. The language is permissive, not mandatory.”³⁹⁹ This interpretation has been generally accepted as correct, both by commentators and a wide range of jurisdictions.⁴⁰⁰ For example, in Hong Kong, the Supreme Court opined that,⁴⁰¹

“Even if a ground of opposition is proved, there is still a residual discretion left in the enforcing Court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing Court to achieve a just result in all the circumstances,

³⁹⁷ It should be noted that in the Travaux Préparatoires of the New York Convention, the representative of the Federal Republic of Germany urged that the word *shall* should be employed. However this suggestion was not accepted. See UN Doc. E/CONF.26/L.34; UN Doc. E/CONF.26/SR.14.

³⁹⁸ Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 265. See also, Garnett, R. and others, op. cit. p.102.

³⁹⁹ Redfern, A., and Hunter, M., op. cit. Para 10-34.

⁴⁰⁰ See, e.g., Davidson, F, op. cit. p.392; Davidson, F, *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, (W. Green/Sweet & Maxwell, Edinburgh, 1991) p.224; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 265; Redfern, A., and Hunter, M., op. cit. para 10-34; Lew, J., Mistelis, L. and Kroll, S., op. cit., para 26-66; Born, G., op. cit. pp 2712-2725; Dicey, A. and Morris, J. *the Conflict of Laws*, (12th ed., Sweet Maxwell, 1993) p.624; Gaillard, E. and Savage, J., op. cit. para 1694; Garnett, op. cit. p.102; Di Pietro, D. and Platte, M., op. cit. p.133; Paulsson, J., ‘May or Must under the New York Convention: an Exercise in Syntax and Linguistics’ (1998) 14 (2) *Arbitration International* 227. Moreover, many local courts taken a similar attitude e.g. *Qinhuangdao Tongda Enterprise Development Co And Another v Million Basic Co Ltd* [1993] 1 HKLR 173; *China Nanhai Oil Joint Service Corporation Shenzhen v Gee Tai Holdings Co. Ltd*, (1995) XX YBCA 671 (Hong Kong High Court, 13 July 1994), 677; *China Agribusiness Development Corp v Balli Trading* [1998] 2 Lloyd’s Rep 76 (UK QBD Com Ct 1997); *Chromally Aeroservice Inc v Arab republic of Egypt* 939 F Supp 907 (US District Court 1996) 909.

⁴⁰¹ *China Nanhai Oil Joint Service Corporation Shenzhen v Gee Tai Holdings Co. Ltd*, (1995) XX YBCA 671 (Hong Kong High Court, 13 July 1994), 677.

although I accept that in many cases where a ground of opposition is established, the discretion is unlikely to be exercised in favour of enforcement.”

Despite this interpretation, a number of jurisdictions have adopted a different view. In German, for example, the word “*may*” in Article V is interpreted as a “*shall*”. Therefore, the courts generally do not have discretion but have the power to refuse leave for enforcement.⁴⁰²

The former attitude may appear to be in line with the goal of the New York Convention, which is aimed essentially at facilitating the recognition and enforcement of foreign arbitral awards. However, adoption of this principle does not mean that the award should always be enforced, if there are serious objections to its enforcement. Thus, if the grounds are established, the enforcing court should normally refuse enforcement.⁴⁰³

How can this discretion be exercised by the enforcing courts? In fact, exercising this discretion is a difficult task for judges when striving to achieve a just result in every situation. However, since the New York Convention does not give guidelines as to how the residual discretion should be exercised, it is therefore to be judged by the enforcing courts on a case-by-case basis.⁴⁰⁴ However, there are obvious instances where this ‘residual discretion’ might be exercised. The first instance is where the discretion to recognise and enforce a foreign award can be exercised pursuant to Article VII (1) of the New York Convention. Article VII (1) provides for enforcement under the national law or another treaty in the state where enforcement is sought if that law is more favourable than the New York Convention, as the more favourable provision shall prevail over the rules of the Convention.⁴⁰⁵ The second instance is the discretion to

⁴⁰² Bockstiegel, K. and Kroll, S. op. cit. pp.521-22; Lew, J., Mistelis, L. and Kroll, S., op. cit. para 26-69.

⁴⁰³ Davidson, F., op. cit. p. 385.

⁴⁰⁴ Di Pietro, D. and Platte, M., op. cit. p.134.

⁴⁰⁵ Article VII (1) provides that “The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.” A common example of the application of Article VII (1) is that courts in a number of jurisdictions may exercised discretion and enforce a foreign award, even if it has been set aside in the country where it was made. See, e.g., in France, *Hilmarton Ltd v Omnium de*

recognise and enforce a foreign award, despite the applicability of one of the Article V (1) grounds having been proved, by relying on the principles of estoppel and waiver.⁴⁰⁶

A third case is that discretion can be exercised through the distinction between national and international public policy. In this case, an enforcing court exercises its discretionary power in order to on the basis that although an award may be contrary to domestic public policy, it does not offend against international public policy.⁴⁰⁷

In parallel to Article V of the New York Convention, interestingly, Article 2 of the Arab League Convention also provides that “requests for execution *may* be refused in the following instances ...” This is certainly in the same vein as the New York Convention, i.e. a court has a discretionary power to grant enforcement.

Do the GCC courts apply the prevailing interpretation regarding the word “*may*” under Article V of the New York Convention or other relevant regimes? To the researcher’s knowledge, the enforcing courts in GCC states have not yet dealt with such a matter, whether directly with an interpretation of the word “*may*,” or indirectly with an issue of the enforcing court having discretion to refuse leave for the enforcement of a foreign arbitral award.

Before answering this question, it is useful to refer to the words that are used in other relevant regimes in the GCC states, which may refer to the discretion of the enforcing

Traitement et de Valorisation OTV (1994) XIX YBCA 655 (France Supreme Court 1994); in the USA, *Chromalloy Aeroservices Inc v Arab republic of Egypt* 939 F Supp 907, (US District Court 1996); in Belgium, *SONATRACH v Ford Bacon & Davis Inc* (1997) XV YBCA 370 (Belgium Court of First Instance 1988); in Austria, *Kajo-Erzeugnisse Essenze Gmbh v Do Zdravilisce Radenska* (1999) XXIV YBCA 919 (Austria Supreme Court 20 Feb 1998); *Radenska v Kajo* (1999) XXVI YBCA 919 (Austria Supreme Court 20 Oct 1993); *X v X* (2005) XXX YBCA 421 (Austria Supreme Court 26 January 2005); *Yukos Capital S.a.r.l. v Rosneft OAO* (The Amsterdam Court of Appeal on 28 April 2009, unreported) cited at < www.kluwerarbitration.com/arbitration/newsletter.aspx?month=june2009> (2/9/2009). See also chapter six, section six.

⁴⁰⁶ See, e.g., *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLDR 552 (Hong Kong Court of Final Appeal, 9 February 1999);

⁴⁰⁷ See, e.g., *Firm P (US) v Firm F (Germany)* (Germany Court of Appeal 3 Apr 1975); *Renusagar Power Co. Ltd v General Electric Co* (India Supreme Court; 1993) pp 696-702; *Kersa Holding Co v Infancourtage* at 626; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* (German Court of Appeal 1999) 696; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* pp 674, 691; *MGM Prod. Group, Inc. v Aeroflot Russian Airlines*, 2003 WL 21108367, at 4 (SDNY 2003); *A (Netherlands) v B& Cia. Ltda* (2007) XXXII YBCA 474 (Portuguese Supreme Court of Justice 2003) p 477; *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Invesment and Isny* (1996) XXI YBCA 617 (Luxembourg Court of Appeal 1993) 625. Also see, Chapter seven Section Two.

courts regarding the enforcement of foreign awards. The rest of the relevant regimes in the GCC states do not use the word “*may*.” The Riyadh Convention provides “the judicial authorities of this State can only refuse enforcement of the award in one of the following cases...”⁴⁰⁸ The Arbitral Rules of Procedure of the GCC Commercial Arbitration Centre are clearer, stating that “upon the occurrence of an of the events indicated . . . the relevant judicial authority . . . *shall* pass a ruling for non-enforcement of the arbitration award.”⁴⁰⁹ The Convention on the Enforcement of Judgements in the GCC States Article 2 states that “enforcement of the whole judgment or any part thereof *shall* be refused in the following cases ...” However, as far as national laws are concerned, except for Saudi Arabian law, the laws of GCC states contain similar provisions. The Codes of Civil and Commercial Procedure in Kuwait, Bahrain, Oman, Qatar, and the UAE provide that “an order of execution *may not* be issued *unless* the following matters have been verified.”⁴¹⁰ In Saudi Arabia, as noted previously, the national law contains no provisions governing the enforcement of foreign awards.

The language used by these provisions, by stating that enforcement “shall be refused”, “an order of execution may not be issued”, “can only refuse enforcement ... in one of the following cases ...” or “shall pass a ruling for non-enforcement”, makes it clear that these regimes do not give the enforcing courts discretion in this respect but have to refuse leave for enforcement where one of the aforementioned grounds exists.

With regard to the answer to an earlier question, despite the aforementioned interpretation of Article V of the New York Convention that the court has the discretion to refuse enforcement if the one of grounds exists, it seems at first glance that such an interpretation is not accepted in GCC Courts. This is because the Arabic text of the New York Convention, which is one of six official texts of the UN and is adopted by the GCC states, is expressed differently. As noted earlier, in the English version, Article V provides that “recognition and enforcement *may* be refused if ...”, whereas the Arabic

⁴⁰⁸ Riyadh Convention, Articles 37 and 30.

⁴⁰⁹ Arbitral Rules of Procedure of the GCC Commercial Arbitration Centre, Article 36.

⁴¹⁰ See, Kuwait: Article 199 of the Code of Civil and Commercial Procedure; Bahrain: Article 252 of the Code of Civil and Commercial Procedure; Qatar: Article 380 of the Code of Civil and Commercial Procedure; Oman: Article 352 of the Code of Civil and Commercial Procedure; and the UAE: Article 235 of the Code of Civil Procedure.

version provides that “recognition and enforcement of the award *shall not* be refused, at the request of the party against whom it is invoked, *unless* that party furnish to the competent authority where the recognition and enforcement is sought, the proof that ...”⁴¹¹ It is clear that the Arabic version establishes what must happen if one of the grounds exists, but the English version does not do so. The words “*shall not ... unless ...*” mean that leave for enforcement of an arbitral award is under conditional stipulation if one of grounds does not exist. Thus the Arabic text is mandatory, not permissive. As a result, if a losing party proves one of the grounds listed for refusing enforcement under Article V, then the court must deny enforcement of the award, which means that the GCC courts do not have discretion in this respect but have to refuse leave for enforcement. Therefore, it would appear that the English text of the Convention has a meaning favouring enforcement which is inadequately rendered in the Arabic translation.

However, it should be noted that this argument is related to the court’s exercise of discretion to grant the enforcement of foreign arbitral awards, and is not linked to its discretion to evaluate the grounds for refusing enforcement that are presented by the party who has an interest in denying enforcement of the award, as in the latter case the courts have full discretion to evaluate the grounds presented.

Indeed, in practice, as will be seen in Chapters Six and Seven, the consequences of this difference in approach between the Arabic and English texts are minor. In both GCC courts and national laws the attitude is that, in most cases, the grounds for defence under Article V of the New York Convention have been given a narrow construction so as to favour the enforcement of foreign awards. This can be seen by the range of excluded defences; for example, in Saudi Arabia the court ignores the incapacity of Saudi government bodies to enter into an arbitration agreement, irrespective of this being

⁴¹¹ In this respect, it is noted also the French version of New York Convention concerning this issue is mandatory, rather than permissive. See, United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration* (Module 5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention), UN Doc UNCTAD/EDM/Misc.232/Add.27 (2003) 29; Paulsson, J., ‘May or Must under the New York Convention: an Exercise in Syntax and Linguistics’ pp 228-30; Born, G., *op. cit.* p.2723.

contrary to national law,⁴¹² while in Kuwait the court rejects defences relating to irregularities in the composition of the arbitral tribunal or irregularity in arbitral procedure.⁴¹³ Some courts will also insist that an irregularity in the procedure has affected the award before they will refuse enforcement, or apply the principle of estoppel.⁴¹⁴ Therefore, it can be said that the enforcing courts in the GCC states have reached the same prevailing interpretation regarding the word “*may*” albeit by different means.

3.3.3.2 Urgent Execution of Foreign Arbitral Awards

The enforcement of a foreign award usually takes time, as enforcement is requested in the same manner as any suit. This means that, pursuant to the Codes of Procedure of GCC states, hypothetically an application for enforcement can be seen by three different levels of courts. Thus, if the Court of First Instance rendered an order granting enforcement, the losing party may challenge this decision. Does the court have residual discretion to render urgent execution of an award before it makes a final decision?

There are no special provisions governing urgent execution of foreign arbitral awards in the GCC states. However, general provisions found in the Codes of Civil and Commercial procedure can be applied here. As a general rule, according to the Codes of Civil and Commercial Procedure of Kuwait,⁴¹⁵ Bahrain,⁴¹⁶ Qatar,⁴¹⁷ Oman,⁴¹⁸ and the UAE,⁴¹⁹ no judgment may be enforced if it is open to appeal unless urgent execution is provided for in law or ordered in the judgment. As explained previously, a request for the enforcement of an award must be made to the Court of First Instance in accordance with the normal procedure for legal actions. This means that the first judgment will not normally grant urgent enforcement, unless the subject of the foreign award relates to cases where the law provides for urgent enforcement or the judgment grants urgent

⁴¹² See Chapter Six, section two.

⁴¹³ See Chapter Six, section five.

⁴¹⁴ See Chapter Six, section Three.

⁴¹⁵ The Code of Civil and Commercial Procedure, Articles 192 to 198.

⁴¹⁶ The Code of Civil and Commercial Procedure, Articles 245 and 246.

⁴¹⁷ The Code of Civil and Commercial Procedure, Article 374-378.

⁴¹⁸ The Code of Civil and Commercial Procedure, Articles 345 to 351.

⁴¹⁹ The Code of Civil Procedure, Article 227-234.

execution. It may therefore be seen that the court has discretion to grant urgent enforcement.

The urgent execution of a foreign award can be granted by the law in Kuwait only where a decision has been rendered in respect of a commercial matter, and then it is mandatory.⁴²⁰ So, if the subject matter of a foreign award relates to a commercial matter, the judge must grant urgent execution, although this is conditional upon the winning party providing security.⁴²¹ Although the Court has no discretion in this matter, this may nonetheless be regarded as a satisfactory situation, due to its being in favour of enforcement of foreign arbitral award.⁴²²

More discretion is accorded to the courts in Bahrain, Oman, and the UAE. The provisions governing urgent execution in these States are similar, and state that⁴²³ “upon application being made by an interested party, the court *may* render judgment including urgent execution with or without security in the following cases:

1. Where a judgment has been rendered in respect of a commercial matter;
2. Where the culpable person has admitted the obligation, even where he has contested its scope or alleged that it has lapsed;
3. Where the judgement was rendered to implement a previous *res judicata*, or if it is covered by urgent execution without security, or where it is indicated on a formal document forgery of which has not been denied, if the culpable party was a party to the previous judgment or a party to the document;

⁴²⁰ The Code of Civil and Commercial Procedure, Article 193 (1) (d).

⁴²¹ The security of urgent execution is defined in Article 196 in Code of Civil and Commercial Procedure which stipulates that “... to provide a credible guarantor or to deposit in the execution directorate treasury an adequate sum or adequate securities or to accept to deposit, whatever is collected from the execution, in the treasury of execution directorate or to deliver whatever he has been ordered, in the judgment rendered, or in order, to deliver to a trustworthy custodian”

⁴²² In this regard, it should be pointed out that, regarding the execution of a judgement marked as urgent being an obligation of the prevailing party, Article 192 of the Kuwaiti Code of Civil and Commercial procedure provides that “If the prevailing party has executed the judgement marked for urgent execution, he shall be under an obligation to enforce it, if the judgement, at a later date, was revoked, even where the applicant for execution was of good faith.”

⁴²³ See Article 246 of the Bahrain Code of Civil and Commercial Procedure, Article 347 of the Oman Code of Civil and Commercial Procedure, and Article 229 of the UAE Code of Civil Procedure.

4. Where the judgment has been rendered in favour of the applicant for execution in a dispute involving him;
5. Where the judgment provides for payment of wages, salaries or compensation resulting from a work relationship;
6. In any other case of the delay of the prevailing party, if the same has been provided for adequately in the judgment ...”

This text shows that, under any of circumstances above, the winning party can apply for urgent enforcement of a foreign arbitral award in these States and that the enforcing court has discretion to render a judgement marked for urgent enforcement. This discretion can be inferred from the use of the phrase ‘*may render*’. This also true in Kuwait if the subject matter of an award is not commercial.⁴²⁴

Finally, it is important to bear in mind that an application for urgent execution should be made before the Court of First Instance renders its decision, otherwise the opportunity for such an application will have been missed.

3.3.3.3 Partial enforcement of a foreign arbitral award

A foreign arbitral award may include a part that is susceptible to enforcement and a part which cannot be enforced, as it is not in accordance with law of the state where enforcement is sought. In this case, the question is whether it is possible to separate the part(s) which may not be enforced from those that are acceptable, so that recognition and enforcement of the latter can be granted.

In the context of the New York Convention, Article V (1) (c) shows that partial enforcement is contemplated only where the decision partly exceeds the arbitrator’s authority. The second half of that Article provides that “if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decision on matters submitted to arbitration may be recognised and enforced.” In this case, the New York Convention accords the court discretion to

⁴²⁴ The Code of Civil and Commercial Procedure, Article 194.

grant enforcement of the part within the arbitrator's authority where it can be effectively separated from the rest.⁴²⁵ For example, the Italian Court of Appeal in *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto) (Italy)* found that while the arbitration agreement only granted the arbitrators authority to deal with non-technical matters, the award also covered technical matters. Thus the court granted enforcement of the award only to the extent that it dealt with non-technical matters.⁴²⁶

Is a court's discretion sufficiently broad to grant partial enforcement under the New York Convention in other circumstances? It should be pointed out that the partial enforcement supports the achievement of the aim of all international conventions in this area, which is to favour the enforcement of foreign arbitral awards. According to Poudret and Besson, "even if partial recognition and enforcement are not expressly provided for in other cases, it must be admitted that they are possible under the same conditions."⁴²⁷ Moreover, Recommendation 1(h) of the final International Law Association Report on International Commercial Arbitration concluded that. "[i]f any part of the award which violates international public policy can be separated from any part which does not, that part which does not violate international public policy may be recognised or enforced."⁴²⁸ In addition, a number of different jurisdictions have adopted this view.⁴²⁹ Accordingly, although the Convention contains no reference to partial enforcement other than under Article V (1) (c), the enforcing court can exercise its discretion to grant partial enforcement in other cases.

⁴²⁵ Di Pietro, D. and Platte, M., op. cit. p.160.

⁴²⁶ *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto) (Italy)* (1983) VIII YBCA 386 (Italian Court of Appeal, 14 January 1981), pp 386-388.

⁴²⁷ Poudret and Besson, op. cit. Para 955. Other authors agree, for example, Lew, J., Mistelis, L. and Kroll, S., op. cit. para 26-70; Bockstiegel, K. and Kroll, S., op. cit. p.522.

⁴²⁸ See Mayer, P. and Sheppard, Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, (2003) 19 *Arbitration International* 258.

⁴²⁹ See, e.g., in *Buyer (Austria) v Seller (Serbia and Montenegro)* (2005) XXX YBCA 421 (Austria Supreme Court 26 January 2005) pp 435-6; *JJ Agro Industries Ltd v Texuna International Ltd* (1993) VXIII YBCA 396 (Hong Kong High Court 1992) pp 399-402; *Laminoirs- Trefileries-Cableries de lens SA v Southwire Co & Sothwire International Corp* 484 FSupp 1063 (US District Court ND Georgia 1980) 1069.

Unlike the New York Convention which restricts partial enforcement to one case, under both the Riyadh Convention and the Convention on Enforcement of Judgments and Notices in the GCC States, the courts have a full discretion to render partial enforcement under any circumstances that make this possible. The Riyadh Convention provides that “the request for enforcement may cover the entire [award] or only one of its parts, provided it is possible to separate them.”⁴³⁰ In addition, enforcement of a foreign arbitral award under the Convention on Enforcement of Judgments and Notices in the GCC States provides that “... the [judicial] authority shall order that necessary measures to be taken so that the judgment [also applying to an arbitral award] shall have the same judicial and executory force as if it had been rendered by the State itself. The writ of enforcement may cover the whole or part thereof if it is separable.”⁴³¹

As regards the GCC national laws, except for the Bahrain International Commercial Arbitration Law, no provisions regulate the question of partial enforcement. Like Article V (1) (c) of the New York Convention, the Bahrain International Commercial Arbitration Law provides for partial enforcement where only parts of the foreign award exceed the tribunal’s jurisdiction.⁴³²

With regard to the practice in national courts, , in several decisions in Saudi Arabia discretion to partially enforce has been deemed to be as a general principle, not limited to excess of jurisdiction.⁴³³ It is suggested that the same view would apply in the remaining GCC Courts, even though there are no provisions allowing the court to do so, giving courts an opportunity to fashion appropriate principles.

Apart from the expansion of the scope of partial enforcement under the conventions, a further question arises as to how is this discretion can be used by the courts to separate

⁴³⁰ Riyadh Convention, Article 32.

⁴³¹ The Convention on Enforcement of Judgments and Notices in the GCC States, Article 7

⁴³² The International Commercial Arbitration Law, Article 36 (1) (a) (3).

⁴³³ See, e.g. the Board of Grievances, 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996); the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997); the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003); the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004). Quoting Al-Tuwaigeri, W., Grounds For Refusal of Enforcement of Foreign Arbitral Awards Under The New York Convention of 1958 With Special Reference to the Kingdom of Saudi Arabia.

the part or parts can be enforced from the rest, in order to achieve a just result between parties.

In this regard, van den Berg suggests that “partial enforcement may be granted if the matter in excess of the arbitrator’s authority is of a very incidental nature and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement.” However, this view was criticised by one commentator, who maintained that “the text of Article V (1) (c) ... does not establish such restrictions to the partial enforcement of arbitral awards. Furthermore, arbitration has evolved in the last fifty years in the direction of firmer recognition and enforcement, even of imperfect awards. In conclusion, there is no reason to bring such limitations to the Convention’s bias in favour of enforcement.”⁴³⁴

In the researcher’s opinion, however, it is clear that the discretion of the enforcing court to grant partial enforcement of an award is only subject to the criterion of the possibility of separating matters. Thus court discretion in this respect is based on the possibility of separating the part or parts of the award that are enforceable from any part which is not. Otherwise the enforcement of the whole award should be denied.

Clearly, the mechanism used by the courts to separate the part or parts that can be enforced from the rest is subject to the national law of the state where the recognition and enforcement are sought. In this regard, the Civil Codes of Kuwait, Bahrain, Qatar, and the UAE, suggest that an obligation is indivisible in two situations.⁴³⁵ The first is where the nature of the object thereof is indivisible, and the second is where it is the intention of or it follows from the purpose pursued by the parties that the performance of the obligation should not be divided. Hence, if an arbitral award sought for enforcement in a GCC State includes interest, and the dispute is related to a civil or commercial matter, but the interest rate was over that allowed by the law, (or awarded at all in Saudi Arabia), the court has the discretion to grant partial enforcement by

⁴³⁴ Silveira, M., and Levy, L., *Transgression of the Arbitrators’ Authority: Article V (1) (c) of the New York Convention*, in Gaillard, E. and Di Pietro, D., *op. cit.* p.676

⁴³⁵ Kuwait: Article 361 of the Civil Code; Bahrain: Article 284 of the Civil Code; Qatar: Article 321 of the Civil Code; the UAE: Article 465 of the Civil Transaction Code.

enforcing the award of the main sum, and refusing enforcement of the award of interest.⁴³⁶ Furthermore, if the winning party invokes the award against two parties and one of the parties can prove that he did not have legal capacity or that he was not validly represented, the enforcing court should enforce the award only against the other.

A further linked question is when the court can exercise partial enforcement; in other words, whether the winning party itself may request partial enforcement or this must be done by the court. In general, it is noted the principle of partial enforcement does not relate to public policy, so it must be presented by the party who seeks enforcement or who has an interest in enforcement. Thus, such requests cannot be applied by a court on its own initiative, unless recognition and enforcement of a foreign award is subject to regimes that indicate the court may do so, e.g. the New York Convention and the Convention on the Enforcement of Judgments and Notices in the GCC States.

In brief, in the researcher's opinion, even when there are no provisions in national laws or international conventions, in practice, the enforcing court should apply the principle of partial enforcement. Partial enforcement can be granted when the losing party voluntarily complies with part of the award and denies the rest. Furthermore, this principle applies when a winning party requests enforcement an award bearing interest in a state where the award of interest is contrary to public policy. The court in effect then has to enforce the award partially of its own initiative.

3.4 Challenging Court Decisions on Enforcement

A distinction should be made between challenging decisions to enforce a foreign arbitral award and challenging decisions relating to the enforcement procedure, and this study will only address the former. The court may grant an order enforcing a foreign

⁴³⁶ For further analysis of this area see Chapter Seven Section Two.

arbitral award or refuse to do so. The majority of states allow either party to challenge such decisions.⁴³⁷

In general, in all GCC states, as previously explained, a request to enforce foreign award must be submitted to the Court of First Instance, following the standard format whereby the party seeking enforcement must institute proceedings against the other party by depositing a declaration. This means that the judgment of the court to grant or refuse exequatur of a foreign arbitral award can be challenged on the grounds provided for under national laws, which are the same as generally apply to the challenge of ordinary judgments. The rules in Kuwait, Bahrain, Qatar, Oman, and the UAE are more or less the same, and differ from Saudi Arabian law.

Finally, it should be noted that this section will approach only the issues that may arise in respect of the enforcement of a foreign arbitral award; therefore the specific issues that are provided for in all GCC national laws will not be dealt with, as they are not applicable in this case.

3.4.1 The position in Saudi Arabia

In Saudi Arabia, it is possible to challenge Board of Grievance decisions. In accordance with the rules of Procedure of the Board Grievance, decisions may be challenged in two ways. The first is by the usual method of submitting an application for review within thirty days from the date of the notice of the judgment.⁴³⁸ Acceptance of the application for review entails that the Review Panel either affirms or reverses the judgment. Article 39 stipulates that “In case of reversal, it may either remand the case to the issuing circuit or adjudicate it. If the case is remanded to the circuit which originally handled it, and that circuit insists on its judgment, the review circuit shall adjudicate the case if it is not persuaded by the arguments of that circuit ... In all cases, judgments made by the review circuit shall be final” and the ruling is made by three judges.⁴³⁹ Secondly, a

⁴³⁷ For example, in England, see ss.66 (1)-(2), 103(2) of of Arbitration Act 1996. By contrast, some Countries only allow a winning party to challenge a decision to refuse enforcement of the award order - see Egypt, Article 58(3) of international Commercial Law.

⁴³⁸ Article 31 of Rules of Procedure before the Board of Grievances

⁴³⁹ Article 39 of the Rules of Procedure before the Board of Grievances

person against whom a judgment is rendered in absentia may apply for re-consideration of the judgement rendered against him, within thirty days from the date on which he was notified of the judgment. He may submit an application to the circuit that had rendered the judgment for retrial.⁴⁴⁰

3.4.2 The Position in Kuwait, Bahrain, Qatar, Oman and the UAE

In Kuwait, Bahrain, Qatar, Oman, and the UAE, as mentioned previously, the application for the enforcement of a foreign award must be submitted before the Court OF First Instance as in any normal proceedings. A challenge of a judgment granting or refusing exequatur of a foreign arbitral award can made following:⁴⁴¹ (i) usual methods (ii) exceptional methods (iii) third party challenge procedure.⁴⁴²

3.4.2.1 Usual methods for challenge

3.4.2.1.1 Challenge by Appeal

A ruling of the Court of First Instance, whether granting or refusing the enforcement of a foreign arbitral award, may be challenged by appeal in the usual manner by depositing a writ before the Registry of the Appeal Court in Kuwait, Bahrain, Qatar, Oman, and the UAE. The writ should include the details of the judgment, the grounds of appeal and action requested, and must be brought within 30 days (45 days in Bahrain)⁴⁴³ otherwise it is considered null and void. The appeal must be brought regarding the case in the form it may have had prior to delivery of the judgment appealed, and only as far as the point appealed is concerned. This means that the court shall hear the appeal on the basis of the evidence, rebuttals and aspect of new defences submitted to it and those submitted to the court of first instance. Also, fresh claims will not be admissible in the

⁴⁴⁰ *Ibid*, Article 41

⁴⁴¹ In Kuwait, Articles 127 to 157, Code of Civil and Commercial procedure Law. In Bahrain, Articles 213 to 232, Code of Civil and Commercial procedure Law deal with appeal and request re-consideration and Articles 8 to 26; Decree law No. 8 of 1989 on issuance of the court Cassation. In Qatar, Articles 163 to 184, Code of Civil and Commercial Procedure Law deal with appeal and request re-consideration and regard to challenge of cassation see Law No.12 of 2005 on conditions and procedures challenge by cassation in non-criminal matters. In Oman, Article 202 to 264 on Civil and Commercial Law. In the UAE, Articles 150 to 188, Code of Procedure Law.

⁴⁴² Wajdee, R. and Sayad, M., *The Procedural Law of Kuwait*, (Kuwait, Dar Alketab, 1994), pp. 468-554.

⁴⁴³ Kuwait Articles 137 and 141 Code of Civil and Commercial Procedure, Bahrain Articles 216 and 217 Code of Civil and Commercial Procedure, Qatar Articles 164 and 167 Code of Civil and Commercial Procedure, and the UAE Articles 159 and 162 Code of Civil Procedure.

appeal. For example, if the winning party only asked for enforcement of the award before the Court of First Instance, then on appeal he cannot add a new request such as asking the other party to be ordered to give suitable security. With regard to the right of the appellant to add aspects of new defences, this happened, e.g. if the losing party has at first instance requested that the award should not be enforced because of the incapacity of a party, he may on appeal request that the award should not be enforced on different grounds. –

At this stage, if the Court of First Instance has granted enforcement, this will not mean execution, unless the judgement includes urgent execution. If the judgment includes urgent execution, a stay of execution⁴⁴⁴ can be made under the civil and commercial law of Kuwait⁴⁴⁵, Qatar,⁴⁴⁶ and Oman,⁴⁴⁷ if the following three conditions are fulfilled: (i) the appellant has so requested; (ii) there are fears that execution will cause significant harm; and (iii) the appeal is likely to be upheld. Such requests can also be made in Bahrain⁴⁴⁸ and the UAE⁴⁴⁹ where there is good cause - a less onerous condition. In addition, on filing the appeal, the appellant must deposit security and attach the writ; otherwise the registry of court will not accept the writ of appeal.⁴⁵⁰

Appeal is the usual method of challenge, and consequently all judgments of the Court of First Instance may be appealed, irrespective of the kind of faults in the judgment. However, not challengeable in this way are judgments capable of appeal by the

⁴⁴⁴ An objection can be made against a stay or to a judgement which does not authorise urgent execution in accordance with normal methods for lodging an appeal, or by interlocutory application. For more information see in Kuwait, Article 198 and memorandum of the Code of Civil and Commercial Procedure; In Bahrain, Article 257 of the Code of Civil and Commercial Procedure; In Oman, Article 348 of the Code of Civil and Commercial Procedure ; In Qatar, Article 357 of the Code of Civil and Commercial Procedure; in the UAE, Article 233 of the Code of Civil Procedure,

⁴⁴⁵ The Code of Civil and Commercial Procedure, Article 133.

⁴⁴⁶ The Code of Civil and Commercial Procedure, Article 375.

⁴⁴⁷ The Code of Civil and Commercial Procedure, Article 349.

⁴⁴⁸ The Code of Civil and Commercial Procedure, Article 212.

⁴⁴⁹ The Code of Civil Procedure, Article 234.

⁴⁵⁰ Generally, the amounts of security are small (20 Dinars in Kuwait, 50 Ryals in Oman, 200 Ryals in Qatar, and 1000 Ryals in the UAE), and are required to prove the seriousness of the appellant. See Article 137 of the Kuwaiti Civil and Commercial Procedure Law, Article 217 of the Bahraini Civil and Commercial Procedure Law, Article 212 of the Omani Civil and Commercial Procedure Law, Article 163 of the Qatari Civil and Commercial and Procedure Law, and Article 185 *bis* of the UAE Procedure Law.

exceptional method - requests for reconsideration and Cassation- even if grounds of challenge exist.⁴⁵¹

3.4.2.2 The Exceptional Method of Challenge

As far as exceptional methods for challenge are concerned, the principle behind this kind of challenge is that it can only be exercised in relation to final judgments, and only allowed for reasons fixed by law. As result, the role of the court at this stage is only to examine the special reasons for the challenge.⁴⁵²

3.4.2.2.1 Requests for Reconsideration

Rulings granting or refusing the enforcement of foreign arbitral awards can also be challenged by a Request of Reconsideration in Kuwait,⁴⁵³ Bahrain,⁴⁵⁴ Qatar,⁴⁵⁵ Oman,⁴⁵⁶ and the UAE.⁴⁵⁷ Re-consideration is only permitted in relation to final judgements under the following circumstances:

1. Where the judgment is based on papers which, after delivery of the judgment, appear to be falsified, or where it is based on the testimony of a witness who, after delivery of the judgement, is shown to be false.
2. Where, after the judgment has been rendered, the applicant for reconsideration obtains papers which are decisive to the case, and which may have been withheld by his opponent.
3. Where the opponent appears to have practised a fraudulent act which has affected the judgment.
4. Where the judgment granted something not requested by the litigants, or exceeding their requests.
5. Where the text of the judgment is self contradictory.

⁴⁵¹ Wajdee, R. and Sayad, M., op. cit. p.469

⁴⁵² *Ibid*, p.503

⁴⁵³ The Code of Civil and Commercial Procedure, Article 148.

⁴⁵⁴ The Code of Civil and Commercial Procedure, Article 229.

⁴⁵⁵ The Code of Civil and Commercial Procedure, Article 178.

⁴⁵⁶ The Code of Civil and Commercial Procedure, Article 232.

⁴⁵⁷ The Code of Civil Procedure, Article 169.

Finally, in Kuwait and Qatar only a request may also be considered if a person was not properly represented in the case.

A request for reconsideration must be brought within 30 days (in Bahrain 45 days) of the rendering of the judgment, except in those situations laid out in the first, second and third paragraphs, where the period begins after the day when the papers are shown to be forged, the testimony is judged to be false or the paper withheld or the fraud is discovered, when such a request is submitted in the usual manner before the court which delivered the judgment.⁴⁵⁸

3.4.2.2 Challenge by Cassation

The judgments of the Court of Appeal whether granting or refusing enforcement of a foreign arbitral award, can be challenged by litigants in Kuwait, Bahrain, Qatar and the UEA. In Oman the objection is made to the highest Court. The challenge in the Court of Cassation can be made by the parties, in the following cases:⁴⁵⁹

1. If it challenges a judgment based on breach of the law or a mistake in its application or interpretation;
2. If there was an omission in the judgment or procedures which had an impact on the judgment.

In addition, the litigants may challenge before the Court of Cassation any final judgment, no matter what court rendered it, which contradicts another judgment applying to the litigants themselves and holding the force of *res judicata*.⁴⁶⁰

⁴⁵⁸ In Bahrain, Article 230 of the Code of Civil and Commercial Procedure. In Kuwait, Articles 149 and 150 of the Code of Civil and Commercial Procedure. In Qatar, Articles 179 and 180 of the Code of Civil and Commercial Procedure. In Oman, Articles 233 and 234 Code of Civil and Commercial Procedure. In the UAE, Articles 170 and 171 of the Code of Civil Procedure.

⁴⁵⁹ In Kuwait, Article 152 of the Code of Civil and Commercial Procedure; In Bahrain, Article 8 of the Law of the Court of Cassation; In Qatar, Article 1 of the Law of Conditions and Procedures Challenge by Cassation in non-criminal matters; In Oman, Article 239 of the Code of Civil and Commercial Procedure; In the UAE, Article 173 of the Code of Civil Procedure Law.

⁴⁶⁰ *Ibid.*

Challenge by cassation can be made by the Attorney General in relation to all final judgments in Qatar,⁴⁶¹ Oman,⁴⁶² and the UAE,⁴⁶³ whatever court rendered the judgments, in relation to the following judgments:

1. Judgments which the law does not allow to be challenged by the litigants;
2. Judgments in which litigants have missed the time limit for challenge or waived the right to challenge.

The period of limitation for litigants to challenge by cassation is 30 days in Kuwait,⁴⁶⁴ 40 days in Oman,⁴⁶⁵ 45 days in Bahrain,⁴⁶⁶ 60 days in Qatar⁴⁶⁷ and the UAE.⁴⁶⁸ The period granted to the Attorney General to challenge by cassation is one year from the rendering of the judgement in the UAE⁴⁶⁹ and Qatar,⁴⁷⁰ while Oman⁴⁷¹ imposes no time limit.

A challenge before the Court of Cassation is carried out by bringing by a writ of cassation, deposited in the registry of the Court of Cassation (the High Court in Oman). The writ of cassation must include the names, capacities, domiciles and the places of business of each of the parties, the date of the judgment, the subject matter of the appeal, the grounds on which it is based, and the claims of the petitioner, and must be signed by a lawyer acceptable to the defence before the Cassation Court, otherwise the challenge is considered null. The court considers issues of nullity on its own initiative, and the ruling is made by five judges. The petitioner must also deposit, by way of security, an amount which differs from state to state; otherwise the registry of court will not accept

⁴⁶¹ Article 2 the law of Conditions and Procedures Challenge by Cassation in non-criminal matters.

⁴⁶² Article 241 the Code of Civil and Commercial Procedure.

⁴⁶³ Article 174 the Code of Civil Procedure.

⁴⁶⁴ Article 153 the Code of Civil and Commercial Procedure.

⁴⁶⁵ Article 242 the Code and Commercial Procedure.

⁴⁶⁶ Article 11 of Decree law No. 8 of 1989 on issuance of the Court Cassation.

⁴⁶⁷ Article 4 Law No.12 of 2005 on conditions and procedures challenge by cassation in non-criminal matters.

⁴⁶⁸ Article 176 the Code of Civil Procedure.

⁴⁶⁹ Article 174 the Code of Civil Procedure.

⁴⁷⁰ Article 2 the law of Conditions and Procedures Challenge by Cassation in non-criminal matters.

⁴⁷¹ Article 242 the Code and Commercial Procedure.

the writ of cassation.⁴⁷² Finally, while the filing of the challenge of Cassation will not cause a stay of execution; the Court of Cassation may order such a stay if so requested by petitioner through a declaration of cassation. In the UAE a challenge brought before the Court of Cassation will automatically lead to a stay of execution without any request from the petitioner if the judgment relates to ownership of property.⁴⁷³

3.4.2.2.3 Opposition by a Third Party

The Kuwaiti, Bahraini, and Qatari Codes of Civil and Commercial Procedure⁴⁷⁴ generally allow third parties to challenge judgments which affect them as an objective fact.⁴⁷⁵ Thus a judgment granting or refusing enforcement of a foreign arbitral award can be challenged by a third party, irrespective of the court which rendered it.

In Kuwait and Qatar, a third party has the right to challenge a judgment in two situations. The first is where the judgment rendered went against a person who neither intervened nor joined in that action. That person has the right to oppose that judgment, and must prove fraud, collusion or gross negligence on the part of the person who represented him. In the second situation, joint creditors have the right to oppose a judgment against a co-creditor and joint debtors can oppose a judgment against a co-debtor. In addition, in Bahrain, the Code of Civil and Commercial Procedure allows any third party to oppose a judgment, whenever it has pleaded against him or otherwise affects his rights. The conditions laid down by Bahraini law are less onerous than those in Kuwait and Qatar. The opposition must file suit in the normal manner before the court which rendered the judgment.⁴⁷⁶ Opposition by a third party will not cause the execution of a judgment to be stayed, unless for serious reasons. Consequent to opposition to the judgment, the case will be re-opened and any reversal or modification

⁴⁷² The amount of security is between 50 to 100 KD in Kuwait, 50 BD in Bahrain, 20000 QR in Qatar, 25 OR in Oman, and 1000 ER in the UAE.

⁴⁷³ In Kuwait, Article 153 Code of Civil and Commercial Procedure. In Bahrain, Articles 10 and 12 of Decree law No. 8 of 1989 on issuance of the Court Cassation. In Qatar, Articles 4 and 8 on Law of Conditions and Procedures Challenge by Cassation in non-criminal matters. In Oman, Article 243 on Code of Civil and Commercial Procedure. In the UAE, Articles 175 and 177 Code of procedure.

⁴⁷⁴ Kuwait Articles, 158 to 162, in Bahrain, Articles 208 to 212, and in Qatar Articles 185 to 189.

⁴⁷⁵ Wajdee , R. and Sayad, M., op. cit. p.546.

⁴⁷⁶ Opposition by a third party can also be made through a subsidiary claim to an existing suit, unless the court does not have jurisdiction on the subject or if the court is inferior to the court which rendered the judgment.

of judgment can be only be made for the parts the judgment which are harmful to the third party.⁴⁷⁷

3.5 Time Limits on the Recognition and Enforcement of Foreign Arbitral Awards

When the winning party obtains an award, he usually seeks to enforce it as soon as possible. He may seek to enforce the award, but this may take a considerable period of time when enforcement is sought in certain states. Hence, the question arises whether the right to enforce the award is subject to prescription. The New York Convention and all conventions that apply in GCC States are silent as to whether there is a time limit for requesting the enforcement of an award. In the drafting of the UNCITRAL Model Law, it was proposed that a ten-year period should be the time limit for enforcing an award. However the working group stated that:⁴⁷⁸

“Many legal systems already had rules on the period for the enforcement of an arbitral award, either by assimilating for this purpose arbitral awards to court judgments or by special legislation. Harmonisation of these rules would be difficult to achieve since they were based on differing national policies closely linked to procedural law aspects of state.”⁴⁷⁹

Consequently, the working group decided that a time limit should not be set in the Model Law.⁴⁸⁰ In the absence of such provisions in conventions, this could matter would be governed by private law, which can be presumed to be the law of the arbitral forum.⁴⁸¹

⁴⁷⁷ In Kuwait, Article 162 of the Code of Civil and Commercial Procedure. In Bahrain, Articles 211 and 212, of the Code of Civil and Commercial Procedure. In Qatar, Article 189 of the Code of Civil and Commercial Procedure.

⁴⁷⁸ Davidson, F., *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, p.256

⁴⁷⁹ As cited in *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ Van de berg, A..J., ‘Concolidated Commentary’ (2003), XXVIII YBCA p.645.

National laws differ on the time of prescription for the enforcement of an arbitral award.⁴⁸² Thus, it would be risky for the winning party not to ask for an experienced local consultant; the same thing can also be said for a party wishing to resist enforcement.⁴⁸³ In England, for example, the period of prescription for enforcement is six years from the date on which the cause of action accrued.⁴⁸⁴ In the U.S., the time limit for enforcement of an arbitral award is three years. In *Fertilizer Corporation of India et al. (India) v IDI Management, Inc. (U.S.)*,⁴⁸⁵ the U.S. District Court in Ohio refused to enforce the award under Sect. 207 of the Federal Arbitration Act because “a party must apply to this Court for enforcement within three years after an award is made. The Award was made in 1974, while counterclaim seeking enforcement was filed in this Court on January 2, 1980. Thus, the counterclaim is time-barred.” In China, under Article 169 of the Code of Civil Procedure, the time limit for filing such an application is six months if both parties are enterprises or institutions, government bodies or organizations, and one year if both parties are private individuals, or if one of the two parties is a private individual. The limitation starts to run from the last day of the fulfilment period provided for by the legal document; where it is agreed that the fulfilment shall be carried out in different periods, the time limit starts to run from the last day of each of the periods.⁴⁸⁶

There are no special provisions governing the time limit for making the request of enforcement of a foreign arbitral award in any of the GCC states. However, there is a general principle in the Civil Codes of Kuwait, Bahrain, and Qatar that the period of prescription for enforcement of judgments having *res judicata* is fifteen years. Article 450 (2) of the Kuwaiti Civil Code provides that “The new time limitation shall nevertheless be fifteen years in the following cases: (a) where the right has been

⁴⁸² *Ibid*

⁴⁸³ Redfern, A., and Hunter, M., op. cit. para. 10-18.

⁴⁸⁴ The Limitation Act 1980 s.7 provides that “An action to enforce an award . . . shall not be brought after the expiration of six years from the date on which the cause of action accrued.” In *Government of Kuwait v. Snow* [1983] 1 Lloyd’s Law Reports 596 at 605 the Court of Appeal concluded, after considering Article III of the New York Convention, that “it is settled law that all issues as to limitations are procedural in nature.” The Court held that s. 7 applies both to domestic and Convention awards.

⁴⁸⁵ *Fertilizer Corporation of India et al. (India) v IDI Management, Inc. (U.S.)* (1982) VII YBCA (United States District Court, Southern District Of Ohio, Western Division, June 9 1981), pp. 382 – 392.

⁴⁸⁶ See, *Guangzhou Ocean Shipping Company (PR China) v Marships (USA)*, (1992) XVII YBCA 485 (Guangzhou Maritime Court, 17 October 1990) pp 486-87.

confirmed by a decision which became a *res judicata* to the exclusion of recurring periodical obligations contained therein which are payable after the decision has been rendered.” Article 337 (2) of the Bahraini Civil Code and Article 415 (2) of the Qatar Civil Code are to the same effect. Thus an application for enforcement of a decision which is *res judicata* must be filed within fifteen years; otherwise the party will lose his right to request enforcement. The concept of the principle of time limitation adopted by the Civil Code is based on the theory of Shari’ah Law theory, which suggests that time does not prescribe rights and obligations, but also arranges a fixed period after which the of hearing of a case is prohibited. The time limitation is not based on the invalidity of right but from practical restrictions on judicial time and role.⁴⁸⁷

The aforementioned principle is deemed as a general, and thus it is thought this principle will be applied in the context of the enforcement of foreign awards. Therefore, the time limitation for requesting enforcement of a foreign arbitral award in Kuwait, Bahrain, and Qatar is fifteen years.⁴⁸⁸ However, this is still a relatively long period, and this may be seen to be contrary to the practical considerations which make most states adopt a shorter time limit. In fact, practical considerations make it in the interest of the winning party to enforce his award without any delay. Thus if the wining party does not request enforcement within might allow the award to be enforced in a way contrary its purpose. For example, if the losing party is a company listed on the stock market, delay in enforcing the award can affect its share price, allowing the winning party to use the award as a weapon. Thus the extent of the rights of the winning party must conform to those rights as determined by the arbitral award, and cannot be used to achieve illegal goals. The fixing of a short time limit for the request to enforce an award in local law can support the stability of the economic situation of trading in any business environment, which is often vulnerable to fluctuations due to rumours.

The following further points might be made:

⁴⁸⁷ Explanatory Memorandum of Kuwaiti Civil Code.

⁴⁸⁸ This view was discussed with Mr. Faysal Alhendi, counsellor at the Appeal Court of Kuwait.

1. Time limitation does not relate to public policy, which means it cannot be raised by a court on its own initiative, but must be pleaded by the party resisting enforcement.⁴⁸⁹
2. A party only can plead time limitation before a trial court i.e. the First Instance Court and Appeal Court, so if the plea is raised for the first time before the Cassation Court, it will be rejected.⁴⁹⁰
3. A party cannot disclaim the time limitation under law, nor can agree a time limitation which differs from that set by the law.⁴⁹¹
4. Time limitation does not apply to recurring periodical obligations, which are payable after the decision has been rendered.⁴⁹²

By contrast, the UAE has adopted the principle that any kind of rights determined by decisions are not subject to time limitation,⁴⁹³ which means that all decisions rendered by a judge or an arbitrator can be enforced at any time, including the request for enforcement of a foreign arbitral award in the UAE. In Oman and Saudi Arabia, the laws are silent in this respect, and as a result there is no time limit imposed for the enforcement of foreign awards.

3.6 Summary

This chapter shows that the request for recognition and enforcement of a foreign arbitral award must be applied for through the Board of Grievances in Saudi Arabia, and the Court of First Instance in the other GCC states. No competent court in the GCC has the power to re-examine the merits of an award.

⁴⁸⁹ Kuwait: the Civil Code, Article 452 (1); Bahrain: the Civil Code, Article 379 (a); Qatar: the Civil Code, Article 417 (1).

⁴⁹⁰ Kuwait: the Civil Code, Article 452 (2); Bahrain: the Civil Code, Article 379 (b); Qatar: the Civil Code, Article 417 (2).

⁴⁹¹ Kuwait: the Civil Code, Article 453 (1); Bahrain: the Civil Code, Article 380 (a); Qatar: the Civil Code, Article 418 (1).

⁴⁹² Kuwait: the Civil Code, Article 450 (2) (b); Bahrain: the Civil Code, Article 377 (2) (b); Qatar: the Civil Code, Article 415 (2).

⁴⁹³ The Civil Transaction Code, Article 485 (2).

It has been seen that under all regimes, the enforcing court is not allowed to review the merits of foreign arbitral awards. Their role is limited to granting or refusing enforcement. For this reason, I suggest that such a request should be submitted to the Appeal Court, as the Competent Court is not a merit court, and the decision of the Appeal Court is under review of the Cassation Court.

Moreover, under the New York Convention and Arab League Convention, even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing court still has residual discretion to grant enforcement. It has been found that the Arabic version establishes what must happen if one of the grounds exists, but English version does not. Thus, the Arabic text is mandatory, not permissive. However, in practice the consequences of this difference in approach between Arabic and English texts are minor, as the GCC courts have adopted a narrow construction in order to favour the enforcement of foreign awards. However, the remaining regimes, clearly do not give the enforcing courts discretion in this respect but have to refuse leave for enforcement where one of the grounds mentioned exists. It is therefore recommended that the provisions dealing with enforcement be rewritten, employing the term 'may' as it is used in the English text of the New York Convention, so that the competent courts would have discretion to grant enforcement. Moreover, court discretion also covers aspects such as an urgent execution of a foreign award before a judgment gives leave for the enforcement to become final, as well as the granting of partial enforcement.

Judgments enforcing or refusing enforcement of a foreign award are subject to challenge by other concerned parties. In Kuwait, Bahrain, Qatar, Oman, and the UAE, this challenge can be made by usual or exceptional methods, i.e. it is not in favour of the enforcement, which emphasises the need for changing the submission of requests so that they are presented before the Appeal Courts in these States. In Saudi Arabia, there is only one way to present a challenge, so in theory the challenge will not take as long as it might in the other GCC States.

The request for enforcement of a foreign arbitral award is not subject to time limitation in Saudi Arabia, Oman, and the UAE, but it has to be made within fifteen years in

Kuwait, Bahrain, and Qatar. It is suggested that GCC States should apply a short time limit of a maximum of three years in order to ensure that enforcement is not used improperly.

Chapter Four

Procedure for the recognition and enforcement of foreign arbitral awards

4.1 Introduction

Normally, an acquaintance with the rules of procedure for the enforcement of foreign arbitral awards is essential and the winning party should have knowledge of these rules prior to initiating the execution process. The winning party, in order to be successful in enforcing his award in the GCC States, should follow the provisions governing the rules of procedure. Thus, it is important to verify the meanings of the rules “which must be followed so as to obtain an order for the enforcement of the award.”⁴⁹⁴

This chapter will examine the most significant questions relating to the rules of procedure. First, it will examine the question of which provisions govern the rules of procedure - whether these provisions are governed by national law or otherwise. Secondly, there will be an examination of the modes of procedure that have been adopted in the GCC States to enforce a foreign arbitral award, and the procedural form that ought to be followed by the winning party to enforce a foreign arbitral award in the GCC States. Thirdly, it will determine the procedural rules to be followed by an applicant for the enforcement of foreign arbitral awards, as provided by applicable relevant provisions in GCC States. Finally, the chapter will seek to establish whether the existing provisions for the regulation of the rules of procedure are adequate, and capable of ensuring enforcement of all categories of foreign arbitral awards in accordance with the conventions that apply in the GCC States.

4.2 Attribution of the enforcement procedure to the *lex fori*

Where might the provisions that regulate rules of procedure for enforcement of foreign arbitral awards in GCC States be found? This issue is addressed by the conventions that

⁴⁹⁴ See, Kuwait Cassation Court decision dated 21 November 1988, (1997) XXII 750 YBCA.

deal with the enforcement of foreign arbitral awards in the GCC States,⁴⁹⁵ but actual enforcement procedure is governed by the *lex fori*.

The New York Convention clearly indicates that the rules of procedure for recognition and enforcement are governed by the national law of the place where the enforcement is sought.⁴⁹⁶ Article III of the Convention provides that “Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”⁴⁹⁷ Moreover, according to van den Berg, the law of procedure of the *lex fori* can be applied to the aspects incidental to enforcement which are not governed by the New York Convention, e.g. attachment, discovery of evidence, set-off, the effect of bankruptcy, time limits for requesting enforcement, and, possibly, questions of estoppel.⁴⁹⁸

The aforementioned principle has been affirmed by GCC Courts. For example, the Kuwaiti Court of Cassation has addressed this question of the principle of the attribution of the rules of enforcement procedure to the *lex fori*. After mentioning Article III of the New York Convention, it held that:

“This text is indicative of the aim of the convention, namely standardizing the treatment accorded to foreign arbitration awards in contracting or acceding States. However, what is intended by the rules of procedure followed in the territory where enforcement is relied on, as stated in the previous article, are the litigation procedures which must be followed so as to

⁴⁹⁵ It is clear that GCC national laws contain a general principle providing that compliance with the rules set forth in the national law shall not prejudice the provisions of Conventions and Treaties which apply in GCC States. See, for example, Kuwait Conflict Law No 5 of 1961, Article 28; the Bahraini Code of Civil and Commercial Procedure, Article 255.

⁴⁹⁶ Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, P. 236; Gaillard, E. and Savage, J., op. cit. para 1671.

⁴⁹⁷ During the drafting process of the New York Convention, proposals were presented to supplement this provisions by “either (a) to include in it uniform procedural rules that would be applicable to the enforcement of foreign arbitral awards, or (b) to provide that arbitral awards to which the convention applied should be enforce by a “summary enforcement procedure”, or (c) to stipulate that arbitral awards to which the Convention applied should be enforced by the same procedure as that which applied to domestic arbitral awards.” However, it was found these proposals would give rise to difficulties, and thus they were rejected. Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 234.

⁴⁹⁸ Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.245.

obtain an order for the enforcement of the award. No account is to be taken of the law of the country issuing an arbitration award. This is intended to prevent procedural duplication which leads to the (kind of) complications which are enjoined against.”⁴⁹⁹

Moreover, the principle of attribution of the rules of enforcement procedure to the *lex fori* has been adopted by the remainder of the conventions that apply in the GCC States. An award rendered in accordance with the Washington Convention has the effect of *res judicata* in all member States, as if it were a final judgment of the court of the state. However, the Convention assigns the rules of procedure to the national law of the place where an award is enforced, stating that “the execution of an award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.”⁵⁰⁰ The Convention on the Enforcement of Judgments Delegations and Judicial Notes in the GCC States echoes this view in providing that “the procedures relating to the enforcement of a judgment shall be governed by the law of the State where enforcement is sought.”⁵⁰¹ Identical provisions are also to be found in the Arab League Convention⁵⁰² and the Riyadh Convention⁵⁰³.

4.3 Modes of enforcement of a foreign arbitral award adopted in the GCC States

In the previous section, it was made clear that the rules of procedure for the enforcement of a foreign arbitral award are governed by the *lex fori*. Thus it is plain that the ease or difficulty of the enforcement of a foreign arbitral award depends on the attitude toward the modes of enforcement of foreign arbitral awards of the national legal system of the place where the award is sought to be enforced.

According to Redfern and Hunter,⁵⁰⁴ there are four principal modes of enforcing arbitral awards. The first is where the award must be registered or deposited with the court, and

⁴⁹⁹ Kuwait Cassation Court decision dated 21 November 1988, (1997) XXII 750 YBCA, pp.750-751. See also Kuwait Cassation Court decision no 115/1983 (commercial), dated 4/4/1984, Cassation Court decision no 62/1980 (commercial), dated 27/5/1981.

⁵⁰⁰ The Washington Convention 1965, Article 54 (3)

⁵⁰¹ The Convention on Enforcement of Judgments Delegations and Judicial Notes in the GCC States, Article 3 (b).

⁵⁰² Arab League Convention, Article 8.

⁵⁰³ Riyadh Convention, Articles 37 and 31.

⁵⁰⁴ Redfern, A., and Hunter, M., op. cit. Para 10-08.

may be enforced if the court so judges.⁵⁰⁵ The second is where national law grants that, with the court's permission, the award may be enforced directly without the need to register or deposit it.⁵⁰⁶ The third is where enforcement of an award involves bringing an application before the court to render an order for enforcement (known as *exequatur*).⁵⁰⁷ The fourth is to sue on the award as evidence of a debt.⁵⁰⁸ The above view shows that the modes of procedure for the enforcement of foreign arbitral awards differ significantly between States, and the unification of the procedure under an international convention between contracting States would seem desirable; however, this impracticable. Van den Berg, in the context of comments on the New York Convention, stated that "in practice, the disparity of the laws on procedure has not produced such results that a revision of the Convention would be needed on this point."⁵⁰⁹

In view of the above, it could be said that the position of national laws as to how an award might be enforced might be linked to their stance as to whether foreign arbitral awards are to be regarded as *res judicata*. Thus if national law demands that a new action be brought to enforce a foreign arbitral award, as where the local court deems the award to be evidence of a debt, the foundation for enforcement is the judgment of the national court. If, on the other hand, national law demands *exequatur* for the enforcement of foreign awards, then enforcement relies on the foreign arbitral award being considered *res judicata*.⁵¹⁰

Which mode is adopted by the GCC States?

It is not easy to classify the modes for enforcing awards in the GCC States, for several reasons. Initially, one can note the inadequacy of existing local provisions that govern the enforcement of foreign awards. The GCC States only have provisions governing the enforcement of foreign judgments, which are applied to the enforcement of foreign

⁵⁰⁵ For example, in Kuwait under Article 9 Law No. 11 on the Judicial Arbitration in Civil and Commercial matters, and also in Swiss law under Article 193 of the Private International Law 1987.

⁵⁰⁶ For example, in England under s.66 of the Arbitration Act 1996

⁵⁰⁷ For example, in Kuwait under Article 185 of the Code of Civil and Commercial Procedure, in France under Article 1498 of the Code of Civil Procedure of 1981.

⁵⁰⁸ Redfern, A., and Hunter, M., op. cit., Para 10-08; Born, G., op. cit. p.753.

⁵⁰⁹ Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 236.

⁵¹⁰ This stance can be found in the GCC States concerning the enforcement of national arbitral awards.

arbitral awards, whether these awards fall within the scope of international conventions or not. In addition, these provisions are not clear with regard to the determination of which enforcement mode is adopted in the GCC States, and therefore must be examined in order to answer that question. Finally, the GCC Courts have not yet dealt with this issue, although this could help to classify the mode for enforcing a foreign award in these States.

The law which lays down the procedure for the enforcement of foreign arbitral awards, (which is similar in the Codes of Civil and Commercial Procedure in Kuwait, Bahrain, Qatar, Oman, and the UAE), provides that “[a]n order may be issued for the execution in [name of State] of an order or judgment that has been rendered in foreign country. ... An order for execution will be filed in the [court of first instance] in accordance with the established rules laid down for the initiation of a suit. An order for execution may not be issued unless the following matters have been verified ...”⁵¹¹ At the same time, this article provides for two things which are not in accordance with the rules governing litigation in the aforementioned codes. The first of these is that the court can grant enforcement by issuing an order, which means under the principles methods of litigation that the mode of enforcement is by *exequatur*, while the text stipulates that such an application should be granted by issuing judgement. The second is that a suit must be filed to request enforcement, which means that under the principles of litigation, courts must issue judgments to grant enforcement, while the text stipulates that such an application should be granted by issuing an order. Moreover, explanatory memoranda on the codes offer no clue why these contradictory approaches are combined.⁵¹² Therefore, according to the aforementioned text, the mode of enforcement is unlikely to be made by *exequatur* or filing of a request for enforcement by writ.⁵¹³

⁵¹¹ See, in Kuwait Article 199 of the Code of Civil and Commercial Procedure; in Bahrain Article 252 of the Code of Civil and Commercial Procedure; in Qatar Article 380 of the Code of Civil and Commercial Procedure; in Oman Article 352 of the Code of Civil and Commercial Procedure; and in the UAE Article 235 of the Code of Civil Procedure.

⁵¹² It might be said, (interview with Dr. Yousuf Al-Sellili, Lecturer at the Faculty of Law, Kuwait University) that legislators to adopt this procedure to prevent courts rendering *exequatur* in the defendant’s absence. However, this implication cannot be accepted, as a defendant may appeal. Also, assuming this view is correct, it remains the case that the legislature can provide that an order granting enforcement of a foreign arbitral award shall only be rendered in the presence of the defendant, which would be preferable to the existing provision.

⁵¹³ Compare the view of GCC States with the mode for enforcing foreign awards in France. According to Articles 1476-1479 and 1500 of the French Code of Civil Procedure, a request for enforcement of a

Of course, seeking *exequatur* and filing an action, pursuant to Codes of Procedure in Kuwait, Bahrain, Qatar, Oman, and the UAE, are very different methods of litigation, governed by different procedures. *Exequatur*, according to the aforementioned codes is regarded as a simplified procedure to grant the litigants' rights, outside of normal proceedings,⁵¹⁴ which can be initiated simply by presenting an application. The courts may exercise their power to render orders,⁵¹⁵ as opposed to normal proceedings leading to normal judgments, which must be initiated by filing a claim. Moreover, *exequatur* grants enforcement of domestic arbitral awards under the codes without the requirement of filing an action.⁵¹⁶ In some GCC States, the judge can render an order without the need for a separate document. The order for enforcement can be placed at the foot of the original copy of the award.⁵¹⁷ In addition, it is not required that an order for enforcement must be reasoned.⁵¹⁸ Moreover, an order made on the petition shall lapse, if it is not presented for execution, within 30 days to run from the date of the issuance thereof, but the lapse shall not bar the issuance of a fresh order.⁵¹⁹ This means that national law in these states uses the *exequatur* form both to grant a litigant's rights and also as a mode for the enforcement of domestic awards.

Finally, a 2004 decision of the Kuwait Court of Cassation may go some way towards defining the mode of procedure for enforcing a foreign arbitral award. The court held, after referring to Articles III to V of the New York Convention that "if the applicant for the execution of a foreign arbitral award pursues litigation procedures that must be followed to obtain the order to enforce an award, he must present the documents stipulated in Article IV of the convention. There exists a simple legal presumption of *the validity of an arbitral award* in favour of the winning party and viable for

foreign award must be made by petitioning the court to issue an enforcement order (*exequatur*). This is the same mode as in the GCC States for the enforcement of national arbitral awards.

⁵¹⁴ See, Wajdee, R., and Sayad M., op. cit. p.564.

⁵¹⁵ See, in Kuwait Article 163 of the Code of Civil and Commercial Procedure. In Bahrain there is no general article governing the form of *exequatur*; but see Article 241 of the Code of Civil and Commercial Procedure. See also, in Qatar Article 141 of the Code of Civil and Commercial Procedure; in Oman Article 190 of the Code of Civil and Commercial Procedure; and in the UAE Article 140 of the Code of Civil Procedure.

⁵¹⁶ See, Kuwait: Article 185 of the Code of Civil and Commercial Procedure; Bahrain: Article 241 of the Code of Civil and Commercial Procedure; Qatar: Article 204 of the Code of Civil and Commercial Procedure; Oman: Article 56 of the Code of Civil and Commercial Procedure.

⁵¹⁷ Kuwait: Article 285 of the Code of Civil and Commercial Procedure; Qatar: Article 204 of the Code of Civil and Commercial Procedure.

⁵¹⁸ Kuwait: Article 163 of the Code of Civil and Commercial Procedure;

⁵¹⁹ Kuwait: Article 163 of the Code of Civil and Commercial Procedure; UAE: Article 140 (4) of the Code of Civil and Procedure;

enforcement, and the party against whom it is invoked, if he denies enforcement, must present proof to rebut this presumption.”⁵²⁰ The language used by this decision in stating “If the applicant of the execution of a foreign arbitral award ... present the documents stipulated in Article IV of the convention. There exists a simple legal presumption of *the validity of an arbitral award...*,” could lead to confusion regarding the *res judicata* of a foreign arbitral award. This decision clarifies that the mode of enforcement is not by *exequatur*, nor by deeming a foreign arbitral award to be evidence of a debt. Rather it creates a rebuttable presumption in favour of the enforcement of a foreign arbitral award. Although national courts are not supposed to have power to review the merits of an arbitral award, whether enforced under international conventions or national law,⁵²¹ it appears that this enforcement mode gives them precisely this power, thus conflicting with the *res judicata* of arbitral awards under the conventions that apply in GCC States.

Thus, the practical mode of enforcement in the GCC States would appear to fall somewhere between the third and fourth categories, where courts grant the enforcement of foreign awards by rendering orders following the must filing of a request for enforcement by writ. This position does not conform to the general principles governing litigation in these States.

As regards Saudi Arabia, according to the provisions governing the enforcement of foreign judgments, which are applicable to the enforcement of foreign arbitral awards, the enforcement of foreign arbitral awards “shall be filed in accordance with the procedures for filing administrative cases.”⁵²² In addition, judges grant enforcement of awards by issuing a judgment where it is laid down that “the competent circuit shall render its judgment after compilation of the case documents and after hearing the statements of both parties to the dispute.”⁵²³ This might classify the mode of enforcement of foreign arbitral awards in Saudi Arabia as falling into the fourth category, since the law demands that an action must be filed for the enforcement of a foreign award, and such enforcement must be granted by a court judgment.

⁵²⁰ Court of Cassation decision No. 423/2003 Commercial/3, dated 8/5/2004. As the decision has not yet been published, this translation is not official.

⁵²¹ See the role of local court when dealing with enforcement of a foreign arbitral award in Chapter Three.

⁵²² Article 6 on the Rules of Procedure before the Board of Grievances

⁵²³ *Ibid*

4.4 Procedural Rules for Enforcing Foreign Arbitral Awards

Generally, national rules of procedure governing the enforcement of foreign awards fall into one of the following categories:⁵²⁴ (i) Specific provisions govern the rules of procedure;⁵²⁵ (ii) One rule of procedure is used for all foreign awards;⁵²⁶ (iii) The employment of the same rules of procedure as pertain to the enforcement of foreign judgments;⁵²⁷ (iv) The employment of the same rules of procedure as pertain to the enforcement of domestic awards.⁵²⁸

In all GCC States the rules of procedure for the enforcement of foreign judgments apply to the enforcement of foreign arbitral awards.⁵²⁹ These provisions indicate that the same rules of procedure are followed that are utilised in bringing a normal legal action.⁵³⁰ Thus, a party seeking to enforce a foreign arbitral award in the GCC States must follow the rules of procedure required for filing an action.

In this section an attempt will be made to examine the detailed rules of procedure to be followed by such a party. There are basically two kinds of procedures which may be followed to obtain the enforcement of a foreign arbitral award:

- i. Bringing a new action to enforce the award.
- ii. Enforcing an arbitral award under ICSID.

We are going to concentrate on the obligatory procedures which must be followed to enforce a foreign award.

⁵²⁴ Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, pp.236-237.

⁵²⁵ For example, this can be found in Australia, Botswana, Denmark, Ghana, India, Sweden, and the United States.

⁵²⁶ For example, this can be found in Germany and Greece.

⁵²⁷ For example, this can be found in most Arab States, Italy, Mexico, and the Netherlands.

⁵²⁸ This can be found in those states where UNCITRAL Model Law has been adopted to govern arbitration, wherein there is no difference between the rules of procedure that govern national and foreign arbitral awards e.g. in Japan, Article 3 (3), 45 and 46 of Arbitration Law No. 183 of 2003.

⁵²⁹ Except in Bahrain, the enforcement of a foreign arbitral award is requested under the terms of the International Commercial Arbitration Law, wherein the same mode of procedure pertains as for the enforcement of domestic awards.

⁵³⁰ See Chapter Two.

4.4.1 Procedural Rules for Enforcing a Foreign Arbitral Award through Filing an Action

As the procedural rules in Kuwait, Bahrain, Qatar, Oman, and the UAE are largely similar, they will be examined together. Since the procedural rules in Saudi Arabia are different, they will be examined separately.

4.4.1.1 Procedural Rules for Enforcing a Foreign Arbitral Award in Kuwait, Bahrain, Qatar, Oman, and the UAE

According to the Codes of Civil and Commercial Procedure in these States, the procedural rules for enforcing a foreign arbitral award involve the following stages:

- i. Preparing the writ.
- ii. Depositing the writ.
- iii. Cooperating with the process server in serving the writ on the defendant.
- iv. Payment of the full fees of the claim.
- v. Legal representation.

4.4.1.1.1 The Writ

An action may be brought by depositing a writ in the Registry of the local competent court.⁵³¹ The writ has three functions. The first is as a document of claim; the second is as a summons, which is to be served by the process server; and the third is as a summons to the defendant to attend the court on a fixed date.⁵³² The writ must include the following particulars: (i) the full names, occupations, domiciles and places of business of the plaintiff, the defendant, and their representatives; (ii) the fixing of an elective domicile in Kuwait for the plaintiff, if he does not have one; (iii) the subject matter of the case, the claims being made and the justification thereof; (iv) details of the court before which the case is initiated; (v) the date on which the claim was presented to the registry. In addition, the writ must include the particulars of service, and a summons to attend.⁵³³

⁵³¹ See Article 45 of the Kuwaiti Code of Civil and Commercial Procedure, Article 23 of the Bahraini Code of Civil and Commercial Procedure, Article 32 of the Qatar Code of Civil and Commercial Procedure, Article 64 of the Omani Code of Civil and Commercial Procedure, and the Article 42 of the UAE Code Procedure Law.

⁵³² Wajdee, R., and Sayad, M., op. cit. p.296.

⁵³³ Wajdee, R. and Sayad M., op. cit. pp.297-298.

4.4.1.1.2 Depositing the Writ

As mentioned previously, the competent court dealing with recognition and enforcement of foreign arbitral awards is the Court of First Instance in Kuwait, Bahrain, Qatar, Oman, and the UAE. The winning party must request enforcement of a foreign arbitral award by depositing the writ at the court's Registry and, on presenting his request to the Registry, must attach thereto a number of copies equal to the number of defendants, plus a copy for the Registry.⁵³⁴ The request for enforcement of a foreign arbitral award is deemed as having been made at the date on which the claim is deposited with the Registry, even where the court does not have jurisdiction.⁵³⁵ Hence, if these States have adopted a short time limit for requesting enforcement, this limit can be met even if the writ is not submitted to the competent court, and irrespective of whether or not it is served on the defendant.⁵³⁶

4.4.1.1.3 Serving the defendant

While the official process server is charged with serving the defendant,⁵³⁷ according to the Codes of Civil and Commercial Procedure of Kuwait and Oman, the plaintiff or his lawyers must, if necessary, assist the process server to serve the defendant with the summons.⁵³⁸ This may be the case when there is a defect or error in the particulars in the writ, which might obstruct the completion of service. It might also arise if the process server needs directions in order to serve the defendant because he is unfamiliar with the area where the defendant lives.

4.4.1.1.4 Paying the claim fees

Payment of the fees relating to a claim is compulsory, so a party requesting enforcement of an award must pay the full fee for this. The court may halt any judicial procedure

⁵³⁴See in Kuwait Article 36 of the Code of Civil and Commercial Procedure, in Bahrain Article 24 of the Code of Civil and Commercial Procedure, in Qatar Article 33 of the Code of Civil and Commercial Procedure, in Oman Article 65 of the Code of Civil and Commercial Procedure, and in the UAE, Article 45 of the Code of Civil Procedure.

⁵³⁵ See in Kuwait Article 45 of the Code of Civil and Commercial Procedure, in Qatar Article 32 of the Code of Civil and Commercial Procedure, in Oman Article 66 of the Code of Civil and Commercial Procedure, and in the UAE, Article 44 (2) of the Code of Civil Procedure.

⁵³⁶ See Explanatory Memorandum of Kuwait Code of Civil and Commercial Procedure.

⁵³⁷ See, in Kuwait Article 5 (3) of the Code of Civil and Commercial Procedure, in Oman Article 5 (3) the Code of Civil and Commercial Procedure, in Qatar Article 2 the Code of the Civil and Commercial Procedure, and the UAE Article 5 the Code of Civil Procedure.

⁵³⁸ See, in Kuwait Article 49 the Code of Civil and Commercial Procedure and in Oman Article 71 the Code of Civil and Commercial Procedure.

unless the full fees for the claim have been paid in accordance with the categories of fees set out in the tables in the statute governing this matter.⁵³⁹

4.4.1.1.5 Legal representation

In Kuwait and Bahrain, the applicant must be represented by an attorney registered in a general list of the practising lawyers.⁵⁴⁰ The role and authority of a law practice for an application to enforce a foreign arbitral award has to be proven, essentially, in accordance with Codes of Civil and Commercial Procedure and Legal Practice Acts. In general, the writ of an enforcement award must be signed by a lawyer, as must objections to the judgements rendered by the courts, and memoranda or pleas during the proceedings.⁵⁴¹ Conversely, in Saudi Arabia, the general law of legal practice provides that “any person shall be entitled to litigate for himself.”⁵⁴² Therefore, a request for the enforcement of a foreign arbitral award in Saudi Arabia should be acceptable without the need to have recourse to a lawyer.

4.4.1.1.6 Consequences of a Procedural Defect

What are the consequences of following the rules of procedure mentioned above?

Regarding writs, the Codes of Civil and Commercial Procedure in Kuwait, Qatar, Oman, and the UAE do not specify whether defective procedure will lead to the nullity of the claim. However, the general principles of those Codes suggest that any procedure shall be null and void if there is a specific statutory provision to that effect, or if it contains a significant error which results in detriment to the other party or to the object of the procedure not being achieved. Nevertheless, a judge will not judge a procedure to be null and void, even if there is a statutory provision to that effect, if the object of the procedure is achieved,⁵⁴³ and no detriment to the other party ensues.⁵⁴⁴ Moreover, a

⁵³⁹ This is clear in Kuwaiti Law No. 17 of 1973 on Judicial Fees; Bahrain Decree Law No. 3 of 1972 on the Judicial Fees.

⁵⁴⁰ Kuwait: Articles 1 and 18 of the Law Regulating the Legal Profession No 42 of 1964 amended by Law No 62 of 1996; Bahrain: Articles 1 and 19 of Decree Law No 26 of 1980 on Legal Practice;

⁵⁴¹ Kuwait: Article 18 of the Law Regulating the Legal Profession No 42 of 1964 amended by Law No 62 of 1996, and Article 153 of the Code of Civil and Commercial Procedure;

⁵⁴² The Legal Practice Act, promulgated by Royal Decree No (M/38) 28 Rajab 1422 [15 October 2001], Article 1.

⁵⁴³ For example, if there is a defect or error of particulars in the writ, e.g. the name or place of business of the defendant, this could lead to the defendant being improperly served. However, if the defendant attends the court, irrespective of the error in the writ, then he cannot plead the nullity of the writ, as the object of procedure is achieved.

void procedure may be rectified even after it has been declared null.⁵⁴⁵ As, at this stage, the defect in procedure is unlikely to result in detriment to the other party, the court normally simply orders the plaintiff to remedy the defect. Accordingly, in these States if writ includes an error or defect this should not nullify the procedure, as the plaintiff can always remedy the defect within the period specified by the court.⁵⁴⁶

In contrast, Bahraini law states that if there is any defect in the particulars mentioned in Article 23 of the Code of Civil and Commercial Procedure, the court may order the plaintiff to remedy the defect or complete the procedure within a period not exceeding three months, otherwise the case will be deemed never to have existed.⁵⁴⁷

As mentioned above, the process server is charged with the duty of serving of the defendant. However, in Kuwait, Bahrain, and Oman the Code of Civil and Commercial Procedure provides that “at the request of defendant, the case may be deemed as never having existed, if, due to an action carried out by the plaintiff, the defendant has not been summoned to attend within 90 days of the date of presentation of the writ to the Registry.”⁵⁴⁸ This provision shows that the law demands that the plaintiff must cooperate with the process server, e.g. if there is an error or defect in particulars that affects the defendant’s ability to attend within ninety days. In such a case, the court may rule that the action is deemed never to have existed, its decision being made according to the following criteria:

- i. If the defendant is not summoned to attend within 90 days from the writ having been submitted to the Registry.
- ii. If the delay was due to an action of the plaintiff, e.g. if he gave incorrect or unclear information in the writ.
- iii. This is not a matter of public policy in that the court cannot render such a decision on its own initiative but only upon the request of the defendant.⁵⁴⁹

⁵⁴⁴ See in Kuwait Article 19, in Qatar Article 16, in Oman Article 21, in the UAE Article 13.

⁵⁴⁵ See in Kuwait article 21, in Qatar Article 18, in Oman Article 23, in the UAE Article 15.

⁵⁴⁶ See, Explanatory Memorandum of the Kuwaiti Code of Civil and Commercial Procedure, Article 21, in Qatar article 18, in Oman Article 23, in the UAE Article 15.

⁵⁴⁷ Article 27 (1) of the Code of Civil and Commercial Procedure

⁵⁴⁸ See, in Kuwait Article 49 the Code of Civil and Commercial Procedure, in Bahrain Article 27 (1) the Code of Civil and Commercial Procedure, and in Oman Article 71 the Code of Civil and Commercial Procedure.

⁵⁴⁹ See Explanatory Memorandum of Kuwaiti Code of Civil and Commercial Procedure.

Even if these conditions are fulfilled, the court still has discretion either to rule or not to rule that the action never existed. However, even if the court rules that the action never existed, this ruling will not bar the party from later requesting enforcement of the award before the same court

With regard to the effect of failing to pay the full fee of the claim, no judicial procedure may come before the court unless the fees have been collected in advance.⁵⁵⁰ This means if the plaintiff does not pay the full fees of the claim before initiating the case, then during the course of the hearing the defendant has the right to object, and the court will stay the case until the fees are paid.⁵⁵¹

Finally, in relation to the legal representation, if the value of a case exceeds 5,000 KD, the writ of the case, challenges the judgements rendered by courts, or petition, if not signed by a lawyer acceptable to the court will be avoid and annulled.⁵⁵²

4.4.1.2 Rules of procedure for the enforcement of a foreign arbitral award in Saudi Arabia

In Saudi Arabia the procedural rules governing the enforcement of foreign judgments are also applicable to the enforcement of foreign arbitral awards.⁵⁵³ Article 6 of the Rules of Procedure before the Board of Grievances states that “cases for enforcement of foreign judgments shall be filed in accordance with of the procedure for filing administrative cases stipulated in Article one of these Rules.” Article 1 provides that “an administrative case filed at the request of the plaintiff is to be presented to the president of the Board of Grievances or his deputy. It shall contain particulars about the plaintiff, defendant, and subject matter of the case ...” These Articles specify remarkably few requirements for the formulation of the claim. Whereas other GCC States demand such details as particulars of the claim, payment of the fee, and particulars of the defendant, Saudi law does not. The only rule of procedure to be followed by a party seeking to enforce a foreign arbitral award is to submit a request

⁵⁵⁰ In Bahrain, Article 1 of Decree Law No (3) of 1972 on Legal Fees; Kuwait: Article 22 of the Law No 17/1973 Concerning the Legal Fees.

⁵⁵¹ In practice, this situation could not feasibly arise, due to the Registry of Court being obliged to ensure payment of the full fees before the claim is recorded in the *ad hoc* register.

⁵⁵² Kuwait: Article 18 of the law regulating the legal profession No 42 of 1964 amended by Law No 62 of 1996;

⁵⁵³ See Chapter Two - although there is no provision giving the Board jurisdiction to deal with foreign arbitral awards, in practice the Board does deal with the enforcement of foreign arbitral awards.

which must include details about the plaintiff, defendant, and subject matter of the case. Thus the rules do not require a particular formulation of the writ, such as the application having to be signed by a public servant. Neither do the Articles stipulate what sort of details regarding the plaintiff and defendant must be included in the application their full names and domiciles. Nor do the Articles indicate what must be included in the particulars of the plaintiff's claim, apart from saying that these must be in the application.

The requirement in Article 1 that a case is to be "presented to the president of the Board of Grievances or his deputy" does not mean that an application for enforcement of a foreign arbitral award must be submitted directly to the president. Clause 6 (1) of Circular 7 of the President the Board of Grievances,⁵⁵⁴ provides that "requests for the enforcement of foreign judgments are made to the Board of Grievances by the same method as filing the cases before the Board, and there is nothing in the system to preclude hearing such an application, if it is submitted to the Board by other government authorities, who have received it from interested parties." This means if any Saudi authorities agree to receive the request from the party seeking enforcement it will be in accordance with the Rules of Procedure. The same thing can be said for a request made outside of Saudi Arabia, e.g. a party can submit a request to enforce a foreign award to any Saudi Arabian Embassy.

Finally, although the law confers on the Board of Grievances jurisdiction to hear many different types of dispute,⁵⁵⁵ the Rules of Procedure are not sufficient to deal with all the procedural aspects of litigation before the Board of Grievances seeking enforcement of a foreign arbitral award. This is clear from the following:

- i. The Rules of Procedure before the Board consist of only 47 Articles.
- ii. The law does not contain any special provisions governing the enforcement of a foreign arbitral award.

⁵⁵⁴ Issued on 15/8/1405(H) (1984)

⁵⁵⁵ Article 8 of the Law of the Board has recently given the Board jurisdiction over all disputes of a commercial nature, following the Council of Minister's decision, No. M/241 dated 26/10/1407 H (21/6/1987); Royal Decree No. 63/M dated 26/11/1407 H (21/7/1987), which abolishes the Settlement of Commercial Disputes Committee and transfers its jurisdiction to the Board. For further details see Al-Ghadyan, A. A., 'The Judiciary in Saudi Arabia', (1998) 13 *Arab L.Q.*, pp. 235-251.

- iii. Few of the provisions are truly procedural, most relating to administrative or disciplinary cases.⁵⁵⁶

As a foreign award usually relates to commercial matters, it is not possible to apply these Rules effectively to secure the enforcement of a foreign arbitral award, (except in the situations mentioned previously), the rules being insufficient in this regard. Therefore, this researcher suggests that new provisions be made to govern such matters by the president of the Board of Grievances,⁵⁵⁷ who is authorised to make such decisions in order properly to implement the rules.⁵⁵⁸

4.4.1.2.1 Consequences of a defect in any of the Rules of Procedure

As we have seen previously, there are few procedural rules that need be followed in order to enforce a foreign arbitral award in Saudi Arabia, apart from filing a request for enforcement.

But what is the effect of following a defective procedure? The Rules do not mention the legal effect of a defective procedure. It can therefore be said that even if a does not follow the Rules, his application will not be nullified. Article 6 of the Rules of Procedure provides that “the competent court shall render its judgment after completion of the case documents.” This text suggests that if the request for enforcement contains defects or errors, these may be rectified before the court, so that it is unlikely that a request will be nullified due to defective procedure.

4.4.2 The Procedure for Enforcing Arbitral Awards Rendered by the ICSID

Awards rendered by the International Centre for the Settlement of Investment Disputes (ICSID) are governed by the Washington Convention and the regulations of the GCC

⁵⁵⁶ The Rules of Procedure before the Board comprise 47 Articles, divided into five sections: Administrative cases; Panel and disciplinary cases; Hearing the case and the judgment; Ways to object to judgments; General provisions.

⁵⁵⁷ Article 44 of the Rules of Procedure before the Board of Grievances

⁵⁵⁸ Although the process of issuing such provisions is granted by a simple method which can be made by a decision issued by the president of the Board, the president has not rendered special provisions governing the enforcement of a foreign arbitral award since the rules be came into force on 19 June, 1989. This indicates either that requests for the enforcement of foreign arbitral awards are not numerous in Saudi Arabia, or that problems with enforcement have not been encountered.

States, apart from Qatar.⁵⁵⁹ The Washington Convention includes a special mechanism for the recognition and enforcement of arbitral awards rendered by the ICSID. It provides that “each contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”⁵⁶⁰ It is clear that an award rendered by the ICSID shall have the effect of *res judicata* in all member States with regard to the pecuniary obligations imposed by the award, as if it were a domestic court judgment, which means that this obligation must be enforced and cannot be resisted on any grounds whatsoever.⁵⁶¹ Yet it should be noted that the facilitated award enforcement procedure is limited to pecuniary obligations, so that other awards rendered by the ICSID must be enforced under the New York Convention or the national law of the state of enforcement.⁵⁶²

Although the Convention facilitates the enforcement of an award, it also refers to the enforcement procedure being subject to national law, providing that “*execution of an award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.*”⁵⁶³ Thus, if the GCC States refuse to enforce the ICSID award voluntarily, then the winning party can seek the assistance of a national court to enforce the award.

This being so, it is not clear what rules of procedure must be followed in the GCC States in order to enforce an ICSID award. This lack of clarity is due to the following principal factors: (i) the legislation of the GCC States giving effect to the Washington Convention does not include provisions governing procedures for recognition and enforcement of an ICSID award;⁵⁶⁴ (ii) existing provisions in GCC States which deal with the enforcement of a foreign judgment cannot be applied to an ICSID award, as these provisions authorize the local court to refuse to enforce the award, which is not permitted with an ICSID award. In addition, the procedure of enforcement requires the filing of an action, in contrast to the provisions of the Convention which lay down that

⁵⁵⁹ See Chapter One.

⁵⁶⁰ Article 54 (1) of the Washington Convention

⁵⁶¹ Davison, F, op. cit. 414.

⁵⁶² See, Lew, J., Mistelis, L. and Kroll, S., op. cit., para 28-111.

⁵⁶³ Article 54 (3)

⁵⁶⁴ In contrast, some countries have detailed statutory provisions regarding the enforcement of an ICSID award - see Tweeddale, A and K, op. cit. p.459.

states must consider an award as if it were a final judgment rendered in a court of that state;⁵⁶⁵ (iii) the GCC States (except for Saudi Arabia)⁵⁶⁶ have not designated a competent court in accordance with the Convention,⁵⁶⁷ whereas such designation in practice is a compulsory step, as in general judgments or awards cannot be enforceable without being stamped with the common seal of the court, being marked ‘valid for execution’ and signed by the clerk.⁵⁶⁸ The designation of a competent court would be a positive step in identifying the first stage of the procedure for enforcing an ICSID award; and, (iv) the absence of cases establishing a precedent in relation to the enforcement of an ICSID award in GCC States.⁵⁶⁹

Nevertheless, as the Codes of Civil and Commercial Procedure in the States of Kuwait, Bahrain, Qatar, Oman, and the UAE have determined the Court of the First Instance as the competent court to deal with the enforcement of foreign arbitral awards in general, and an ICSID award is deemed to be a foreign arbitral award in these States, it can be expected that the Court of the First Instance will be the competent court to deal with the enforcement of an ICSID award. The Registry of Court, in the absence of provisions governing enforcement of such an award, will not issue an order for enforcement. According to Codes of Civil and Commercial Procedure, if the Registry refuses to issue a writ of execution⁵⁷⁰ the applicant can seek an order to obtain such a writ’.⁵⁷¹

In the light of the above, in practice, the procedure that should be followed in order to enforce an ICSID arbitral award, is to apply to the Court of First Instance for *exequatur*, as stipulated in the Codes of Civil and Commercial Procedure, which means that the enforcement procedure should be simpler than that for other foreign arbitral awards, which require the bringing of an action. According to the Codes of Civil and Commercial Procedure, *exequatur* can be sought by a petition presented the court

⁵⁶⁵ See Chapter Two.

⁵⁶⁶ See the list of Contracting States which have designated competent courts. Of the GCC states, only Saudi Arabia is included. <http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm>

⁵⁶⁷ Article 54(2) of the Convention provides that “ each contracting State shall notify the Secretary-General of the designation of the competent court for the purpose of recognition and enforcement”

⁵⁶⁸ Kuwait, Article 118 of the Code of Civil and Commercial Procedure;

⁵⁶⁹ See the list of pending cases rendered by the ICSID <<http://www.worldbank.org/icsid/cases/pending.htm>>

⁵⁷⁰ The writ of execution include the form of execution, as follows: “ the authority that will be assigned to carry out the execution must proceed with it when an application to that effect has been made to; every authority shall render assistance in the enforcement of execution, even where the use of force is necessary, in accordance with the law”

⁵⁷¹ See, in Kuwait, Article 118 of the Code of Civil and Commercial Procedure.

having jurisdiction. This petition must be in duplicate, and must include the facts and justifications of the claim, the domicile of the claimant, and supporting documents must be attached.⁵⁷² In addition, an order for enforcement rendered by the First Instance Court, whether enforcement is granted or refused, can be made without any adversarial proceedings between the parties at this stage. This means that an order will be rendered without the defendant being summoned.

In Saudi Arabia, there are no special Rules of Procedure that apply to the enforcement of ICSID awards. As we saw in the previous section, although the competent authority to deal with the enforcement of an ICSID award is the Board of Grievances,⁵⁷³ procedural rules in general and those of the Board of Grievances in particular are deficient. In addition, these provisions do not regard an award as if it were a final judgment of a Saudi court, and there are no provisions governing the execution of the Board judgments themselves, so that the rules do not conform to the mechanism for enforcing an ICSID award as stipulated in the Washington Convention.

Consequently, in the absence of provisions reflecting the method of enforcement of an ICSID award laid out in the Washington Convention, according to general principles that govern the enforcement of foreign arbitral awards, the enforcement procedure of an ICSID award might be made by filing an action in accordance with procedures for filing administrative cases, as discussed in the first section.⁵⁷⁴ Nevertheless, application of such procedural rules to the enforcement of ICSID awards surely constitutes a breach of the Convention. Thus it is suggested that proper enforcement of an ICSID award can be guaranteed simply by empowering the President of the Board of Grievances to issue the necessary decisions for implementing the Convention.⁵⁷⁵ There appears to be no reason to retain these rules, which are not in accordance with the Saudi Arabian obligation to honour the enforcement of Convention awards.

⁵⁷² See, in Kuwait, Article 163 of the Code of Civil and Commercial Procedure.

⁵⁷³ See the list of contracting States that designate the competent authorities, which deal with enforcement of ICSID awards. <<http://www.worldbank.org/icsid/pubs/icsid-8/icsid-8-e.htm>>

⁵⁷⁴ See Articles 6 and 1 of the Rules of Procedure before the Board of Grievances.

⁵⁷⁵ See Article 44 of the Rules of Procedure before the Board of Grievances where the president of the Board can render such decisions, e.g. President's circular No. 7, dated 15/8/1405(H) relating to enforcement of foreign judgments and awards.

4.5 Are there particular criteria which must be fulfilled in the Rules of Procedure of the GCC States?

Despite the aforementioned principle that issues of procedure for the enforcement of foreign arbitral awards will be considered as being subject to the *lex fori* where enforcement is sought, some international conventions impose certain restrictions on this principle.

Thus, the question arises as to the standards concerning procedural rules required by the Conventions that govern the enforcement of foreign arbitral awards in the GCC States. A discussion of this question is only really relevant with regard to the New York Convention, and the Arab League Convention.

4.5.1 New York Convention

The New York Convention demands that procedural rules for the enforcement of foreign awards in each contracting State “shall not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”⁵⁷⁶

Certain points with regard to the context of this article should be clarified. First, the word ‘conditions’ must be considered as referring to procedural rules,⁵⁷⁷ such as the method of enforcement, and the competent authority; it is therefore not concerned with the conditions for enforcement.⁵⁷⁸ Second, while the use of the phrase “substantially more onerous”, implies that the New York Convention might allow contracting States to apply different procedural rules to local awards and foreign awards, the Article emphasises that the distinction should not be maintained to the point where enforcement of foreign awards becomes “substantially more onerous”,⁵⁷⁹ otherwise the procedural

⁵⁷⁶ Article III.

⁵⁷⁷ Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.239.

⁵⁷⁸ Di Pietro, D. and Platte, M., op. cit. p.128; Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p. 239.

⁵⁷⁹ The English High Court in *Far Eastern Shipping Co. v AKP Sovcomflot* favoured equal treatment of Convention and national awards, observing that “while the Convention is concerned to see that the rules of the enforcing state do not ‘impose more onerous conditions’ than in respect of domestic awards, it does not require that a regime any more advantageous to a foreign judgment creditor be created in respect of convention awards”. Cited, YBCA XXI 705 (1996). In France in the case *the Government of the Russian*

rules will contravene Convention obligations. Nonetheless, if a contracting state has no provisions at all governing the procedure for the enforcement of foreign arbitral awards, it is suggested that the enforcement procedures for national awards will apply, as a result of the Convention.⁵⁸⁰ Thus it can be said that the New York Convention requires that each contracting State enforce foreign arbitral awards fairly.⁵⁸¹

Nonetheless, the New York Convention does not indicate the standard by which it can be recognized if the distinction between the procedural rules relating to national and foreign awards reaches the point where it violates the Convention. Neither does the Convention refer to sanctions that might be applied to States if they impose substantially more onerous conditions or higher fees or charges. Indeed, the provision of Article III only sets out general principles. This might be taken to mean that if procedural rules are improperly discriminatory in terms of Article III, one can seek a judicial remedy for breach of this principle if this is constitutionally competent.⁵⁸² Otherwise one must hope for an amendment to the rules by the legislature.⁵⁸³

In the light of the aforementioned, the following questions might arise. Do the GCC States impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of foreign awards than are imposed on the recognition or enforcement of domestic arbitral awards? If so, do the distinctions constitute a breach of the New York Convention? If this is the case, can a party seeking enforcement of a foreign arbitral award in the GCC States do anything about it?

Federation v Compagnie NOGA d'Importation et d'Exportation (Switzerland), the Court of Appeal of Paris observed that Article III "leaves the definitions of the procedural rules for the enforcement to the contracting states, with the double obligation not to impose substantially more onerous conditions or higher fees or charges on foreign awards than are imposed on domestic awards". Cited, YBCA XXVII 437 (2002). In Germany see the Federal Supreme Court in *Franz J. Sedelmayr v Russian Federation*, (2006) YBCA XXVII 705.

⁵⁸⁰ See Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.237; Gaillard, E. and Savage, J., op. cit. Para 1671; Onyema, E., 'Formalities of the Enforcement Procedure (Articles III and IV)', Gaillard, E. and Di Pietro, D., op. cit. p.603. See also *Hiroshi Nishi v Casaregi Compagnia di navigazione et commercio* (1967) I YBCA 194 (Tokyo Court of Appeals, 14 March 1963) 194.

⁵⁸¹ Martinez, R., 'Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: the "refusal" provisions', (1990) 24 *International Lawyer* pp.494-500.

⁵⁸² See for example, Article 177 of Kuwait Constitution.

⁵⁸³ Some academic writers support the idea of a uniform system of international procedural rules of enforcement for foreign awards, and consider of the lack of uniformity of the rules of procedure one of the biggest drawbacks of the New York Convention. See, Martinez, R., op. cit. p.496. However, I disagree with this view as the Convention has been ratified by more State than any others, and because the ideal of uniformity is unattainable. International conventions only provide general principles and leave detailed provisions to the national laws.

With regard to the first point, if we compare the procedural rules applicable to national and foreign arbitral awards in the GCC States, we find that the latter rules are more onerous. As we saw at the beginning of this chapter, the enforcement of foreign arbitral awards can only be sought by bringing an action, while in Kuwait, Bahrain, Qatar, Oman, and the UAE the enforcement of national awards can be achieved simply by seeking *exequatur*. The *exequatur* form under the Codes of Civil and Commercial Procedure of these States is a straightforward process,⁵⁸⁴ characterised by its facility, expedition, and inexpensive nature.⁵⁸⁵ Accordingly, there is clearly discrimination in terms of Article III of the New York Convention. There are three principal reasons which lead the researcher to conclude that the procedural rules for enforcing foreign arbitral awards are substantially more onerous than those relating to the enforcement of national awards.

- i. Form of request: the enforcement of foreign awards must be sought by writ, involving many procedural requirements, while enforcement of national awards can be granted by *exequatur*, requiring only a simple application;
- ii. Service of defendant: This is a compulsory condition for enforcing foreign arbitral awards. The procedure includes many formalities, which is a significant deterrent to the initiation of actions in general. In contrast, the enforcement of national awards does not require this procedure, as it does not apply to the *exequatur* form, where the party seeking enforcement can obtain the relevant order in the absence of the defendant.⁵⁸⁶ This tends to mean that an order granting enforcement of a national award may be obtained within days, while enforcement of a foreign award may take months, or even as long as a year.
- iii. Higher fees or charges: According to Kuwaiti law, the fees payable for requesting enforcement of a foreign arbitral award are *ad valorem* due to the request being made by an action,⁵⁸⁷ while the fee payable for requesting enforcement of a national arbitral award is a nominal lump sum due to the

⁵⁸⁴ The provisions governing orders are set out in separate chapters in the Codes of Civil and Commercial Procedure in these States.

⁵⁸⁵ Wajdee, R. and Sayad, M., op. cit. p. 555

⁵⁸⁶ See, Wajdee, R. and Sayad, M., op. cit. p.568.

⁵⁸⁷ According to Article 6 of the Law No 17/1973 Concerning the Legal Fees in Kuwait, the fees will be 1% of the value of the case.

request being made in the *exequatur* form.⁵⁸⁸ (This is not true of Bahraini law, while the position in the rest of the GCC States remains unclear.)⁵⁸⁹

It might be said that the above discrimination could reach the point of breaching the Convention, since the procedural rules are not compatible with of Article III of the New York Convention. The question thus arises as to what the parties can do about this discrimination under the laws of the GCC States.

On the basis that the laws of the GCC States have impliedly incorporated the obligation to honour Article III of New York Convention, theoretically a remedy may be sought for the imposition of these more onerous conditions – pleading that the conditions are unconstitutional in the course of requesting enforcement.⁵⁹⁰ The states which are likely to allow such a remedy are Kuwait and Bahrain, due to the existence of Constitutional Courts that are able to deal with such matters, and the UAE, where the Supreme Court has the power to interpret international treaties and agreements.⁵⁹¹ The plea of unconstitutionality is based on a constitutional principle that considers the Convention to take precedence over the ordinary rules of national law, and that the Convention's provisions stand even if they contradict the national law.⁵⁹² Thus if there is a conflict between national procedural rules and the provisions of the New York Convention, the latter must be applied.

In terms of form, in order to have the plea of unconstitutionality accepted by the constitutional court, parties must submit this plea to the enforcement court through the use of a negative plea.⁵⁹³ The lawyers of the parties are permitted to present this plea,

⁵⁸⁸ The sum in this case would be too small, which equal five KD (Article 7 of the Law of the Legal Fees.

⁵⁸⁹ According to the law of legal fees in Kuwait, there is no discrimination between the legal fees that are collected for requests for the enforcement of foreign or national awards.

⁵⁹⁰ For example, if a court refuses enforcement due to a procedural defect, the winning party can appeal this decision on the basis of unconstitutionality, as provisions that govern the rules of procedure for the enforcement of foreign arbitral awards must conform with Article III of the Convention, which takes precedence over national law.

⁵⁹¹ See Chapter One.

⁵⁹² See in Kuwait Article 4 (b) of the Law No. 14 of 1973 on setting up the Constitutional Court. Also see for example, Article 177 of the Kuwaiti Constitution.

⁵⁹³ This formality has to be taken into consideration by the lawyers in Kuwait and Bahrain. For example, if the court charges the losing party the fees of the case, he might appeal, on the basis that the fees are higher than those for enforcing a national award. If the plea is refused by the Appeal Court because the first decision adjudged the fees in accordance with the law governing the legal fees, then he can plead unconstitutionality, in view of national law being incompatible with of Article III of the New York Convention.

where they are expressly authorised by the parties to do so.⁵⁹⁴ Should the Constitutional Court declare the imposition of substantially more onerous conditions unconstitutional, then the legislature must correct the irregularity and the courts will no longer refuse enforcement of awards on this basis.⁵⁹⁵

4.5.2 The Arab League Convention

The Arab League Convention has a different approach to this question, as it requires that in any of the states of the League, “citizens of the requesting state shall not be asked to pay any fees, furnish any deposits or produce any securities, which they are not required to do in their country, nor is it permitted to deprive them of legal aid or exemptions from legal fees.”⁵⁹⁶ This shows that there should be no discrimination in the treatment of citizens of contracting states as compared with citizens of the requesting state. In practice, this text will not cause any difficulty in the GCC States, as national laws governing litigation do not include any provisions laid down for discrimination between people.

4.6 Summary

This chapter has shown that issues of procedure for the enforcement of foreign arbitral awards as general rule will be considered as being subject to the *lex fori* where enforcement is sought, whether the request for enforcement is made under an international Convention or national provisions governing the enforcement of foreign arbitral awards. However, the New York Convention prohibits contracting states from imposing “substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” The Arab League Convention requires that there should be no discrimination between a citizen of the state of enforcement and a citizen of the state where an award was made.

⁵⁹⁴ See in Bahrain Article 20 of the legislative Decree No. 27 of 2002 with respect to establishing the Constitutional Court.

⁵⁹⁵ See in Kuwait Article 6 on the Law No. 14 of 1973 with respect to establishing the Constitutional Court; in Bahrain Article 31 on the legislative Decree No. 27 of 2002 with respect to establishing the Constitutional Court.

⁵⁹⁶ The Arab League Convention, Article 7

It was found that under the Codes of Civil and Commercial Procedure in Kuwait, Bahrain, Qatar, Oman, and the UAE, except in the case of an ICSID arbitral award, a request for the enforcement of an award is made by writ and the courts grant the enforcement of foreign awards by rendering orders. The request for the enforcement of an ICSID arbitral award is made by a petition to the Court of First Instance to issue an enforcement order (*exequatur*). In Saudi Arabia, the request for the enforcement of a foreign arbitral award should be filed in accordance with the procedures for filing administrative cases.

Indeed, the procedural rules for enforcing foreign arbitral awards can be considered as a significant element in measuring a state's support for arbitration as a method of dispute settlement. Some aspects of the rules in the GCC States give cause for concern. The requirements of enforcing foreign arbitral awards in the GCC States can be considered stringent. Although enforcement of foreign arbitral awards may be granted, a request for enforcement of a foreign arbitral award must be filed by writ. The procedural rules for enforcing foreign arbitral awards are not generally the same as for enforcing foreign national awards. This suggests that legislators in these states have not concerned themselves sufficiently with furnishing an appropriate mechanism for facilitating the enforcement of foreign arbitral awards, and with honouring their obligations under international conventions to ensure the enforcement of such awards.

In conclusion, ample grounds exist on which the enforcement of foreign arbitral awards may be refused in appropriate circumstances. Thus imposing stringent procedural rules on the enforcement of foreign arbitral awards in the GCC States is unjustified, especially regarding relating to international commerce. Therefore, the researcher proposes that the rules be amended so that they adopt the *exequatur* form which applies to the enforcement of national awards. In the researcher's opinion, one of the major consequences that would follow the adoption of the *exequatur* form is the facilitation of the enforcement of foreign arbitral awards, ensuring that the GCC States honoured their obligations under international conventions. This would be in the interests of the GCC States as it would encourage international investments in the states.

Chapter Five

The evidence and conditions required for the recognition and enforcement a foreign arbitral award

5.1 Introduction

This chapter will deal with questions relating to the evidence and conditions that must be satisfied in order to obtain the recognition and enforcement of foreign arbitral awards in the GCC States. It will first identify and examine the compulsory evidence that should be fulfilled for the recognition and enforcement of a foreign non-convention arbitral award, and will then discuss the evidence that is required under conventions that apply in the GCC States. Finally, the chapter will discuss the conditions governing the recognition and enforcement of foreign arbitral awards set out under GCC laws.

5.2 Evidence governing the recognition and enforcement of foreign arbitral awards

The evidence required for the recognition and enforcement of foreign arbitral awards in the GCC States differ depending on whether the enforcement of a foreign arbitral award is sought according to national laws or under the conventions that govern this matter. This section will therefore be divided into two sub-sections in order to determine and discuss the evidence according to whether it is applied under national laws or under the conventions.

5.2.1 The evidence to be fulfilled for the enforcement of a non-convention arbitral award

In the absence of a treaty or convention, and with the enforcement of a foreign arbitral award being sought under the national law of the GCC States, what evidence must be provided by the enforcing party?

In fact, provisions that regulate the enforcement of foreign arbitral awards in the GCC States do not mention any evidence which must be given for the recognition and

enforcement of foreign arbitral awards.⁵⁹⁷ In such cases, however, the general principles for litigation mentioned in the national law must be followed by the winning party to ensure his application for enforcement is acceptable. As we have seen in the last chapter, GCC States have based the procedure for enforcement of foreign arbitral awards on the mode for filing lawsuits, so that the evidence demanded for filing lawsuits will be required.

5.2.1.1 The position in Kuwait, Bahrain, Qatar, Oman, and the UAE

The Codes of Civil and Commercial Procedure in Kuwait, Bahrain, Qatar, Oman, and the UAE, provide that “the plaintiff when bringing his claim must present all the documents supporting his suit.”⁵⁹⁸ But what documents might be necessary? In order to classify this evidence, it may be useful to begin by examining the conditions required for the enforcement of a foreign arbitral award in the GCC States.

National provisions governing the enforcement of foreign judgment which also apply to foreign arbitral awards are largely similar in Kuwait, Bahrain, Qatar, Oman, and the UAE. They stipulate that an order of execution may not be issued unless the national court finds the following conditions established:

- i. That the foreign arbitral award was rendered by a competent court, in accordance with the law of the country wherein it was rendered;
- ii. That the parties had been summoned to appear and were duly represented;
- iii. That the foreign arbitral award has become a *res judicata* according to the law of the court which rendered it;

⁵⁹⁷ This is also considered to be a weak point in the national provisions that govern the enforcement of foreign arbitral awards in the GCC States, as many countries expressly specify the evidence that should be presented by the winning party for the enforcement of a foreign arbitral award. See, e.g. Article 1499 of the French Code of Civil Procedure, Article 1719(4) of the Belgian Judicial Code, and s.102 of the Arbitration Act 1996 in England.

⁵⁹⁸ See, in Kuwait Article 46 of the Code of Civil and Commercial of Procedure and Article 1 of the Evidence Act for Civil and Commercial, in Bahrain Articles 26 and 80 of the Code of Civil and Commercial of Procedure and Article 1 of the Evidence Act for Civil and Commercial, in Qatar Article 30 of the Code of Civil and Commercial of procedure, in Oman Article 65 of the Code of Civil and Commercial of procedure, in the UAE Article 45 of the Code of Civil Procedure and Article 1 of the Evidence Act for Civil and Commercial.

- iv. That the foreign arbitral award is not in conflict with an order or judgment that has already been rendered and does not contain anything which is in violation of morality or public order in the enforcing State;
- v. “That the subject of the award must have been arbitrable under the law of [the name of the enforcing State], and must be enforceable in the country wherein it was rendered”.⁵⁹⁹

It can be seen that a national court will not grant the enforcement unless the above conditions are fulfilled. The verification of these conditions is deemed to be proof of the application in accordance with the general principles wherein it is obligatory for the applicant to present all the evidence supporting his suit. So the party seeking enforcement must supply evidence of the fulfilment of the above conditions.

The provisions governing enforcement do not specify what evidence must be supplied. However, the minimum evidence which must be supplied in order to fulfil these conditions are: (i) A copy of the arbitral award and arbitration agreement; (ii) The laws relating to arbitration; (iii) Evidence of *exequatur* where award was made; (iv) A translation of the award into Arabic; (v) Other evidence. Each point will now be looked at in turn.

5.2.1.1.1 Arbitral awards and arbitration agreements

It appears fairly clear that an arbitral award and an arbitration agreement form the basis of any such application. Thus a national court cannot grant an application without establishing that these exist. Although the general principle does not indicate that an applicant must submit duly authenticated originals of the award and arbitration agreement or duly certified copies thereof, in practice these documents should be originals or authenticated copies in order for the application to be successful.⁶⁰⁰ This is

⁵⁹⁹ See, in Kuwait Articles 199-200 of the Code of Civil and Commercial Procedure, in Bahrain Articles 252-253 of the Code of Civil and Commercial Procedure, In Qatar Articles 380-381 of the Code of Civil and Commercial Procedure, Oman Articles 352-353 of the Code of Civil and Commercial Procedure, and the UAE Articles 235-236 of the Code of Civil Procedure.

⁶⁰⁰ It is in the interest of the enforcing party to include with his request for enforcement the original award and arbitration agreement, otherwise the losing party can claim that these documents are forgeries. In addition, enforcement of a national award requires the submission of the originals of these documents. Therefore it is unthinkable that a court would impose less onerous conditions on the enforcement of

made clear under the Code of Civil Procedure in the UAE which stipulates that if there is a dispute relating to the validity of copies of documents the court shall determine that the originals should be provided as soon as possible.⁶⁰¹

5.2.1.1.2 Laws relating to arbitration

The conditions provide that the award has become *res judicata* according to the law of the arbitral seat, and that the award was rendered by a competent arbitral tribunal in accordance with that law. As mentioned previously, the court may have to examine several foreign laws in order to verify these conditions. This can be the law of seat of arbitration or the law chosen by parties. For example, in order to confirm these conditions the court must examine whether the arbitral award became *res judicata*, whether an appeal is allowed, irregularities in the constitution of the arbitral tribunal, or violations of the right to be heard.

5.2.1.1.3 Evidence that an award is enforceable

Evidence should be supplied to verify the condition that a foreign arbitral award “must be enforceable in the country wherein it was rendered.” This text can be read in two ways. First, the award has to have gone through certain procedures in order to become enforceable where it was made. Thus, if the award had to follow any particular procedure where it was made, e.g. having to be deposited or registered in order to be enforceable, then the winning party has to show the national court in the GCC States appropriate evidence. Thus, if the law where the award was rendered required *exequatur* to be enforceable, then the winning party must submit *exequatur* to GCC Court, thus creating the need for double *exequatur*.⁶⁰² This evidence might exist in a separate document or in the same award.⁶⁰³

foreign awards. The enforcing party must therefore deposit the original document or authenticated copy thereof in order to avoid any delay in the enforcement procedure.

⁶⁰¹ See, the Code of Civil Procedure, Article 45 (3).

⁶⁰² See second section in this chapter.

⁶⁰³ For example, in Kuwait awards made in accordance with the Code of the Civil and Commercial Procedure can become enforceable by an order placed at the foot of the original copy of the award as article 185 states that “the arbitrator’s award shall not be capable of execution except by order issued by the president of the court in the registry of which the award has been deposited, which will be issued upon application being made by an interested party...., the order of the writ of execution shall be placed at the foot of the original copy of the award”. This is also true in Qatar under Article 204 of the Code of Civil and Commercial Procedure, whereas, in Bahrain, Oman, Saudi Arabia, and the UAE an order granting enforcement is issued in a separate document.

Second, the evidence required under this condition might be linked to evidence required under previous conditions. Thus, if the winning party deposits the evidence showing that the award is enforceable in the country where it was made this might well be considered adequate evidence to show the national court that the award was rendered by a competent arbitral tribunal and has become *res judicata*, and it will not be necessary to provide further evidence. Thereafter, if the losing party pleads on one of these grounds, he is charged with presenting the evidence.

5.2.1.1.4 Translation

Translation is required by all GCC Courts where documents are presented which are not written in Arabic. This is provided for by the judicial laws of all GCC States, which indicate that Arabic is the official language of the Courts,⁶⁰⁴ and also under the Codes of Procedure which require that if any documents are written in a foreign language, the winning party must attach an Arabic translation thereto.⁶⁰⁵ Consequently, where a translation is not supplied by the enforcing party or the court ignores a request for the translation of documents on which they have based judgment, this will lead to the annulment of the *exequatur*.⁶⁰⁶

The ruling of the national court will of course be based on the Arabic documents, and it is therefore important that the enforcing party ensures that the translation renders the correct meaning of the original documents, as any defect or error in the translation might affect his application.⁶⁰⁷ In this regard, the question arises as to whether there are any requirements relating to the type of translation which should be provided by the party seeking enforcement. All GCC laws stipulate such requirements to be met, although these differ from State to State.

⁶⁰⁴ See Article 14 on the Organisation of Judiciary in Bahrain, Article 4 on the Organisation of Judiciary, in Qatar, Article 16 on the Organisation of Judiciary in the UAE.

⁶⁰⁵ The requirement that evidence should be translated into Arabic is mentioned expressly in Kuwait in Article 74 of the Code of the Civil and Commercial Procedure, in Oman in Article 27 of the Code of the Civil and Commercial Procedure, and in Saudi Arabia in Article 13 of Procedural Rules before the Board of the Grievances. In the other GCC States, the requirement can be found in provision (Bahrain Article 57 of the Code of the Civil and Commercial Procedure, Qatar Article 68, in Saudi Arabia Article 13 of Procedural Rules Before the Board of the Grievances, and the UAE Article 4 of the Code of the Civil Procedure) which stipulate that the language of the Courts is Arabic.

⁶⁰⁶ See, e.g. the Cassation Court decision in Egypt No. 1497/22 of 19/7/1993 where Egyptian laws include the same provisions adopted in the GCC States. The Court of Cassation provides that a lower court decision in which reliance was placed on documents not written in Arabic or where the court had ignored the request of the defendant to translate these documents will be annulled.

⁶⁰⁷ This matter demands that the translator should be an expert in legal translation, and more than one translator may be used.

In Oman and the UAE, the translation must be made by a translator licensed in accordance with the laws regulating the translation profession.⁶⁰⁸ In Kuwait, the national Court will be satisfied with: (i) an informal translation unless the other party objects or (ii) a translation by a body designated by the court or (iii) a formal translation made by the Ministry of Justice.⁶⁰⁹

In Qatar, the position is different as formal translation is not required, nor need the translator be licensed. However, the provision that governs this matter might lead to some confusion as it lays down that “the language of the court is Arabic. The court shall hear the declarations the parties or witnesses who do not know this language through an interpreter who takes an oath before carrying out his task, and that the translation is carried out in trust and honesty.”⁶¹⁰ The first part of the text shows that Arabic is the official language approved for recording hearings, but the second sentence, after stipulating that the interpreter must take an oath before carrying out his task, only deals with translation of declarations of the parties and witnesses. Therefore, the question might arise as to whether this requirement will apply to *documents* translated by the translator. Is it necessary for the translator to take an oath before carrying out his task? If this is a compulsory procedure and a Qatari court decision is based on documents that do not satisfy the procedure, this could lead to the annulment of the decision. In the researcher’s opinion, the requirement of taking an oath before embarking on translation excludes the translation of documents.⁶¹¹ As the translation is made in the court, the parties do not have the time to give their opinion regarding the interpreter, so the intention of the legislation by is to give guarantees for the parties by requiring an oath, whereas in the translation of documents the parties have the time to review the translated documents and present their objections if they do not agree with the translation For this reason an oath is not required. In Bahrain the same thing can be said, as similar provisions are applied.⁶¹²

⁶⁰⁸ See, in Oman the Royal Decree No. 18 of 2003 on the promulgated law of regulation of legal translation offices, and in the UAE the Federal Law No. 9 of 1981 on the regulation of the profession of translation.

⁶⁰⁹ See Article 74 of the Code of Civil and Commercial Procedure.

⁶¹⁰ See Article 68 of the Code of Civil and Commercial Procedure.

⁶¹¹ The law that governs the regulation of the profession of translation in Oman and the UAE stipulates that the translator must take an oath in order to be licensed.

⁶¹² See Article 4 on the Decree Law No. 42 of 2002 promulgated Judicial Authority Law, also Article 57 of the Code of Civil and Commercial Procedure.

In Saudi Arabia, the Procedural Rules of the Board of Grievances stipulate that “translation approved in Arabic shall be presented for the documents and official instruments written in a foreign language.”⁶¹³ This text shows that presented translations should be approved, although in fact the procedural Rules before the Board of Grievances do not specify how the translation can be certified, and there is no law governing the profession of translation in Saudi Arabia which might be applied to this matter. In reality, the position of Saudi law in this regard can be considered less stringent than that of the other GCC States, as it does not require the submission of a formal translation or that the translator must be licensed or take an oath before carrying out his task. Therefore, it is to be supposed that applying this text will not cause any problem and the winning party at the start of the procedure of hearing the case and before submitting this evidence can request the court to appoint a translator in order to translate or certify the documents written in a foreign language.

5.2.1.1.5 Other evidence

As mentioned previously, provisions regulating the enforcement of foreign awards in the GCC States do not indicate what evidence that should be supplied by the enforcing party, on the basis that absence of such provisions may allow the enforcing court to request other evidence not mentioned above. This situation cannot arise under the New York Convention where the enforcing party has only to supply the arbitral award, arbitration agreement, and the translation,⁶¹⁴ as well as under Riyadh Convention which requires only the award, accompanied by a certificate of the judicial authority witnessing its executory force, and the arbitration agreement.⁶¹⁵

Finally, it should be noted that according to the general principles of the Court of Cassation that examination of the evidence and documents provided is within the power of the trial judge, as long as he does not rely on a fact without any evidential basis. According to this principle, an enforcing court can fall back on the particulars mentioned in the arbitral award to verify one of conditions of enforcement, e.g. verification of due process can be inferred from the record of the arbitral award.⁶¹⁶

⁶¹³ See the Procedural Rules before the Board of Grievances, Article 13.

⁶¹⁴ See Article IV of the New York Convention.

⁶¹⁵ See Article 37 of the Arab Convention on Judicial Cooperation (Riyadh).

⁶¹⁶ See, the Egypt Court of Cassation decision (No. 1136 of 28/11/1990, pp.818-826). Egyptian law requires that the Court of Merits must verify that the parties to a case concerning a foreign arbitral award

Moreover, it should be noted that the laws of the GCC do not say that it is compulsory for the enforcing party to supply the above evidence at the time of application⁶¹⁷ or authenticated evidence or certified copies thereof as stipulated in the international conventions governing the enforcement of foreign arbitral awards, e.g. in the New York Convention, which will be discussed in the next sub-section. However, in order to avoid any attempt to contest the evidence it recommends that the enforcing party produce authenticated originals of the evidence or certified copies thereof.

5.2.1.2 The Saudi Arabian Position

Unlike the Board of Grievances Act 1982, the new Board of Grievances Act 2007 clearly indicates that the Board has the jurisdiction to enforce foreign arbitral awards.⁶¹⁸ However, Article 51 of this Act indicates that procedural rules of the Board will determine all procedure before it, and the Board still applies the old rules issued in 1989.

Except for provisions for the enforcement of foreign judgments, the Procedural Rules (1989) contain no provisions governing the procedure of enforcement of foreign awards nor do they make any reference to applying the provisions governing foreign judgments. However, it seems that the enforcement procedures for foreign judgments will apply as a result of the 2007 Act, providing jurisdiction for the Board in respect of requests for the enforcement of both foreign judgements and arbitral awards.⁶¹⁹ Yet the Procedural Rules do not indicate what evidence might be requested by the Board for the enforcement of foreign judgements, not even what documents might be requested when filing lawsuits. Article 6 of the Procedural Rules (1989) provides that “cases for enforcement of foreign judgments shall be filed in accordance with the procedure for filing administrative cases stipulated in Article One of these Rules. The competent circuit shall render its judgement after completion of the *case documents* and hearing the statements of both parties to the dispute ...” Article (1) of the Procedural Rules, however, does not specify any of the documents that should be presented, as it provides that “an administrative case shall be filed by the plaintiff with the President of the Board

have been summoned to appear. The party seeking enforcement did not supply such evidence and was not allowed to fall back on the arbitral record. The Court of Cassation however, dismissed this objection, holding that the law did not restrict the court to one way of ratifying the due process.

⁶¹⁷ This question was discussed in the previous chapter where it was found that national law does not demand that evidence shall be provided at the time of filing the case.

⁶¹⁸ The Board of Grievances Act 2007, Article 13 (J).

⁶¹⁹ *Ibid.*

of Grievances or his designee. It shall contain particular about the plaintiff, defendant, subject-matter of the case, and the date of filing the claim against the administrative body if such a claim is of the type that must be demanded before filing the case according with Article Two of these Rules ...” As previously noted, such a defect is assumed, as the Procedural Rules of the Board Grievances contains only 47 Articles. Nevertheless, in the researcher’s opinion, pursuant to the general rule that “*the burden is on the prosecution to prove commitment and on the debtor to prove disposal of it*”, it seems that evidence such as arbitral awards and arbitration agreements, translation of the documents and official instruments written in a foreign language, as well as other evidence, might be requested by the court.

5.2.2 The evidence to be fulfilled for the enforcement of an arbitral award under conventions

This sub-section will consist of a discussion of the evidence which should be supplied by the enforcing party when enforcement is sought according to provisions of any conventions that apply in the GCC States. This examination will deal with the New York Convention, the Riyadh Convention, the Arab League Convention, the Convention on Enforcement of Judgement Delegations and Judicial Notes in the GCC States, as well as the awards rendered by the ICSID, the GCC Commercial Arbitration Centre.

5.2.2.1 New York Convention

According to Article IV of the New York Convention, at the time of the application the party seeking enforcement has only to supply (i) the duly authenticated original award or a duly certified copy thereof; (ii) the arbitration agreement or a duly certified copy thereof,⁶²⁰ and (iii) a translation of the aforementioned documents if they are written in a language other than that of the country where enforcement is sought. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

⁶²¹ It can be seen from these minimal requirements that the Convention is designed to

⁶²⁰ See, The New York Convention, Article IV (1).

⁶²¹ *Ibid* (2).

provide internationally uniform and transparent standards of proof in order to facilitate and simplify the conditions of enforcement as much as possible.⁶²²

There are certain principles arising from Article IV.⁶²³ Firstly, the only condition required for the enforcement of an arbitral award under the New York Convention is that the above evidence is to be submitted by the winning party.⁶²⁴ Secondly, these provisions are the only provisions that govern the matter of evidence or conditions to be fulfilled by the party applying for enforcement of a foreign award, which means that the provisions of the Convention supersede national law in this regard.⁶²⁵ Thirdly, when the enforcing party has produced *prima facie* evidence this enables him to obtain enforcement⁶²⁶ and the burden of proof shifts to the other party if he resists enforcement on one of the grounds mentioned in Article V(1).⁶²⁷

In Kuwait a number of decisions of the Cassation Court reflect these principles, e.g. a decision from 1988.⁶²⁸ In this case a dispute arose regarding the construction of the headquarters of the Kuwait Arab Economic Development Fund, and an agreement between the parties provided for resolution of the dispute by a sole arbitrator in ICC Arbitration. It was agreed that the award would be final and not subject to appeal. An award was made in France in favour of the respondent, who sought enforcement in Kuwait. Both the Court of First Instance and the Appeal Court granted leave to enforce. The appellant lodged an objection before the Cassation Court on the grounds of the misapplication and interpretation of the law, arguing that the arbitration award did not satisfy the conditions for an enforcement order to be issued in Kuwait in accordance with Articles 199 and 200 of the Code of Civil and Commercial Procedure, which govern the enforcement of foreign arbitral awards. Article 200 demands that an award must have been enforceable in the country in which it was made, and it was argued that

⁶²² See, Di Pietro, D. and Platte, M., op. cit. p.124; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 246; Born, G., op. cit. p2702.

⁶²³ See, The New York Convention, Article IV

⁶²⁴ See, Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 248; Di Pietro, D. and Platte, op. cit. p.124; Lew, J., Mistelis, L. and Kroll, S., op. cit., para 26-58; Gaillard, E. and Savage, J., op. cit. para 1673.

⁶²⁵ Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 248; Lew, J., Mistelis, L. and Kroll, S., op. cit. para 27-03.

⁶²⁶ *Ibid*

⁶²⁷ See, Martinez, R., op. cit. p 496; Born, G., op. cit. p.2703.

⁶²⁸ See also the Cassation Court decisions; No. 1202/2004 of 12/2/2006, No. 423 of 2003, No. 292/95 of 1997, No. 80/97 of 1998, No.78/88 of 21/11/1988, No. 215/84 of 30/10/1985, and No. 115/1983 of 4/4/1984.

Article 1477 of the French Code of Civil Procedure demands that an award could only be enforced by the Tribunal de Grand Instance.⁶²⁹ The court when dealing with this objection found that Kuwait and France had acceded to the New York Convention and thus:

“The provisions of this Convention become a state law and the judge is obliged to apply the rules contained therein to foreign arbitral awards made in the territory of another contracting state.”

It was also for this reason the Court affirmed that:

“the rules and provisions pertaining to the formal and substantive conditions which ought to be present in an arbitration award and (determining the party) on whom the onus of proof falls, the documents which ought to be presented by the party seeking enforcement and the limits of a judge’s authority in passing the order of enforcement - all these are subject to the provisions of the Convention alone to the exclusion of others.”

In addition, the court stated that the party who wishes to avoid enforcement:

“Must present what refutes this evidence and prove that the competent authority in the country in which the award was passed has set aside or suspended it in accordance with its law.”

In view of the above, as the appellant had not presented any evidence refuting the validity of the award in accordance with the provision of Article V (1) (e) of the Convention, the Cassation Court upheld the decisions of the lower courts, finding that the award and procedure fully complied with the New York Convention. Most

⁶²⁹ Article 1477 of the French Civil Code of Procedure reads:

“The arbitral award may be forcibly executed only by virtue of an order of *exequatur* by the *Tribunal de Grande Instance* having jurisdiction at the place where the award was rendered. *Exequatur* shall be ordered by the enforcement judge of the Tribunal. To this effect, the text of the award and a copy of the arbitration agreement shall be filed by one of the arbitrators or by the most diligent of the parties, at the Secretariat of the court.”

importantly it ruled that it was not necessary that the award first be granted *exequatur* in France.⁶³⁰

To the researcher's knowledge, there has not yet been a court decision dealing with this matter in the rest of the GCC States. However, it can be said that national courts should take the same view; otherwise their position would be contrary to the GCC States' obligations towards the New York Convention.

In addition, Article IV (1) stipulates that the evidence shall be supplied "at the time of the application," but does not explain the effect of a failure to do so. The question therefore arises here as to what the consequences would be if the claimant had not supplied the evidence at the time of the application. In other words, would a failure to supply the evidence of Article IV cause the application to be refused or not? In fact, this text has been read by national courts in two different ways.⁶³¹ In some states a failure to supply evidence as set out in Article IV (b) of the Convention does not justify a refusal of enforcement, the local court permitting the enforcing party to cure such a defect during progress of the proceedings.⁶³² The alternative view reads this text as an obstacle to granting enforcement where the enforcing party does not supply the key evidence when the application is made.⁶³³

Academic writers argue that this text should not be interpreted literally, nor be applied too strictly. So the enforcing party should be allowed to complete the evidence during the progress of the proceedings in order to achieve the purpose of Article IV to facilitate as much as possible the enforcement of foreign awards.⁶³⁴

⁶³⁰ See, Kuwait Cassation Court decision dated 21 November 1988, (1997) XXII 750 YBCA, pp.748-752.

⁶³¹ The survey is based on the decisions in the Yearbook of International Commercial Arbitration.

⁶³² See, e.g. in Spain, *Sea Traders SA (Panama) v. Participaciones, Proyectos y Estudios SA (Spain)* (1996) XXI YBCA 676 (Supreme Court, 6 April 1989) pp. 676 – 677; in Austria, *German party (F.R.G.) v. Austrian Party* (1976) I YBCA 182 (Supreme Court, 17 November 1965) 182; in Switzerland, *A SA v B Co Ltd & C SA* (2004) XXIX YBCA 834 (Supreme Court, 8 December 2003) pp. 837-38.

⁶³³ Several Italian supreme decisions hold that a foreign award cannot be enforced under the New York Convention of 1958 if the claimant does not submit to the court, at the same time he makes his application for enforcement, the award and the arbitration agreement, as indicated in Article IV, e.g., *Vicere Livio (Italy) v. Prodexport (Romania)* (1982) VII YBCA (Court of Cassation, 26 May 1981) pp. 345-46; *Jassica SA (Switzerland) v Ditta Gioacchino Polojaz (Italy)*, (1992) XVII YBCA525 (Court of Cassation, 12 February 1987), pp. 525 – 528.

⁶³⁴ See, e.g., Di Pietro, D. and Platte, M., op. cit. p.124; Van den Berg, A.J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 250; Lew, J., Mistelis, L. and Kroll, S., op. cit. para 26-60; Gaillard, E. and Savage, J., op. cit. para 1675.

Will the courts of the GCC states adopt the prevailing view?

The expression “at the time of the application” in Article IV should not give rise to any problem, because in the Arabic text of the Convention it is mentioned in a different context to that of the English text. Article IV of the Convention in the Arabic text provides that “to obtain recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement, at the time of application, supply the following ...”, while the English text of Article IV provides that “... *shall* , at the time of application, supply ...”. Moreover, as a general rule, under the procedural rules, non-fulfilment of evidential requirements at the time of the application will not lead to the claimant’s application being refused. According to the Codes of Civil and Commercial Procedure in Kuwait, Bahrain, Qatar, Oman, and the UAE, the plaintiff when bringing his claim, must present all the documents supporting his suit at the time he deposits the claim or in the first session that has been fixed for hearing the case,⁶³⁵ and if the claimant fails to do this, the national court may take following actions:

- i. Fix a time limit to allow the claimant to remedy non-fulfilment of the evidence that was not submitted at the time of the application;
- ii. Pay a fine or;⁶³⁶
- iii. Order suspension of the case for a period of not more than three months in Oman⁶³⁷ and the UAE,⁶³⁸ six months in Qatar and Kuwait, unless the defendant who is in attendance objects⁶³⁹;
- iv. If the period of suspension has expired and the plaintiff has failed to complete the documents the court may rule that the action is deemed never to have existed

⁶³⁵ See, In Kuwait article 46 of the Code of Civil and Commercial Procedure, in Bahrain Article 45 of the Code of Civil and Commercial Procedure, Qatar Article 34 of the Code of Civil and Commercial Procedure, in Oman Article 99 of the Code of Civil and Commercial Procedure, and the UAE Article 70 of the Code of Civil Procedure.

⁶³⁶ The national court in Kuwait may oblige a party to pay a fine of not less than 10 or more than 50 Dinars, in Bahrain not less than 5 or more than 20 dinars, in Qatar 500 Riyals, in Oman not less than 10 or more than 20 Riyals, and in the UAE not less than 2000 or more than 5000 Riyals.

⁶³⁷ See Article 101 of the Code of Civil and Commercial Procedure.

⁶³⁸ See Article 71 of the Code of Civil and Commercial Procedure.

⁶³⁹ See Article 70 in Kuwait Code of Civil and Commercial Procedure, Article 67 in Qatar Code of Civil and Commercial Procedure.

(in Kuwait, this is unless the defendant who is present has expressed an objection).⁶⁴⁰

Finally, in the researcher's opinion, it should be emphasised if the national courts refuse an application on the basis that the claimant did not supply the evidence at the time of the application, this will not hinder the enforcing party's right to reapplication in the same court. This is due to the decision to refuse resting on formalities, and also as the grounds for refusal of enforcement according to the New York Convention have only to be in accordance with Article V of the Convention.⁶⁴¹ Accordingly, it can be said that national courts do not interpret the text of "at the time of the application" too strictly by allowing the winning party to complete the evidence during the progress of the proceedings.

5.2.2.1.1 Authentication and certification

Article IV requires that the enforcing party must provide the duly authenticated original award or a duly certified copy thereof, and the same applies to the copy of the agreement, although the original agreement is not necessary. The purpose of authentication of the award is the concern to prove that the signatures of the arbitrators are genuine; while certification is to confirm that a copy of the document is a true copy of the original.⁶⁴²

The New York Convention does not state which law should govern the authentication of the original documents or the certification of the copy,⁶⁴³ a choice of law provision having been intentionally removed by the drafters of the Convention in order to allow greater latitude to the national courts to deal with this issue.⁶⁴⁴ Academic opinion favours the interpretation that a court should apply the *lex fori* to authentication and

⁶⁴⁰ See, in Kuwait Article 70 of the Code of Civil and Commercial Procedure, in Qatar Article 6 of the Code of Civil and Commercial Procedure 7, in Oman Article 101 of the Code of Civil and Commercial Procedure, and in the UAE Article 71 of the Code of Civil Procedure.

⁶⁴¹ See Chapter Six.

⁶⁴² See, Di Pietro, D. and Platte, M., op. cit. p.125; Lew, J., Mistelis, L. and Kroll, S., op. cit. para 26-61; Gaillard, E. and Savage, J., op. cit. para 1675.

⁶⁴³ In some States Arbitration Acts legislation specify what is meant by an authenticated or certified document e.g. s.8 (1) of the Indian Act, s.38 (1) of the Ghanian Act), and s.9 of the Australian Act.

⁶⁴⁴ In the report of the ECOSOC Committee which accompanied the draft Convention of 1955, it clarified the omission by providing that it was "preferable to allow a greater latitude with regard to that question to the tribunal of the country in which the recognition or enforcement was being requested." See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 252; Gaillard, E. and Savage, J., op. cit. para 1675.

certification, or possibly the law of the country where the award was made.⁶⁴⁵ This interpretation may be further supported by the purpose of Article IV to facilitate and simplify as much as possible the conditions to be fulfilled by the party applying for enforcement of a foreign award.⁶⁴⁶ Although only a few judgments have dealt with this question, such an interpretation was supported by the Austrian Supreme Court, where it was stated:⁶⁴⁷

The Convention does not make clear whether the arbitral award and the arbitration agreement must comply with the requirements for authenticity or trueness obtaining in the country in which, or under the law of which, the arbitral award is made, or whether they also must comply with requirements for legalisation of foreign documents in the country in which the award is relied upon. Consequently, according to the convention, the claimant is not obliged to go to the foreign mission of the country in which he wishes to request the enforcement... In order to avoid difficulties it is, however, recommended to have the copies certified by the foreign mission of the country whose courts will be requested to recognise or enforce the arbitral award ... but this is not obligatory.”

In the GCC States, there is no case-law dealing with this subject, nor any other law that could govern such an issue. However, in practice, in order for the authentication or certification to be acceptable in the GCC courts, it is suggested that parties follow the diplomatic approach. This requires that the documents should include a series of certifications where the enforcing party obtains certification of the documents first from the Ministry of Foreign Affairs in the country where the arbitral award was made, then the GCC State mission in that country, finally obtaining the stamp and an authorised

⁶⁴⁵ See, Gaja, G., op. cit. p.1; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 252; Lew, J., Mistelis, L. and Kroll, S., op. cit. para 26-60; Gaillard, E. and Savage, J., op. cit. para 1675.

⁶⁴⁶ Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 252.

⁶⁴⁷ *X v X* (1977) II YBCA 232 (Austrian Supreme Court, 11 June 1969), 232. See also *SODIME – Societa Distillerie Meridionali v Schuurmans & Van Ginneken BV* (1996) XXI YBCA 607 (Italy Supreme Court, 14 March 1995) 608.

signature from the Ministry of Foreign Affairs of the GCC State in which the enforcement is sought.⁶⁴⁸

A Kuwait Court of Cassation decision in 1985 upholds the decision of Appeal Court refusing to enforce a foreign arbitral award, since the copy of arbitration agreement supplied was not compatible with Article IV. The enforcing party had failed to supply the original arbitration agreement or a certified copy, although he had been given enough time to do so.⁶⁴⁹

5.2.2.1.2 Translation

In accordance with the second paragraph of Article IV, a party looking to enforce a foreign arbitral award in the GCC States must produce a translation of the award and the arbitration agreement if they are not written in Arabic. Article IV (2) provides that the translation must be certified by an official or sworn translator or by a diplomatic or consular agent. The Convention does not state whether the translation should be so certified in the country where arbitration was made or in the country in which enforcement is sought, but this might be again be intended to provide maximum flexibility so as to make enforcement as simple as possible.⁶⁵⁰ Court decisions suggest that certification can be made in the either country.⁶⁵¹

It is suggested that the certification of translation by a diplomatic or consular agent is sufficient.⁶⁵² However, in reality, diplomatic and consular agents are not specialist translators and their role is only to certify the general meaning of the documents, so that certification does not include certification of the accuracy of the translations.⁶⁵³ Thus, a national court might require an official translation if a defendant objects that the

⁶⁴⁸ Many of the circulars issued by the Ministries of Foreign Affairs in GCC states mention this procedure, and Mr. Fahed Al Lafi the Consular of the Kuwait States in London, confirmed the above procedure in a telephone call. *Judicial and Law Journal*, Year 13, No.3, pp. 235-237.

⁶⁴⁹ The Court of Cassation decision No.67/58 commercial date 18/12/1985, *Judicial and Law Journal*, Year 13, No. 3, pp. 235-237.

⁶⁵⁰ See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 206; Gaillard, E. and Savage, J., op. cit. para 1675.

⁶⁵¹ See, van den Berg, A.J., 'Consolidated Commentary' (2003) XXVIII YBCA, p.649.

⁶⁵² *Ibid*

⁶⁵³ In a conversation with the Kuwaiti consul in London, he mentioned that their role is only to verify the general meaning of the documents.

translation does not reflect the exact meaning of the document. This might apply particularly in the Courts in Kuwait, Oman, and the UAE.⁶⁵⁴

In conclusion, there is no doubt that national GCC Courts should not grant enforcement of a foreign arbitral award if the enforcing party does not supply the evidence with his request according to the provisions of Article IV, taking into account that a such a failure can be retrieved during the hearing of the case.

5.2.2.2 Arab League Convention

Article 5 of the Arab League Convention demands numerous pieces of evidence be supplied before an arbitral award, may be enforced, providing that “requests for execution should be supported by the following documents: (1) A certified true copy of the judgment, duly authorized by responsible quarters. (2) The original summons of the text of judgment which is to be executed or an official certificate to the effect that the text of the judgment has been duly served. (3) A certificate from a responsible authority to the effect that judgment is final and executory. (4) A certificate that the parties were duly served with summons to appear before the proper authorities or before the arbitrators in case the judgment or arbitrators’ decision was by default.”

Although this is the only evidence that is mentioned in the Convention, it is suggested that national courts in the GCC States will not adhere strictly to the provisions of this Article, for the following reasons: (i) the language used has been formulated only to govern the evidence for enforcement of judgements; (ii) the Article provides that it is compulsory that the these documents are supplied by the enforcing party, while the Court of Cassation is not required to supply evidence in (2);⁶⁵⁵ (iii) The Article does not stipulate that the enforcing party should supply the arbitration agreement, although it is deemed as essential evidence, as the national court cannot refuse enforcement of award without verifying the arbitration agreement.⁶⁵⁶

⁶⁵⁴ See, the previous section.

⁶⁵⁵ See the Egyptian Court of Cassation’s decision No. 1136 (Judicial year 54) of 28/11/1990, pp.818-826.

⁶⁵⁶ Article 3 provides that “Request of execution may be refused in the following instances:
 a. If the laws of the requested State do not admit the solution of litigation by means of Arbitrations.
 b. If the verdict passed was not in pursuance of a conditional *Arbitration Agreement*.
 c. If the Arbitrators were not qualified to act in pursuance of a conditional *agreement of Arbitration* or in accordance with the provisions of the law under which the sentence was passed.”

5.2.2.3 Arab Convention on Judicial Cooperation (Riyadh)

The Riyadh Convention includes a step toward laying down special provisions regarding the evidence which is suitable for the nature of the enforcement of an arbitral award compared to the Arab League Convention and the Convention on the enforcement of judgments in the GCC States.⁶⁵⁷

Article 37 of the Convention provides that “The party requesting recognition or enforcement of the arbitral award must present a certified copy of the award, accompanied by a certificate of the judicial authority witnessing its executory force. If there exists a written agreement between the parties which foresees that an existing dispute or any dispute which might arise between the parties out of a determined legal relationship shall be referred to arbitration, a certified true copy of this agreement must be produced.”

Accordingly, an enforcing party must supply: (i) a certified copy of the award; (ii) a certificate of the judicial authority witnessing its executory force; (iii) a certified true copy of Arbitration agreement.

Although the Convention only stipulates only that a certified copy of the award should be provided, the question may arise whether, if the enforcing party supplies the duly authenticated original award, this can be considered as fulfilling the requirement. It is suggested that, although the convention says nothing about supplying the duly authenticated original award, this will be acceptable, since the original award has primary authority as long as it is duly authenticated.

Nor does the convention stipulate that the enforcing party has to supply a translation of documents. However, as we have been seen, Arabic is the language of the GCC Courts and according to general principles of public policy a translation of these documents should be supplied if they are not written in Arabic.⁶⁵⁸

⁶⁵⁷ See Article 5 on the Arab League Convention and Article 9 on the convention on enforcement of judgement delegations and judicial notice in the GCC States.

⁶⁵⁸ See sub section 5.1.1.4 in this chapter.

5.2.2.4 The Convention on the Enforcement of Judgement Delegations and Judicial Notice in the GCC States

Article 12 of this Convention lays down that “arbitral awards rendered in any member State shall be enforced in the same manner [as judgments] subject to the rules applicable in the state where enforcement is sought.” This article shows that conditions for the evidence that should be fulfilled by the enforcing party are subject to the provisions of the Convention and the national law where enforcement is sought.⁶⁵⁹

The Convention demands that the applicant must supply (i) A duly certified copy of the judgement with the signatures authenticated by the competent authority.⁶⁶⁰ (ii) A certificate indicating that the judgement has acquired *res judicata* effect unless the judgement itself so states.⁶⁶¹ (iii) A copy of the notification or other instrument with certification of the original evidence to the effect that the defendant has been given proper notice in case of a judgment by default.⁶⁶²

It is clear that these provisions do not take into consideration the nature of the enforcement of arbitral awards, especially with regard to the requirements of evidence under clauses (ii) and (iii). It is therefore useful to discuss these requirements. Firstly, the purpose of: (ii) is to prove that an award is final. This certificate may apply to a judgement where the court in which the judgement was rendered can issue a certificate that judgment has acquired *res judicata*. However, it is unlikely that a national court will provide such a certificate, unless the enforcing party has to provide *exequatur* to obtain enforcement in that country, which is not provided for in the Convention or found under national law in Bahrain or Qatar.⁶⁶³ The aim of this certificate is only to prove that an arbitral award has become final, which can be confirmed by any evidence, as mentioned by the New York Convention and the national laws in the GCC States. Hence, we suggest that the national courts in Bahrain and Qatar should not make it a

⁶⁵⁹ The Convention provides, according to Article 9, stipulations as to the evidence which should be supplied by the enforcing party, although the provisions of national law also refer to this, which makes the enforcement procedure more complicated and inconvenient.

⁶⁶⁰ See, Article 9 (a).

⁶⁶¹ *Ibid* (b)

⁶⁶² *Ibid* (c)

⁶⁶³ This question cannot arise under the laws of Kuwait, Oman, and the UAE, as the law in these States requires that a foreign arbitral award must become enforceable where it was made in order to grant enforcement where the national law is also applicable law, in accordance with Article 12 of the Convention.

stringent condition that this certificate be supplied, as other evidence can be substituted for it.

Secondly, it should be noted that the Convention does not mention that the enforcing party has to supply an arbitration agreement or translation of documents despite the importance of supplying such evidence. However, such evidence should be supplied under GCC laws.

The Convention does not dictate in which country the competent authority has to authenticate the award, as there are no laws in the GCC States governing such a matter; however it may be suggested that national courts will accept a diplomatic exchange in this regard.

5.2.2.5 ICSID

The evidence to be supplied under the ICSID Convention is very simple, Article 54(2) stating that: “A party seeking recognition or enforcement in . . . a contracting State shall furnish the competent court . . . with a copy of the award certified by the Secretary-General.” Thus the only evidence that requires to be supplied by the enforcing party is a copy of the award certified by the Secretary-General. However, according to national law, a translation may also be required if the award is not written in Arabic, as this issue relates to public policy and therefore cannot be avoided by the applicant.⁶⁶⁴

5.2.2.6 GCC States Commercial Arbitration Centre

Unlike the aforementioned regimes, the charter of the GCC Commercial Arbitration Centre and the Arbitral Rules contain no requirements for the documents to be submitted by the party applying for enforcement. In contrast, according to Article 16 of the Charter and Article 35 (1) Arbitral Rules, the Secretary General of the GCC Commercial Arbitration Centre is required to submit such documents. Article 16 of the Charter provides that “the arbitral tribunal shall refer to the Centre’s Secretary General a copy of the award passed and he shall provide possible assistance in depositing or registering the award whenever necessary in accordance with the law of the country where the award is to be enforced.” This position might be explained by the final and

⁶⁶⁴ See sub section 5.1.1.4 in this chapter.

binding nature of a GCC Centre award. Articles 15 of the Charter and Article 36 (1) of the Arbitral Rules establish the binding nature of the award, where both provide that “An award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.”

In light of the above provisions, it might be said there is no obligations for the enforcing party to supply any evidence before the national court where enforcement is sought in order to accept an application of the enforcement. This refers to the effect of an arbitral award rendered by the Centre.

In conclusion, in the light of the above it can be said that an enforcing court in the GCC States should not request the enforcing party to supply any evidence apart from that which is provided for in the Convention governing an application for enforcement. However, there is exception which may arise under all Conventions, where the enforcing party has to supply evidence show that the country in which award was made is a member of the Convention under the provisions of which he sought enforcement. In fact, this evidence should be supplied, as it is deemed to be the key of an application and the enforcing court must verify this issue at the start of the proceedings. It appears that a national court in the GCC States might consider it sufficient if the enforcing party supplies a copy of the evidence which shows that the country where the award was made is a member of the Convention.⁶⁶⁵

5.3 Conditions required for enforcing foreign arbitral awards

In this section we will attempt to determine and discuss the conditions that may be required for the enforcement of a foreign arbitral award in the GCC States. First of all, it should be pointed out that if an award is sought to be enforced under the New York Convention, it is only necessary that the state where the award was made is a party to the Convention and that the enforcing party has supplied the evidence discussed in the previous section.

⁶⁶⁵ See, e.g. the Kuwait Court of Cassation decision NO. 40/1992 of 15/2/1993. A party sought to enforce under the Arab League Convention a decision rendered in the UAE but the court of Appeal upheld the lower court’s refusal on the basis that there was no proof t that the UAE had ratified the Convention. However, The Cassation Court found a copy supplied by a party was a sufficient basis for enforcement.

In cases where no treaty or convention is applicable, provisions dealing with the enforcement of a foreign arbitral award are the same as govern enforcement of foreign judgments in the Codes of Civil and Commercial Procedure in of Kuwait, Bahrain, Oman, Qatar, and the UAE. These are practically identical, apart from certain additional conditions which exist in Oman.

For example, in Kuwait Article 199 of the Code of Civil Procedure lays down that: “Judgements and orders made in a foreign country may be performed in Kuwait under the same conditions foreseen by the law of this foreign country for performance of Kuwaiti judgements and orders. An order of execution will be filed in the Al Kulliyah Court, in accordance with the established rules laid down for the initiation of suit; an order of execution may not be issued unless the following matters have been verified:

- i. That the judgment or order was rendered by a competent court, in accordance with the law of the country wherein it had been rendered;⁶⁶⁶
- ii. That the parties to the case, which forms the subject matter of the foreign judgment, have been summoned to appear and were duly represented;
- iii. That the judgement or order has become a *res judicata* according to the law of the court which rendered it;
- iv. That the judgment or order is not in conflict with an order or judgement that has already been rendered by a court in Kuwait and does not contain anything which is in violation of morality or public order in Kuwait”.⁶⁶⁷

Moreover, Article 200 lays down that: “The provisions of Article 199 shall apply to awards rendered by arbitrators in a foreign country; the foreign arbitrators’ award must have been rendered in a matter which may be the subject of arbitration, in accordance with the laws of Kuwait, and must be enforceable in the country wherein it was

⁶⁶⁶ This condition is stated differently in Qatar, Oman, and the UAE; e.g. in Qatar it is provided “that Qatari courts do not have exclusive jurisdiction over this dispute and that the court which made it has jurisdiction according to the international rules of jurisdiction foreseen in its law.”

⁶⁶⁷ The same stipulations are also adopted in Egypt and Syria.

rendered.” Similar provisions are applied in Bahrain, Qatar, and the UAE.⁶⁶⁸ The same provisions are also to be found in Oman, although there further conditions are applied which lay down that the award must not have been “rendered based on fraud”, and that the award must not include a request which breaks the law.

In this regard, it should be remembered that the role of national law is not to decide whether or not a foreign arbitral award is correct as a matter of fact and law. Its role is limited to verifying the fulfilment of conditions, and then rendering *exequatur* to grant or refuse the enforcement.⁶⁶⁹ Further, the national courts in these states are never entitled to grant enforcement of a foreign arbitral award except upon verification of the existence of all the conditions laid down by the above provisions, which is made clear by the words “*an order of execution may not be issued unless the following matters have been verified.*”⁶⁷⁰

In addition, although the above provisions refer to the conditions that should be verified by an enforcing court, they do not clearly indicate the responsibility of the enforcing party to supply the evidence to prove the existence of all the conditions required in order for the national court to be able to verify these conditions. Nonetheless, as we have seen previously in this chapter, pursuant to general rules under the Codes of Civil and Commercial Procedure that set out that “the plaintiff when bringing his claim must present all the documents supporting his suit,” and the general principle of the law of evidence, which provides that “the burden is on the prosecution to prove commitment and on the debtor to prove disposal of it,”⁶⁷¹ the enforcing party is responsible for supplying the evidence to prove the existence of all the conditions required in order for the national court to be able to verify these conditions. This means that the evidence which is to be furnished in order for the national court to grant enforcement is unspecified and unlimited. These provisions are therefore in favour of non-enforcement,

⁶⁶⁸ See, in Bahrain Articles 252 and 253 of the Code of Civil and Commercial Procedure, in Oman Articles 352 and 353 of the Code of Civil and Commercial Procedure, in Qatar Articles 379-38 of the Code of Civil and Commercial Procedure 1, and the UAE Articles 235 and 236 of the Code of Civil Procedure.

⁶⁶⁹ See Chapter Three

⁶⁷⁰ See, the Dubai Court of Cassation decisions No. 114/39 of 26/9/1993 and No. 117/193 of 20/1/1993.

⁶⁷¹ See, in Kuwait Article 46 of the Code of Civil and Commercial of procedure and Article 1 of the Evidence Act for Civil and Commercial, in Bahrain Articles 26 and 80 of the Code of Civil and Commercial of procedure and Article 1 of the Evidence Act for Civil and Commercial, in Qatar Article 30 of the Code of Civil and Commercial of procedure, in Oman Article 65 of the Code of Civil and Commercial of procedure, in the UAE Article 45 of the Code of Civil Procedure and Article 1 of the Evidence Act for Civil and Commercial.

in contrast to the New York Convention, where the burden of proof is on the defendant. These provisions are thus deemed to establish positive grounds for the refusal of enforcement foreign awards.

However, although these conditions are the only grounds on which enforcement might be denied, the defendant who seeks to deny enforcement of the award has to supply the evidence to prove non-verification of one of the conditions.

Consequently, there are several conditions which should be fulfilled to enforce foreign awards in accordance with the national law of these states, these being: (i) reciprocity; (ii) that the arbitral tribunal had jurisdiction; (iii) that the parties were duly notified and legally represented; (iv) that the award has the authority of *res judicata* according to the law applicable to the award; (v) that the award does not conflict with any judgement issued in one of these States; (vi) that the award does not conflict with public policy; (vii) that the award has been issued in a matter arbitrable under one of these States' laws; (viii) that the award has become enforceable in the country where it was made; (ix) certain other conditions under Omani law.

5.3.1 Reciprocity

The principle of reciprocity is laid down under all the national laws of the GCC States and also in the international conventions that are applied in these States. In general, the principle of reciprocity has been classified as “the relationship between two States when one state offers the subjects of the other certain privileges on the condition that its subjects enjoy similar privileges in the other State.”⁶⁷² Accordingly, this principle can be considered to be a condition which will not allow the enforcing party to seek enforcement of an arbitral award in the one of the GCC States unless the foreign country in which the award was made enforces GCC awards.

Looking at national law, for example, in Kuwait Article 199 of the Code of Civil and Commercial Procedure (with a similar text being found in the Codes of Civil and Commercial Procedure in Bahrain, Oman, Qatar, and the UAE)⁶⁷³ provides that: “Judgements and orders made in a foreign country may be performed in Kuwait under

⁶⁷² See Mok Y.J., op. cit. pp.123-125.

⁶⁷³ See Article 252 in Bahrain, Article 379 in Qatar, Article 352 in Oman, and Article 235 in UAE.

the same conditions applied by the law of this foreign country for performance of Kuwaiti judgments and orders.” This shows that the GCC States require reciprocity as a condition in order to recognise and enforce a foreign arbitral award. Consequently, the enforcing party should make sure that the condition of reciprocity is affirmed in his application before submitting the application.

According to aforementioned text, there are several points which have to be clarified concerning the application of the principle of reciprocity where the enforcement is sought only under the national laws in the GCC States, as follows:

- i. The term “under the same conditions” does not mean that, in order to enforce a foreign arbitral award, the conditions for enforcement of an arbitral award laid down by the foreign country in which the award was made must be the same as the conditions provided to enforce an arbitral award in the GCC States,⁶⁷⁴. This is not required by the principle of reciprocity in international law. It is only necessary that that an award made in a GCC State would be enforceable in accordance with the foreign country’s law, irrespective of what the conditions for enforcement actually are.
- ii. In addition, it not a requirement that there be a diplomatic exchange between the GCC States and the foreign country concerned, unless an application for enforcement is based on convention provisions.⁶⁷⁵

However the enforcing party should supply evidence to show the national court that the foreign country in which the award was made applies the principle of reciprocity. This can be done by supplying a duly certified copy of the law which shows that a foreign arbitral award can be enforced in this State or, if the enforcement is sought according to a Convention, by the enforcing party offering proof that the country where the award was made has ratified this convention. Consequently, if the enforcing party fails to provide such proof, that will be sufficient reason for the national court to dismiss the application.

⁶⁷⁴ Alsamdan, A., op. cit. pp.75-80.

⁶⁷⁵ See, the Egyptian Court of Cassation decision No. 1136 (Judicial year 54) of 28/11/1990, pp.818-826. The Court of Cassation dealt with same condition where Egyptian law included the same provision. The petitioner challenged the decision granting enforcement, arguing that reciprocity entailed a diplomatic exchange between Egypt and Yemen. However, the Cassation Court did not think this was required.

If there is no reciprocity the court should reject the claim. Nonetheless, if any GCC State should amend its law to disapply the principle of reciprocity, a previous rejection will not bar the party from later requesting enforcement of the award from the same Court. Of course in the absence of such amendment, a previous rejection will bar the application being presented again.

Although a plea concerning non-reciprocity may be presented by the defendant at any stage of the proceedings, a national court may render judgment with respect thereto on its own initiative, due to such subject matter relating to public policy.⁶⁷⁶

Finally, in Bahrain, according to the Model Law, the principle of reciprocity will not be required for recognition and enforcement if the provisions of the Model Law are the only applicable provisions governing the enforcement application.⁶⁷⁷ The Model Law provides that an arbitral award, irrespective of the country in which it was made, shall be enforced.⁶⁷⁸

The New York Convention provides that “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.”⁶⁷⁹ The principle of reciprocity is mentioned in the Convention, as some of the drafters could not agree to the enforcement of an arbitral award regardless of country where the award it was made - the principle of “universality.”⁶⁸⁰ However, states that used this reservation when they ratified the convention can withdraw from it reservation later.⁶⁸¹ Currently, nearly half of the contracting States have used this reservation, which might be said to undermine much of the significance of the Convention.⁶⁸² The consequence of the adoption of

⁶⁷⁶ Consequently, the judge should verify this question at the start of hearing the application, otherwise continuing the proceedings would be pointless.

⁶⁷⁷ According to Article 2 of the Decree Law No (9) of 1994 which lays down that provisions of the Code of Civil and Commercial Procedure will not apply except to the extent that they are not inconsistent with the provisions of the UNCITRAL Model Law on International Commercial Arbitration.

⁶⁷⁸ See Articles 1 (1), 35 and 36 of the Model Law.

⁶⁷⁹ See Article 1 (3).

⁶⁸⁰ See, Di Pietro, D. and Platte, M., op. cit. p.57.

⁶⁸¹ For example, in Austria made the reservation when it ratified the Convention in 1961, and withdrew it in 1988. See Austrian Supreme Court decision, 30 November 1994, (1997) YBCA XXII pp. 628-630.

⁶⁸² Out of 142 States that ratified the New York Convention, 71 have made a reservation. See the status of the Convention

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>

reciprocity is that there is no obligation on the part of the contracting states with regard to the recognition and enforcement of awards made in a non-contracting State.⁶⁸³

It should be noted that application of the principle of reciprocity according to the Convention is not used in international law as the party's nationality is excluded as a condition for the application of the Convention.⁶⁸⁴ However, the contracting States' obligations should match under the Convention, which means that a State using a reservation is not "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".⁶⁸⁵

The position of various GCC States regarding reciprocity under the New York Convention differs. Reservations regarding reciprocity were expressed by Kuwait, Bahrain, and Saudi Arabia.⁶⁸⁶ In Kuwait, for example, the Decree states only one reservation to in Article 1, that "Kuwait reserves implementation of the Convention to the recognition and enforcement of arbitral awards made in the territory of other contracting States."⁶⁸⁷ The same reservation was expressed in Bahrain and Saudi Arabia.⁶⁸⁸ Accordingly, in these states, an application for the enforcement of a foreign arbitral award under the Convention will be denied unless the state where the award was made is a party to the Convention.⁶⁸⁹

⁶⁸³ See, Gaja, G., op. cit. p.1.

⁶⁸⁴ See, van den Berg, A.J., 'Consolidated Commentary' (2003) XXVIII YBCA, p.649.

⁶⁸⁵ See Article 14 of the New York Convention.

⁶⁸⁶ See the status of the Convention

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>

⁶⁸⁷ See Decree Law No 10 of 1978 approving the accession of the State of Kuwait to the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards of 1958.

⁶⁸⁸ See in Saudi Arabia Royal Decree No (M/11) of 16/07/1414 Hegira [29/12/1993]. However, in Bahrain, Decree Law No. (14) of 1988 contains more than the reservation as to reciprocity, as it provides three aspects of reservations regarding the Convention: "this Convention will not be a cause for the recognition of Israel; the Convention will apply only to the recognition and enforcement of awards made in the territory of another contracting State; the Convention will apply only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law."

⁶⁸⁹ Numerous court decisions in countries which employ the reciprocity reservation stated that the Convention was applicable in the enforcement of the award. See, e.g., *Int'l Iranian Oil Co. v Dep't of Civil Aviation of Dubai*, 360 F. Supp. 2d 136, 137-38 (D.D.C. 2005) (denying enforcement to an award rendered in Dubai because it is not party to the New York Convention); *Weizmann Institute of Science v Neschis* (2003) YBCA XXVIII 1038 (US District Court, 3 October 2002) pp 1041-42; *J.M. Ltd v Firm S* (1977) YBCA II 232 (German Court, 15 April 1964) 232

On the other hand, Qatar, Oman, and the UAE do not require reciprocity to apply the Convention awards,⁶⁹⁰ i.e. these States will recognise and enforce a foreign arbitral award under the New York convention, irrespective of the country in which it was made. In fact, the position of the States of Qatar, Oman, and the UAE where reciprocity is not required gives a good indication that these States support international commercial arbitration, leading parties to international transactions to choose these States as the place of arbitration.

5.3.2 Arbitral tribunal had jurisdiction

The second condition for granting acceptance of recognition and enforcement of a foreign arbitral award is that the enforcing court should verify that the arbitral tribunal had jurisdiction.

The laws of the GCC states take different approaches regarding this condition. The relevant Kuwaiti, provision demands that: “the judgement or order was rendered by a competent court, in accordance with the law of the country wherein it had been rendered.”⁶⁹¹ Provisions in Bahrain, Qatar, Oman, and UAE indicate that their courts “do not have jurisdiction in a dispute in which the judgment has been given or the order made, provided that the court that made it has jurisdiction according to the international rules of jurisdiction stated in its law.”⁶⁹² It is suggested that jurisdictional issues will not be as difficult in Kuwait as in Bahrain, Qatar, Oman, and UAE.

The provision governing jurisdiction under the laws of Bahrain, Qatar, Oman, and the UAE, if read literally, will lead to such complexity as to be unsuitable for governing the enforcement of foreign arbitral awards. There are three reasons for this.⁶⁹³ First, theoretically the text obliges judges states to verify whether the arbitral tribunal has jurisdiction according to the international rules of jurisdiction recognised in the law of the seat. Thus it is not sufficient for judges to be content that the arbitral tribunal has

⁶⁹⁰ *Ibid.*

⁶⁹¹ See Article 199(a) of the Code of Civil and Commercial Procedure.

⁶⁹² See, in Bahrain Article 252 (1) of the Code of Civil and Commercial Procedure, in Qatar Article 380 (1) of the Code of Civil and Commercial Procedure, in Oman Article 352 (a) of the Code of Civil and Commercial Procedure, and in the UAE Article 235 (a) (b) of the Code of Civil Procedure.

⁶⁹³ This is one of many positions in the laws of all the GCC States, whereby applying the same provisions as are applicable to recognition and enforcement of a foreign judgment leads to some confusion. It should be emphasised that the GCC States need to issue special provisions to govern the enforcement of a foreign arbitral award.

jurisdiction in accordance with the arbitration agreement, they must investigate a matter of foreign law. This text also might lead indirectly to the requirement that the subject matter of arbitration be arbitrable in the state where the award was made. As a result, the legislators in these States have the right to impact on the law of other States by determining which place should regulate the issue of jurisdiction. By contrast, in Kuwait the court need examine only whether the judgement or order was rendered by a competent court in accordance with the law of the country wherein it had been rendered.⁶⁹⁴ (ii) In addition, in many states the national law does not refer to the issue of the jurisdiction in international matters.⁶⁹⁵ (iii) By indicating that the national courts “do not have jurisdiction in the dispute in which the judgments has been given or the order made”, the question might arise as to whether national courts have international jurisdiction in accordance with the national law of these States; if i.e. both competent forums have international jurisdiction, then how can this condition be applied? Indeed, the national courts in Bahrain and the UAE have dealt with this question and have reached different interpretations of this condition.

The Dubai Court of Cassation in two decisions has dealt with this question and stated that in cases where a foreign judgment is rendered in a dispute relative to one of the cases in international jurisdiction provided in Article 23 of the Codes of Procedure, the judge should refuse to issue *exequatur* granting recognition or enforcement of a foreign judgment.⁶⁹⁶ In 1990 a petitioner requested the First Instance Court of Dubai to enforce

⁶⁹⁴ The question of jurisdiction is relative to the countries in which the legislator of any country has the right to determine their jurisdiction as there are no international rules that can deal with international jurisdiction.

⁶⁹⁵ For example, Kuwaiti, Qatari, and Saudi law do not refer to the question of when an arbitration becomes international.

⁶⁹⁶ Article 23 lays down that “The courts has jurisdiction to hear cases where actions are initiated against a foreigner who does not have a domicile or place of residence in the country in the following cases:

1. if he has an elected domicile in the country;
2. if the action relates to assets in the country or to a citizen’s estate or to a legacy made in the country;
3. if the action relates to an obligation concluded or executed or to be executed in the country or to a contract to be legalized in the country or to a death occurring in the country or to bankruptcy declared in a court of the country;
4. if the action is brought by a wife with an address in the country against a husband who previously had an address in the country;
5. if the action relates to support in respect of a parent, wife, minor, child, in guardianship, affiliated child or personal or financial guardianship, if the party requesting support, the wife, minor or child in guardianship has an address in the country;
6. if the action concerned with the registration of births, marriages and death and the plaintiff is a citizen or an alien with an address in the country, where the defendant has no known address a broad or where national law must apply in the action;
7. if one of the defendant has an address or a place of residence in the country.”

a judgement made in its favour on by a Hong Kong court, directing the defendant to pay the sum mentioned in the judgement and the interest thereon. The court rejected the case and was upheld on appeal. A further appeal was then lodged on the basis that the correct interpretation of the relevant provision demanded that a foreign judgement should not be executed if the courts in the UAE have sole jurisdiction to hear the case, although and if both the foreign and UAE court have jurisdiction, then the foreign judgement may be executed. Thus, Article does apply where national courts have jurisdiction. The court did not accept this argument, and concluded that if one of the conditions laid down in the relevant provision is not fulfilled, a national judge may not render *exequatur* even if rest of the conditions have been fulfilled. Where the national court is competent to hear the dispute then it cannot grant enforcement, even if the foreign judgment is issued in accordance with their international rules of jurisdiction in the law of that state. The court added that there was no room for discretion in this context, the provision being absolute, so the objection was dismissed.⁶⁹⁷

Despite having the same provisions, courts do not subscribe to the same view, for example in Bahrain, Qatar, Oman, and Egypt, as will be discussed in the next paragraph. It also should be mentioned that the Dubai ruling does not necessarily prevail in the rest of the Emirates' courts, for the following reasons. First, it relates to procedural matters where the principles set by the Court of Cassation of Dubai are not binding on the rest of federal Courts in the UAE, since they are regulated by different laws.⁶⁹⁸ Secondly, the general principles in the Civil Code set out that “the rules of jurisdiction and all procedural matters shall be regulated by the law of the country where the case was filed or the proceedings initiated.”⁶⁹⁹ Thus, when a national judge verifies a question of jurisdiction he should refer to the law of the country where the case was filed or the proceedings initiated. Finally, the view adopted by the Dubai Court of Cassation can be held to demonstrate an extremely conservative attitude which leads to negative consequences for the interests of international commercial transactions in Dubai, particularly as Dubai has become the biggest commercial centre in the Middle East.

⁶⁹⁷ This view was adopted by the Dubai Court of Cassation decisions No. 114/39 of 26/9/1993 and No. 117/193 of 20/1/1993.

⁶⁹⁸ See Chapter One.

⁶⁹⁹ See Article 21 of the UAE of Civil Code.

In Bahrain the Court of Cassation provided a more logical interpretation. In 1991 it followed the Explanatory Memorandum to the Egyptian Code of Civil and Commercial Procedure which included the same provision.⁷⁰⁰ This states that “although the said law does not deal with the issue of joint jurisdiction between the courts of the State in which enforcement is to take place and the foreign court which has handed down the judgment, it has been in the mind of the legislature to enforce the foreign judgement even though it is delivered in respect of a dispute that is subject to the jurisdiction of the courts of the State in which the enforcement is required”.⁷⁰¹ The court also added that the provision also has to be read with condition 4 of Article 252 which requires “the judgement or order is not in conflict with an order or judgement that has already been rendered by a court in Bahrain and does not contain anything which is in violation of morality or public order in Bahrain.” Consequently, if the courts in these States have jurisdiction in a dispute in which an arbitral tribunal’s decision has been given in accordance with its jurisdiction, this will not be an obstacle to the enforcement of the foreign arbitral award, as long as is not in conflict with an order or judgement that has already been rendered by a court in these States and does not contain anything which is in violation of morality or public order in these States.

In the researchers’ opinion, when the GCC Court verifies a jurisdiction condition it should not take this condition too literally, since the jurisdiction of the arbitral tribunal essentially derives from the arbitration agreement, while the Court’s jurisdiction is determined by the provisions of the national law. Nonetheless, it is still unlikely that courts will determine the arbitral tribunal’s jurisdiction solely by reference to the scope of the arbitration agreement. This is due to the last line of the provision which demands that jurisdiction is “*in accordance with the law of the country wherein [the award] had been rendered.*” This means that a court should require that an arbitral tribunal has jurisdiction when dealing with a matter which is arbitrable under the law of the country wherein it had been rendered. A similar condition can be found under the provisions of

⁷⁰⁰ See, Ahmed, J., ‘Enforcement of Foreign Judgments in some Arab Contraries and Legal Provision and Court Precedents: Focus on Bahrain’, *Arab Law Quarterly*, (1999) p.171.

⁷⁰¹ *Ibid.* The Egyptian Court of Cassation (decision No 1136 (Judicial year 54) of 28/11/1990, pp.818-826) takes the same view, and where it refers to this condition states that it “indicates that the meaning of the condition is that the jurisdiction which Egyptian courts have in the dispute in which the judgements has been given or the order made is exclusive jurisdiction in which the jurisdiction only arises in Egypt Courts. Whereas, in a case where a foreign court has jurisdiction according to the international rules of jurisdiction foreseen in its law besides the national courts, which called *joint jurisdiction*, it not prevent the execution of a foreign judgment as long as this is not contrary to the rule previously issued by national courts.”

the Riyadh Convention which refers to whether the arbitrators were “ompetent under the agreement to arbitrate or the law under which the award was made.”⁷⁰² The New York Convention and Arab League Convention are more specific as to the question of jurisdiction of the arbitral tribunal and require that the investigation should only relate to the terms and scope of the arbitration agreement.⁷⁰³

5.3.3 Parties were duly notified and legally represented

The third condition for the recognition and enforcement of a foreign arbitral award under the laws in Kuwait, Bahrain, Qatar, and the UAE is that the enforcing court should verify that the parties were “summoned to appear and were duly represented.”⁷⁰⁴ This raises a certain number of questions which should be examined.

The first question is what law should govern the subject. Although the clause is silent on this matter, it is obvious that courts in the GCC States will not verify this condition in accordance with national law. The Civil Code of the UAE, for example, sets out a general rule providing that “the rules of jurisdiction and all procedural matters shall be regulated by the law of the country where the case was filed or the proceedings initiated.”⁷⁰⁵ Consequently, the GCC Courts when verifying this condition should apply that law rather than domestic law.

The second question is what is the role of the court in this context. The stipulation that parties must “have been summoned to appear” shows that the judge’s role is limited to ensuring that the parties have been summoned to appear. The clause focuses on substance rather than formality. If parties are not summoned to appear, but the losing party nonetheless attended, a foreign arbitral award would still be enforceable. It is only

⁷⁰² See, Riyadh Convention, Article 37 (c).

⁷⁰³ See Article V(1)(c) of the New York Convention which states that an arbitral tribunal does not have jurisdiction if “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”.

⁷⁰⁴ See, in Kuwait Article 199 (b) of the Code of Civil and Commercial Procedure, in Bahrain Article 252 (2) of the Code of Civil and Commercial Procedure, in Qatar Article 380 (2) of the Code of Civil and Commercial Procedure, in Oman Article 352 (b) of the Code of Civil and Commercial Procedure, and in the UAE Article 235 (c) of the Code of Civil Procedure. It noted that This condition is less than is required by the New York Convention to refuse the enforcement of a foreign arbitral award, as Article V (1) (b) also provides that “... or was otherwise unable to present his case”.

⁷⁰⁵ See, in the UAE Article 21 of Civil Code.

where the losing party did not attend because he was not summoned to appear that the award would not be enforceable.

The third question is whether courts when verifying the conditions may take into consideration the nature of arbitration, which may not demand application of all the requirements that govern due process. In this instance, several court decisions in Kuwait and the UAE illustrate that all the procedure provided for in the Code of Civil and Commercial Procedure in respect of court hearings need not be applied.⁷⁰⁶ As there is no particular method that the court should follow to verify due process, and no need for the enforcing party to submit specific evidence, the court can thus infer due process from the details of the arbitral award itself.⁷⁰⁷ Consequently, a plea of violation of due process will not necessarily be fatal to enforcement, as lack of due process does not amount to a breach of public policy according the law in the GCC States.⁷⁰⁸ By contrast, the New York Convention considers lack of due process as a key ground for refusing enforcement, and also requires other elements to ensure that the parties are given a fair hearing.⁷⁰⁹

Finally, the stipulation that the parties “were duly represented” demands two aspects be verified, (i) that throughout the proceedings a lawyer pleaded on behalf of the losing party before the arbitral tribunal; (ii) that the arbitrators ensured that this party’s representative had the opportunity to plead before the award was issued. This means that the provisions of the GCC States provisions are more limited than those mentioned in the New York Convention, which stipulate that a party who has been unable to present his case may resist enforcement.⁷¹⁰ Consequently, if a foreign arbitral award

⁷⁰⁶ See the Kuwait Court of cassation decision No. 9/91 of 10/1/1993. the court after mentioning Article 182 of the Code of Civil and Commercial procedure which lays down that “the arbitrator shall issue his award without being bound by the procedures laid down by law, except those laid down in this chapter.” In its statements the court states that arbitrators do not obligate to apply the provisions of the Code of Civil and Commercial Procedure except those relating to fundamental notions of justice.

⁷⁰⁷ See the Egyptian Court of Cassation decision No. 1136 (Judicial year 54) of 28/11/1990, pp.818-826.

⁷⁰⁸ Usually in cases where there is a due process violation during the hearing the later attendance of the relevant party will correct the violation. Article 80 of the Code of Civil and Commercial Procedure in Kuwait provides that “Nullity of service of the writs of the suits and of the papers requiring attendance, which resulted form a defect in the summons or in the court declaration or in the date of the hearing is eliminated by the presence of the addressee at the hearing that has been fixed in said summons or by depositing a memorandum containing the defence.” See also the Kuwait Court of Cassation decision No. 111/92 of 20/12/1992.

⁷⁰⁹ See, e.g., Gaillard, E. and Savage, J., op. cit. paras 1696-1699; Redfern, A., and Hunter, op. cit., para 10-39; Lew, J., Mistelis, L. and Kroll, S., op. cit., para 26-81.

⁷¹⁰ See the New York Convention, Article V (1) (b).

was issued in the absence of lawyer or he was not given the chance to present a defence of the client, this will be reason to refuse enforcement.

5.3.4 The award has the authority of *res judicata* according to the applicable law to the award

The fourth condition for the recognition and enforcement of a foreign arbitral award under the laws in Kuwait, Bahrain, Qatar, and the UAE is that the enforcing court should verify that the award “has become a *res judicata* according to the law of the court which rendered it.”⁷¹¹ In Oman, the law is more specific in stating that an award “has become final” according to the law of the country in which award was made.⁷¹²

In general, in the GCC States, an arbitral award is deemed to have become *res judicata* if it is no longer open to a customary method of challenge (appeal) on the merits on which it became final.⁷¹³ However, the issue in determining when a foreign award has finality is subject to verification in accordance with the law of the country where it was made. Indeed, generally, there are two factors which affect when the award became final. The first relates to the attitude of the national laws as to whether a right to appeal is granted in all circumstances or none.⁷¹⁴ The second is where the arbitration agreement deals with issue of appeals. Thus, the courts in the GCC States should verify these two factors in order to determine whether a foreign arbitral award has become a *res judicata*.

It should therefore be noted that the concept of *res judicata* is not linked to the *exequatur* rendered by a national court in order to grant the enforcement of awards. The arbitral award acquires *res judicata* when it becomes final as long as the award exists, irrespective of whether the national court where the award was made had granted leave to enforce the award by *exequatur*, or whether it is challenged by an exceptional method

⁷¹¹ See in Kuwait Article 199 (c) of the Code of Civil and commercial Procedure, in Bahrain Article 252 (3) of the Code of Civil and commercial Procedure, in Qatar Article 380 (3) of the Code of Civil and commercial Procedure, and in the UAE Article 235 (d) of the Code of Civil Procedure.

⁷¹² See Article 353 (a) of the Code of Civil and commercial Procedure.

⁷¹³ See Explanatory Memorandum of Evidence Law in Kuwait referring to Article 52.

⁷¹⁴ The attitude of national law regarding the right of appeal can be classified into four positions as follows: (i) where it allows appeals against arbitral awards on the same basis as court judgements e.g. Article 18 of the Arbitration Regulations of Saudi Arabia; (ii) where it permits no appeal against arbitral awards, e.g. in Kuwait, Article 9 of the Law No. 1 of 1995 on Judicial Arbitration in Civil and Commercial Matters; (iii) Where it permits no appeal against arbitral awards except where the parties have agreed otherwise, e.g. in Oman under Article 55 of the Law of Arbitration in Civil and Commercial Disputes; (iv) Where it allows appeals against arbitral award except where the parties have agreed otherwise, e.g. in Bahrain Article 242 of Code Civil and Commercial Procedure.

(request for reconsideration, challenge by cassation, or opposition by a third party). However, exceptions can be found in some countries, e.g. in Saudi Arabia where an award is only considered final when it has been granted by the court.⁷¹⁵ Consequently, if the national law of the country where the award was made includes such a provision, there will arise what is called “double *exequatur*”, so the national courts of the GCC States should not issue an *exequatur* to grant enforcement unless the enforcing party shows the *exequatur* that granted enforcement by the court where the award was made.⁷¹⁶

In this regard, “double *exequatur*” also arises in another aspect, in that there is another condition in the GCC States that requires a foreign arbitral must be enforceable in country where it was made, under the law of Kuwait, Oman, and the UAE.⁷¹⁷ This means that courts in these States will not issue the *exequatur* unless it had first been obtained from the court where the award was made.

In Bahrain and Qatar, the condition that a foreign arbitral is enforceable where it was made does not exist, meaning that the national courts in these States do not require “double *exequatur*.” Accordingly, this might lead the courts in Bahrain and Qatar to enforce a foreign arbitral award that has become *res judicata* where it was made, even if facing a challenge by exceptional method.⁷¹⁸ Consequently, it can be said that this point will make it more likely that a foreign arbitral award will be enforced in these States than in the rest of the GCC States.

⁷¹⁵ See, Article 20 of the Arbitration regulations of Saudi Arabia which provide that “The award of the arbitrators shall be due for execution, when it becomes final, by an order from the Authority originally competent to hear the dispute.”

⁷¹⁶ Some commentaries refer to that term “final” as being linked with the term “binding” that is required under the New York Convention. These terms will be discussed in the next chapter

⁷¹⁷ See, in Kuwait Article 200 of the Code of Civil and Commercial Procedure, in Oman Article 353 of the Code of Civil and Commercial Procedure, and in the UAE under Article 236 of the Code of Civil Procedure.

⁷¹⁸ See, e.g. in Kuwait under Article 9 of the law No. 1 of 1995 on Judicial Arbitration in Civil and Commercial Matters where Awards becomes *res judicata* and executory without the need for an order to be rendered by a judge, whereby it can be done after the executory formula has been set upon the award by the Secretariat of the Court of Appeal, in spite of the Article 10 providing that awards may be subject to recourse to the Court of Cassation.

5.3.5 The award does not conflict with any judgement issued in one of these States

The fifth condition for the recognition and enforcement of a foreign arbitral award under the laws in Kuwait, Bahrain, Qatar, Oman, and the UAE is that the enforcing court should verify that the award “does not in conflict with an order or judgement that has already been rendered by a court in these States.”⁷¹⁹

Some writers have said that this condition aims to preserve the sovereignty of national courts and prevent any contradiction with a national court’s decision.⁷²⁰ However, we not agree with this view, as the provision relates to matters of jurisdiction and proof of the judgments in general, when both judgement and award deal with the same issue. This view is based on the following reasons:

- i. The condition does not apply in all circumstances where a national judgement conflicts with a foreign arbitral award. A judgment only enjoys priority of execution over a foreign arbitral award if made before the award. This means that if the award was made before the judgement it enjoys priority of execution over the judgment.
- ii. The same provision also applies in conflicts between national judgments in these States, e.g. in Kuwait Article 82 of Code of Civil and Commercial Procedure provides that: “A plea that the case may not be heard on the grounds that it has already been decided may be adduced at any stage of the proceedings and the court will render judgment with respect thereto on its own initiative”.⁷²¹

In order to verify this condition, the court should make sure that conflict between a foreign award and national judgement has fulfilled the conflict conditions, i.e. the foreign award was the subject of a previous judgement rendered on the merits between

⁷¹⁹ See, in Kuwait Article 199 (d) of the Code of Civil and commercial Procedure, in Bahrain Article 252 (4) of the Code of Civil and commercial Procedure, in Oman Article 352 (d) of Code of Civil and Commercial procedure, in Qatar under Article 380 (4) of Code of Civil and Commercial procedure, and in the UAE under Article 235 (d) of Code Civil Procedure.

⁷²⁰ See, Alsmidan, A., op. cit. p.84; Hassan, A., ‘Execution of foreign judgements in the UAE’, (2002) *Arab Law Quarterly*, p.211.

⁷²¹ See also, in Bahrain Article 30 of the Code of Civil and Commercial Procedure, in Oman Article 111 of the Code of Civil and Commercial Procedure, in Qatar Article 72 of the Code of Civil and Commercial Procedure, and in the UAE Article 92 of the Code of Civil Procedure.

the same litigants and pertaining to the same rights. Besides this, the provision does not indicate whether the previous judgement should have become *res judicata* in order to enjoy priority of execution over a foreign arbitral award or any other judgment. Nevertheless, according to the general principles that govern the concept under the national law, that judgement should have become final.⁷²²

By contrast under the Convention on the Enforcement of Judgement Delegations and Judicial Notes in the GCC States enforcement shall be refused if the arbitral award is the subject of a suit pending before any court in the State which was instituted on a date prior to the submission of the dispute to the arbitral tribunal.⁷²³

5.3.6 That award does not conflict with public policy

The sixth condition for the recognition and enforcement of a foreign arbitral award under the laws in Kuwait, Bahrain, Qatar, Oman, and the UAE is that the enforcing court should verify that the award “does not contain anything which is in violation of morality or public order in these States.”⁷²⁴

Breach of rules of public policy is grounds for refusing enforcement and setting aside awards in every jurisdiction.⁷²⁵ It is also provided for in the New York Convention under Article V (2) (b), in the Riyadh Convention under Article 37 (e), in the Arab League Convention under Article 3 (e), and in the Convention on the Enforcement of Judgement Delegations and Judicial Notes in the GCC States under Article 2 (a).

Under this condition, if a foreign arbitral award conflicts with the public policy or morality of these States, the court should refuse to enforce the award of its own motion. The provision uses the terms “morality” and “public order” as if they had different meanings, whereas term morality” is part of concept of public order.⁷²⁶

⁷²² See, Explanatory Memorandum of Evidence Law in Kuwait referring to Article 52.

⁷²³ See, The Convention on Enforcement of Judgement Delegations and Judicial Notes in the GCC States, Article 2 (d).

⁷²⁴ See, in Kuwait Article 199 (d) of the Code of Civil and Commercial Procedure, in Bahrain Article 252 (4) of the Code of Civil and Commercial Procedure, in Qatar Article 380 (4) of the Code of Civil and Commercial Procedure, in Oman Article 352 (d) of the Code of Civil and Commercial Procedure, and in the UAE under Article 235 (e) of the Code of Civil Procedure.

⁷²⁵ See Tweeddale, A. and K., op. cit p.425.

⁷²⁶ See, Alsmidan, A., op. cit. p.85.

The concept of public policy is not defined by a particular law in the GCC States. Several questions therefore arise in this regard. Is there a definition of public policy? Is there a distinction between domestic and international public policy and do the courts in the GCC States apply it? What examples are given by the GCC States? Do the GCC States' courts refuse enforcement when a foreign award is contrary to *Sharia*? All of these questions will be answered at length in Chapter Seven, which deals with grounds for refusal of the enforcement of foreign arbitral awards.

5.3.7 That the award has been issued in a matter arbitrable under one of these States' laws

The seventh condition for the recognition and enforcement of a foreign arbitral award under the laws in Kuwait, Bahrain, Qatar, Oman, Saudi Arabia, and the UAE is that the enforcing court should verify "that the award must have been rendered in a matter which may be the subject of arbitration, in accordance with the laws of these States."⁷²⁷

A similar provision is found under Article V (1) (b) of the New York Convention, in the Riyadh Convention under Article 37 (a), and in the Arab League Convention under Article 3 (a).

Under this text, if the national court in the GCC States finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of the country of the enforcing court, enforcement of a foreign arbitral award must be refused. If there not the case, it would open the door to the circumventing of national laws by submission of the disputes to a foreign arbitral tribunal.⁷²⁸

Generally, the provisions that regulate arbitration in the GCC States agree with the general principle which sets out that arbitration is not allowed in matters which cannot be subject to compromise;⁷²⁹ although the laws in the GCC do not categorise matters in

⁷²⁷ See, in Kuwait Article 200 of the Code of Civil and Commercial Procedure, in Bahrain Article 253 of the Code of Civil and commercial Procedure, in Qatar Article 381 of the Code of Civil and commercial Procedure, in Oman Article 353 of the Code of Civil and Commercial Procedure, and in the UAE under Article 236 of the Code of Civil Procedure.

⁷²⁸ See, Alsmidan, A., op. cit. p.85.

⁷²⁹ See, in Kuwait Article 173 of the Code of Civil and Commercial Procedure, in Bahrain Article 233 of the Code of Civil and Commercial Procedure, in Qatar Article 190 of the Code of Civil and Commercial Procedure, in Oman Article 11 Law of Arbitration in Civil and Commercial Matters, in the UAE Article 203 (4) of the Code of Civil Procedure, and in Saudi Arabia Article 2 of Arbitration Regulation.

which compromise cannot be reached. Yet matters relating to bankruptcy,⁷³⁰ trademarks,⁷³¹ commercial agency,⁷³² criminal law,⁷³³ and labour law⁷³⁴ should not be referred to arbitration.⁷³⁵

5.3.8 That the award has become enforceable in the country where it was made

The eighth condition for the recognition and enforcement of a foreign arbitral award under the laws in Kuwait, Oman, and the UAE is that the enforcing court should verify “that a foreign arbitral award must be enforceable in the country wherein it was rendered.”⁷³⁶

In order to understand correctly the meaning of this condition we suggest reading this condition with the condition which requires “that a foreign arbitral award has become a *res judicata* according to the law of the country in which award was made.” This means that legislators in Kuwait, Oman, and the UAE exceed the requirements for a foreign arbitral award becoming final. One writer has said that the term “enforceable” may ultimately be conducive to requiring a first *exequatur* from the court where the award was made.⁷³⁷ However, in the researcher’s opinion obtaining a first *exequatur* in some countries is not enough to deem an arbitral award to be enforceable as, for example, some countries stipulate having a “form of execution” which is usually made by the Registry of the Court rendering the *exequatur*.⁷³⁸ Therefore the meaning of this

⁷³⁰ See Article 557 of the Commercial Code in Kuwait,

⁷³¹ See Article 92 of the Commercial Code in Kuwait,

⁷³² See Article 285 of the Commercial Code in Kuwait, in the UAE the Code of the Organisation of Commercial Agencies, as well as the Dubai Cassation Court Decisions No. 221 of 20/30/1994, No. 293 of 1991, and the Federal Supreme Court in Abu Dhabi No. 270 of 14/5/1995, in Saudi Arabia Commercial Agencies Act and the Implementation Rules for this Act were published on 24/5/1401(H).

⁷³³ See, El-Ahdab, A. *Arbitration with Arab Countries*, p. 517 and 719

⁷³⁴ See Bahrain Cassation Court Decision No. 143,158 of 4/12/1994.

⁷³⁵ In Chapter Seven, under the heading Non-Arbitrability I will attempt to give more analysis of the meaning of compromise in the GCC laws and the matters that may arise in the GCC States.

⁷³⁶ See, in Kuwait Article 200 of the Code of Civil and Commercial Procedure, in Oman Article 353 of the Code of Civil and Commercial Procedure, and in the UAE under Article 236 of the Code of Civil Procedure.

⁷³⁷ See, Saleh, S, *Commercial Arbitration in the Arab Middle East Shari’a, Lebanon, Syria, and Egypt*, Second Edition, (Oxford and Portland, Oregon) , p.130.

⁷³⁸ See, e.g. in Kuwait under Article 190 of the Code of Civil and Commercial Procedure stipulated that “execution may not be enforced except pursuant to a copy of the writ of execution, which must bear the following form of execution: The authority that will be assigned to carry out the execution must proceed with it when an application to that effect has been made to it; every authority shall render assistance in the enforcement of the execution, even where the use of force is necessary, when request, in accordance with the law”. The form of Execution is usually marked in behind *exequatur*.

condition should include all procedures that should be followed when awards become final in order that an award be enforceable in the country where it was made, whether these procedures are taken by the Court or other competent authorities. Consequently, if the enforcing party brought an *exequatur* that was rendered in the country where the award was made without supplying the appropriate form of execution from the same country, the courts in Kuwait, Oman, and the UAE should refuse enforcement of foreign award.

In addition, under this condition, if the enforcing party has supplied the national court in these States with all the evidence that shows he has fulfilled all the requirements for the award to become enforceable in the country where the award was made, the question arises as to whether this is enough to meet this condition. It might be not enough in a hypothetical case. For example, this could be the case if the enforcing party sought to enforce an award in Kuwait or Oman or the UAE only under the national provisions that govern a foreign arbitral award in these states, with all the evidence that is required under national law having been supplied including the *exequatur* (which was rendered in the absence of losing party as the national law of the country where the award was made does not require service the defendant in cases where the *exequatur* form is used), then later the defendant brought an objection against the *exequatur* before the same court that rendered the *exequatur* and it ordered a stay of execution, following which the losing party supplied the enforcing court with evidence showing that award was not enforceable in the country where the award was made. In such a case the court could not grant enforcement even though the enforcing party had fulfilled all conditions when filing the application. This means that another condition could arise regarding a foreign arbitral award not being suspended in the country where it was made.⁷³⁹ Consequently, if the losing party obtained such evidence, he could during the course of the hearing

⁷³⁹ It appears this is linked to Article V(1)(e) of the New York Convention, where enforcement may deny if “the award 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”. Although the provision of the New York convention appear more strict, however this is not necessarily how it is applied, Courts in some States will enforce an arbitral award even if it has been set aside on the country where the award was made. See, Redfern, A., and Hunter, M., op. cit. para 10-46.

plead before a trial court that the award was not enforceable where it was made, even if the court of first instance had granted enforcement.⁷⁴⁰

It could therefore be extremely difficult to enforce a foreign arbitral award in Kuwait, Oman, and the UAE, as the national court under this condition could not grant enforcement if the losing party supplied any evidence showing that the award was not enforceable where it was made. This could be based on a malicious action being brought by the losing party in the country where the award was made, as the national courts do not have the authority to re-examine the merits of the award.⁷⁴¹

5.3.9 Other conditions exclusive to Oman law

The last conditions for the recognition and enforcement of a foreign arbitral award can be found in the law of Oman, which requires that the enforcing court should verify that the award “has not been issued on the basis of a fraud”⁷⁴² and also that a foreign award “does not include a request on the basis of a breach of the laws applicable in the Sultanate.”⁷⁴³

Regarding the first condition, which stipulates that a foreign arbitral award “has not been issued on a fraud,” it should first be emphasised that verification under this condition does not permit the Omani Court the possibility of re-examining the merits of a foreign award. However, it might require the Omani Court to look into the foreign award if a plea arises in this regard in order to grant enforcement.⁷⁴⁴

Omani law does not give a definition of the term “fraud,” and this has been absent from the Civil Code until now. However, according to the Code of Civil and Commercial Procedure, fraud is mentioned as being one of the exceptional methods for challenge by a Request of Reconsideration where a party has committed fraud, which has tended to affect the judgement.⁷⁴⁵ One writer says that ‘fraud’ would appear to mean fraudulent

⁷⁴⁰ In the absence of an applicable international convention, the court must decide on the request of enforcement in accordance with the principle of reciprocity. Before the UAE adopted the New York Convention in 2006 the above hypothetical case existed between France and the UAE, as there was no treaty or convention between them.

⁷⁴¹ See Chapter three

⁷⁴² See the Code of Civil and Commercial Procedure, Article 352 (a).

⁷⁴³ See the Code of Civil and Commercial Procedure, Article 352 (c).

⁷⁴⁴ See Chapter three

⁷⁴⁵ See the Code of Civil and Commercial Procedure, Article 232 (a).

behaviour knowingly committed by one party in the action towards his opponent during the proceedings, by changing the facts in such a way that the outcome of the case was affected.⁷⁴⁶

The Omani Court when dealing with the investigation of a question of fraud which affects foreign arbitral awards suggests ensuring the existence of three conditions in order to deny enforcement. These are (i) that fraud affects the result of an arbitral award; (ii);⁷⁴⁷ the fraud was exercised by the party in whose favour the award was issued or by his legal representative or by a third party, due to the general expression that an award “has not been issued on a fraud”;⁷⁴⁸ (iii) the losing party could not have known the truth throughout the entire proceedings.⁷⁴⁹

The means for fraud can be by speech or by action. Several examples can be given of fraud, e.g. the theft of the other party’s documents, bribing an opponent’s attorney or witnesses or exerting illegal pressure on them, intercepting an opponent’s correspondence and providing the court with the wrong address for the opponent’s correspondence and providing the court with the wrong address of the opponent for serving him with notices.⁷⁵⁰

The second condition stipulates that a foreign arbitral award “does not include a request on the basis of a breach of the law of the laws applicable in the Sultanate.”⁷⁵¹ The meaning of this expression is not clear, in particular if we take into account that conditions for enforcement in Oman include other conditions which stipulate that a foreign arbitral award “does not contain anything which is in violation of morality or public order.”⁷⁵² This suggests that the Omani legislator aims to be stricter in enforcing foreign awards than violation of morality or public policy. The question arises as to

⁷⁴⁶ See, Haddad, Hamza, *Enforcement of Foreign Judgments and Awards in Jordan and Iraq*, A lecture addressed to the IBA Conference of Bahrain (5 – 8/3/1989). See also Article 552 of the Civil Code in Kuwait, Article 125 (2) of the Civil Code in Egypt, and Article 185 of Civil Code in the UAE.

⁷⁴⁷ This is based on the Article 232 of the Code of the Civil and Commercial procedure which it stipulates that a fraud is a basis for challenging a judgment.

⁷⁴⁸ See the Code of Civil and Commercial Procedure, Article 352 (a).

⁷⁴⁹ This is based on the general principles that govern challenges based on fraud. See, e.g. the Egypt Court of Cassation decisions No 4809 (Judicial year 62) of 21/4/1994, and decision No 589 (Judicial year 52) of 14/1/19986. These state that if it is proved that the defendant had known of the behaviour of his opponent and did not mention it, there is no right to object

⁷⁵⁰ See, Haddad, Hamza, *Enforcement of Foreign Judgments and Award in Jordan and Iraq*, A lecture addressed to the IBA Conference of Bahrain (5 – 8/3/1989).

⁷⁵¹ See, the Code of Civil and Commercial Procedure, Article 352 (c).

⁷⁵² See, the Code of the Civil and Commercial procedure, Article 352 (e).

what extent a breach of Omani law will be a bar for the enforcement of foreign awards. Notwithstanding that the words used might lead to a wide application, we suggest that this condition be limited to a breach of the imperative rules under the law of Oman, otherwise it will result in an unacceptable situation. In the case of a foreign arbitral award including a breach of supplementary rules we presume that this would not be grounds to deny the enforcement. It is certain that the Omani courts under this condition do not have the discretionary power to give narrow interpretations regarding the concept of public policy in Oman.

Finally, it can be observed that Omani law does not lay down the same provisions with regard to the conditions governing the enforcement or challenge of a national award. In addition, no similar provision can be found in the laws of the GCC States or the conventions.

In conclusion, there is no doubt that with this condition, Omani legislators in an indirect way set the requirement that arbitrators apply Omani law as the applicable law governing the dispute of arbitration.

5.4 Summary

This chapter has shown that the evidence that must be supplied by the enforcing party for the recognition and enforcement of a foreign award in the GCC States differs according to whether the enforcement sought according to the Convention or the national law.

It has been found that the evidence required for the enforcement of Convention awards is not the same. It can be seen that the New York Convention requires reasonable evidence where it refers to the original arbitral award or a copy thereof, the original arbitral agreement or a copy thereof, and a translation if they are not written in Arabic, as does the Riyadh Convention, while the Arab League Convention and the Convention on the Enforcement of Judgement Delegations and Judicial Notes in the GCC States require more evidence to be supplied for the enforcement of awards. However, under the charter of the GCC Commercial Arbitration Centre and the ICSID the only evidence that must be supplied is the arbitral award.

The aforementioned evidence required by relevant regimes must be submitted by the winning party, and this is considered to be the only condition that is required for the enforcement of an arbitral award under relevant Conventions. Moreover, when the enforcing party has submitted evidence, this establishes a *prima facie* case for enforcement, and the burden of proof shifts to the other party if he refuses the proof of enforcement on one of the grounds mentioned for the refusal of enforcement under the relevant conventions. In addition, a failure to supply the evidence “at the time of the application” under the Article IV of the New York Convention will not cause the application to be refused, as the enforcing party can complete the evidence during progress.

In contrast, under the GCC law, it has been noted that unlimited evidence may be supplied, although however the minimum evidence consists of the arbitral award and the arbitration agreement, the laws relating to arbitration, the *exequatur* from where an award was made, and translation if these if they are not written in Arabic.

In addition, it has been found that only national laws provided conditions for the recognition and enforcement of a foreign arbitral award not found under the conventions. The national courts in these states are never entitled to grant enforcement of a foreign arbitral award unless these conditions are verified. The national laws have all adopted practically the same conditions, although in some respects they take a different view of these conditions. More specifically, these conditions are: (i) reciprocity; (ii) that the arbitral tribunal had jurisdiction; (iii) that the parties were duly notified and legally represented; (iv) that the award has the authority of *res judicata* according to the law applicable to the award; (v) that the award does not conflict with any judgement issued in one of these States; (vi) that the award does not conflict with public policy; (vii) that the award has been issued in a matter arbitrable under one of these States’ laws; (viii) that the award has become enforceable in the country where it was made; (ix) certain other conditions under Omani law providing that an award must not include a request made on the basis of a breach of the laws applicable in the Sultanate, which might lead indirectly to the requirement that parties have to choose Omani law as the applicable law governing disputes, otherwise the enforcement will be refused.

Chapter Six

The grounds on which a respondent may apply to dismiss the application for recognition and enforcement of a foreign arbitral award

6.1 Introduction

As we observed in the last chapter, although relevant regimes in GCC States for the recognition and enforcement of foreign arbitral awards establish a *prima facie* case for enforcement when the enforcing party has submitted the required evidence, they also allow the losing party to apply for dismissal of the application for recognition and enforcement of awards on specified grounds. These grounds of refusal are set forth in Article V (1) of the New York Convention, Article III of the Arab League Convention, and Article 37 of the Riyadh Convention. Similar provisions can be found in Article II of the Convention on the Enforcement of Judgement Delegations and Judicial Notices in the GCC States, Article 36 (2) of the Arbitral Rules of Procedure for the GCC Commercial Arbitration Centre, as well as national laws governing the enforcement of foreign arbitral awards in the absence of relevant applicable conventions.

Three general points may be made. Firstly, the grounds for refusal of recognition and enforcement set out by the relevant regimes are generally considered to be exhaustive.⁷⁵³ Secondly, the grounds do not allow enforcing courts to review the merits of foreign arbitral awards for possible mistakes in fact or law by the arbitral tribunal.⁷⁵⁴

⁷⁵³ See e.g., van den Berg, A.J., *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, 265; Davidson, F., op cit p.392; Davidson, F., *International Commercial Arbitration: Scotland and the UNCITRAL Model Law*, p.222; Redfern, A., and Hunter, M., op cit para 10-33; Di Pietro, D. and Platte, M., op cit.p.135; Gaillard, E. and Di Pietro, D., op cit. para 251; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-66; Born, G., op cit. p.2736; Tweeddale, A. and K., op cit. p.412; Garnett, R. and others, op cit. p.102. For Court decisions see, e.g., *Yusuf Ahmed Alghanim & Sons v Toys "R" Uss Inc* 126 F3d 15 (US Court of Appeals 2 nd Circ 19970) 23; *Norrsk Hydro ASA v The State Property Fund of Ukraine* 2002 WL 31476341 (UK QBD Admin Ct) para 17; *Kaaraha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F3d 274 (US Court of Appeals 5th Circ 2004) 288; *Societe d'Etudes et de Commerce SA v Weyl Beef products BV* (2001) XXIV YBCA 827 (Netherlands Court of First Instance 2000) 828; *X v X* (2006) XXXI YBCA 673 (German Court of Appeal, 28 July 2005) 675; *SG Industrial Finance AG v OAO Foreign Trade Enterprise Stankoimport* (2008) XXXIII YBCA 683 (Moscow District Court, 29 September 2005) 685.

⁷⁵⁴ See Chapter Three

Finally, a party who alleges that an award is unenforceable bears the burden of proof of establishing that one of the grounds exists.⁷⁵⁵ Many authors consider the last aspect to be one of the key changes made by the New York Convention, since the Geneva Convention 1927 had stipulated that the party seeking enforcement was required to prove the validity of the award.⁷⁵⁶

The provisions under the relevant regimes in the GCC States lay down different grounds for refusing enforcement, i.e. (1) incapacity; (2) invalidity of the arbitration agreement; (3) a party was not given proper notice or was unable to present its case; (4) the tribunal exceeded its jurisdiction; (5) improper composition of tribunal or defective procedure; (6) the award is not binding, or has been suspended or set aside. In the following sections, each of these grounds will be examined in depth separately.

6.2 Incapacity of a Party

The first ground on which the defendant may resist an application for the enforcement of a foreign arbitral award in the GCC States, is if he proves he was under some incapacity at the time the agreement was made. This defence is only available under the New York Convention and the Bahraini International Commercial Arbitration Law.

The New York Convention sets out that recognition and enforcement of an arbitral award may be refused if the defendant proves that “the parties to the [arbitration] agreement ...were, under the law applicable to them, under some incapacity.”⁷⁵⁷ Equally Article 36 (1) (a) (i) of the Bahraini International Commercial Arbitration Law states that recognition and enforcement may not be granted under the Convention (or the Bahraini International Commercial Arbitration Law, where applicable) if a party has shown lack of capacity, even if he/she has participated in the arbitral proceeding in full knowledge of this.⁷⁵⁸ However, under the principle of good faith, some GCC laws

⁷⁵⁵ See e.g., van den Berg, A.J., *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, p.264; Born, G., op cit. p.2718. See also *Parsons & Whittemore Overseas Co., Inc. v Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 973 (2d Cir. 1974).

⁷⁵⁶ See e.g., van den Berg, A.J., *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, p.264; Tweeddale, A. and K., op cit. p.413; Garnett, R. and others, op cit. p.103; Gaillard, E. and Savage, J., op cit. para 1673; Born, G., op cit. p. 2718.

⁷⁵⁷ See New York Convention Article V (1) (a).

⁷⁵⁸ See Davidson, F., *Arbitration*, p. 392.

provide that a party cannot rely on his own incapacity if the other party proceeded in good faith, as will be seen later.⁷⁵⁹

An arbitration agreement, like any contract, must be valid. Thus parties entering into an arbitration agreement must have legal capacity to do so.⁷⁶⁰ Usually, general contractual capacity is sufficient to allow someone to enter into an arbitration agreement, and national laws rarely impose restrictions on the capacity to enter into arbitration agreements.⁷⁶¹ However, in some cases that capacity may not exist, or may need approval by competent court or authority.⁷⁶²

While the issue of incapacity as a ground for refusing recognition and enforcement may arise at the end of an arbitration, it may equally arise at the beginning of the arbitration as a basis for a party asking a competent court to stop the arbitration.⁷⁶³

Several questions arise concerning this ground. First to what extent must a party lack capacity? Must he be entirely without capacity, or will diminished capacity suffice? Secondly, what law governs the issue of capacity? (iii) What sort of ‘parties’ are covered by the relevant provisions?

The first question arises due to the fact that the expression used in the Arabic text differs to that used in the English text. The latter uses the expression “under some incapacity,” which covers the complete incapacity or defective capacity, while the Arabic text refers only to ‘incapacity’.⁷⁶⁴ Under the GCC laws, in general, legal competence to enter into contracts differs according to the level of the capacity of the natural person, which means that the validity of a contract depends on the level of

⁷⁵⁹ This principle is also found in several jurisdictions, for example, CA Paris, Jan. 4, 1980, *Intercast v. Ets. Peschaud et Cie. International*, mentioned in Gaillard, E. and Savage, J., op cit. para. 470; Italian Corte di Cassazione, Jan. 15, 1992, *Privilegiata Fabbrica Maraschino Excelsior Girolamo Luxardo SpA v. Agrarcommerz AG*, XVIII Y.B.C.A. 427 (1993); see also the March 12, 1984 award of the Arbitral Tribunal of the Hamburg Commodity Exchange, *FR German buyer v. Thai seller*, XVI Y.B. C. A. 11 (1991).

⁷⁶⁰ See Redfern, A., and Hunter, M., op cit. para 3-25.

⁷⁶¹ *Ibid.*

⁷⁶² So the Saudi Arbitration law, Article 6 lays down that “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”, and Article 3 which provides that “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.” In France and Belgium, the capacity of public law Bodies to arbitrate is restricted - see Redfern, A., and Hunter, M., op cit. para 3-28.

⁷⁶³ See Redfern, A., and Hunter, M., op cit. para 3-25.

⁷⁶⁴ See http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/NYConvention.html

capacity of the person. These laws have three categories regulating the level of a natural person's capacity: (1) full capacity; (2) diminished capacity; (3) incapacity,⁷⁶⁵ with a person suffering from diminished capacity being entitled in certain circumstances to enter into a valid contract, as we shall see later. Clearly, the effect of this ground depends upon whether the issue of capacity is read according to the Arabic text or the English. If a party's request is examined under the Arabic text, enforcement will not be refused if he/she has only diminished capacity. Thus if the enforcing court applies the Arabic text there is less chance of enforcement being refused than under the English text.

The second question is under which law should a party's capacity be judged. The New York Convention refers to "the law applicable to parties" without any indication as to how this law would be determined. This question has not yet been clearly resolved in the context of international arbitration.⁷⁶⁶ However, the most obvious approach is to apply the law which is personal to the party concerned. Since the Convention gives no guidance on this point either, most authors have suggested that personal law is determined by reference to the conflict rules of the state in which enforcement is sought.⁷⁶⁷ These conflict rules vary from state to state. Generally, a physical person's personal law is either the law of their nationality (most civil law countries), or of their domicile or habitual residence (most common law countries), while for a legal person, it is the law of the country where its headquarters are located or it is incorporated.⁷⁶⁸

The personal law of physical persons, is determined by reference their nationality in Kuwait, Bahrain, Qatar, the UAE,⁷⁶⁹ Saudi Arabia and Oman. The personal law of

⁷⁶⁵ See Kuwait: Articles 84 to 146 of Civil Code; Bahrain: Articles 72 to 83 of Civil Code; Qatar: Articles 50 to 52 and 190 to 129 of the Civil Code; the UAE: Articles 85 to 88 and 157 to 175 of the Civil Transactions law; and Oman: Articles 138 to 157 and 143 (a) of the Personal Status law No 32 of 1997.

⁷⁶⁶ See Di Pietro, D. and Platte, M., op cit. p.144.

⁷⁶⁷ See e.g. Van den Berg, A.J., *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, p.276; Gaillard, E. and Savage, J., op cit. para 1695; Gaja, G., op cit. p.1; Poudret, J. and Besson, S., op cit. p.831; Anzorena, I., *The Incapacity Defence under the New York Convention* in Gaillard, E. and Di Pietro, D., (eds), op cit. p.632; Born, G., op cit. p.2785; Redfern, A., and Hunter, M., op cit. para 3-25.

⁷⁶⁸ See e.g., Van den Berg, A.J., *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* 276-277; Gaillard, E. and Savage, J., op cit. pp. 454-460; Poudret, J. and Besson, S., op cit. p.234; Anzorena, I., op cit. pp.633-635; Born, G., op cit. pp.556-557; Lew, J., Mistelis, L. and Kroll, S., op cit. para 6-51.

⁷⁶⁹ Kuwait: Article 33 of the Conflict Law No. 5 of 1961; Bahrain: Article 21 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 11 of the Civil Code; the UAE: Article 11(1) of the Civil Code.

juristic persons is the law of their place of headquarters.⁷⁷⁰ The exception is Bahrain. Bahraini law will only govern if a corporation was established in Bahrain, or has its headquarters there.⁷⁷¹

The third question relates to the type of “parties” are covered. Under the law of the GCC States, the issue of capacity depends on whether the party is a natural person or a juristic person. Although the scope of this study is confined to the enforcement of foreign awards in the GCC States, and the losing party is likely to a national of one of these states, it may be useful to focus on the provisions which govern the issue of capacity in the GCC States. Therefore, in the following section we will examine in detail the capacity of natural persons and then juristic persons.

6.2.1 Capacity of Natural Persons

The rules governing the capacity of natural persons can be found in the Civil Codes of Kuwait, Bahrain, Qatar, and the UAE) and in the Personal Status law of Oman. In Saudi Arabia the rules can be found under *Shari’a* law.

Those GCC states which have legal systems based on Civil law are generally influenced by *Shari’a* jurisprudence, which divides capacity into two categories. The first category is called *Ahliyyat Al-Wujub*, which signifies the capacity to acquire rights such as inheritance, but not to incur obligations. The second category is called *Ahliyyat Al-ida*, which signifies the capacity both to acquire rights and incur obligations.⁷⁷² In general, the Civil Codes in the GCC set out that every person of full capacity is competent to conclude a contract.⁷⁷³ In addition, the arbitration law in all GCC States provides that “Agreement to resort to Arbitration should not be deemed valid except by those who

⁷⁷⁰ Kuwait: Article 20 of the Civil Code; Qatar: Article 11 of the Civil Code; the UAE Article: 11 (2) of the Civil Transactions law.

⁷⁷¹ See Commercial Companies Law, Article 4.

⁷⁷² See Explanatory Memorandum of the Kuwaiti Civil Code; see also Al-Sanhori, A., *Alwaseet Fi Sharah Al-Qunoon Al-Madani (Commentary in Civil law)*, Vol. 1 (Dar Ihya’ Al-Turath Al-Arabi, Beirut) pp.266-268.

⁷⁷³ See e.g. Kuwait: Article 84 of the Civil Code; Bahrain: Article 72 of the Civil Code; Qatar: Article 49 of the Civil Code; the UAE: Article 157 of the Civil Transactions law; Oman: Article 138 of the Personal Status law.

have the legal capacity to dispose of their rights.”⁷⁷⁴ Thus parties must fall within *Ahliyyat Al-ida* to have capacity to arbitrate.

Before dealing with rules that restrict the capacity of natural persons, the distinction between the issue of capacity and defects of Consent (Mistake, Fraud, and Duress) should be clarified. The law of those GCC states whose legal system is based on Civil law (Kuwait, Bahrain, Qatar, and the UAE) distinguishes between these issues. In the case of the incapacity any contracts made by the person shall be deemed null.⁷⁷⁵ Therefore, a person of diminished capacity will not be prevented from invoking that diminished capacity, even if he had claimed to have capacity, or indeed had induced the belief that he had full capacity by fraud. In such cases, the only thing that the other party can do is request compensation if he has suffered loss.⁷⁷⁶

On the other hand, issues of defective consent such as Mistake, Fraud or Duress, only render an arbitration agreement voidable. So if a person had given consent to an arbitration agreement due to Mistake, Fraud, or Duress, the agreement remains valid until voided by the Court of Merits (Arbitral Tribunal). Thus issues resting on defective consent must be raised at the outset of the arbitration. If they are not, an enforcing court any GCC states will categorically refuse to entertain a defence based solely upon incapacity.

With regard to the restrictions which might relate to the legal competence to enter into an arbitration agreement, this issue involves a number of related factors, which will be examined below, as well as the issue that governs the trustee and attorney.

6.2.1.1 Factors Affecting Capacity

The Civil Codes of Kuwait, Bahrain, Qatar and the UAE and the Personal law in Oman contain almost identical provisions. There are three factors which affect the legal

⁷⁷⁴ Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 233 of the Code of Civil and Commercial Procedure; Qatar: Article 190 of the Code of Civil and Commercial Procedure; Oman: Article 11 of the Law of Arbitration in Civil and Commercial Disputes; Saudi Arabia: Article 2 of Arbitration of 1983; Saudi Arabia: Article 2 of the arbitration law and Article 2 of the Arbitration Regulation; and in the UAE: Article 203 (4) of the Code of Civil Procedure.

⁷⁷⁵ See Al-sanhuri, A., *Alwaseet Fi Sharah Al-Qunoon Al-Madani (Commentary in Civil law)*, Vol. 1, pp.271-272.

⁷⁷⁶ Kuwait: Article 97 (1) (2) of the Civil Code; Bahrain: Article 76 of the Civil Code; Qatar: Article 117 (2) of the Civil Code; the UAE: Article 175 of the Civil Transactions law.

capacity of a person to enter into an arbitration agreement: (i) age affecting capacity (infants, minors, age of majority); (ii) impediments to capacity (insanity or feeble-mindedness, imprudence or foolishness); (iii) restrictions and limitations on the capacity to enter into contracts (terminal illness, bankruptcy, criminal conviction).⁷⁷⁷

6.2.1.1.1 Capacity Affected by Age

The Civil Codes of Kuwait, Bahrain, Qatar, and the UAE and the *Shari'a* law set out three main categories relating to capacity based on age:

- i. An infant (*gher mumayyiz*): the Civil Codes of Kuwait, Bahrain, and the UAE provide that “every person who has not completed seven years of age is deemed to be irrational.”⁷⁷⁸ The same applies in Oman.⁷⁷⁹ Therefore, at this stage, a person lacks capacity and cannot contract⁷⁸⁰ other than through their natural guardian or tutor. The *shari'a* is to the same effect.⁷⁸¹

- ii. A minor (*mumayyiz*): according to the law of Kuwait, Bahrain, Qatar, Oman, and the UAE, a minor is deemed capable of discretion from the age of rationality until he attains the age of majority.⁷⁸² The same applies in *shari'a* law.⁷⁸³ At this stage the law deems that minors have incomplete capacity. They can validly enter transactions which are entirely advantageous to them, e.g. acceptance of bequests or gifts.⁷⁸⁴ Transactions to their complete detriment, e.g. loans and guarantees, are null. Transactions which may be advantageous or detrimental, e.g. sale or hire, are voidable in their favour unless permitted by the minor’s natural guardian, or ratified by the minor him/herself after attaining the age of

⁷⁷⁷ See Al-sanhuri, A., *Alwaseet Fi Sharah Al-Qunoon Al-Madani (Commentary on Civil law)*, Vol. 1, pp 272-287.

⁷⁷⁸ Kuwait: Article 86 (2) of Civil Code; Bahrain: Article 73 (b) of Civil Code; Qatar: Article 50 (2) of the Civil Code; and the UAE Article: 159 (3) of the Civil Transactions law.

⁷⁷⁹ Oman: Articles 141 (a) (1) and 143 (a) of the Personal Status law No 32 of 1997.

⁷⁸⁰ Kuwait: Article 86 (1) of Civil Code; Bahrain: Article 73 (a) of Civil Code; the UAE Article: 158 of the Civil Transactions law.

⁷⁸¹ See Saleh, S., *op cit.* p.22.

⁷⁸² Kuwait: Article 87 (3) of Civil Code; Bahrain: Article 75 of the Civil Code; Qatar: Article 51 of the Civil Code; Oman: Article 143 (b) of the Personal Status law; and the UAE: Article 87 of the Civil Transactions law.

⁷⁸³ See Saleh, S., *op cit.* p.22.

⁷⁸⁴ Kuwait: Article 87 (1) of Civil Code; Bahrain: Article 74 (1) of the Civil Code; Qatar: Article 111(1) of the Civil Code; the UAE: Article 159 (1) of the Transaction law; Oman: Article 144 (b) of the Personal Status law; Saleh, S., *op cit.* p.23.

majority.⁷⁸⁵ If the minor reaches the age of 18 in Kuwait and the UAE, 16 in Qatar, and 15 in Oman s/he may be permitted to manage all or some of their property, and this permission may be absolute or restricted.⁷⁸⁶ A permit in Kuwait and Qatar should be issued by their natural guardian or tutor in an official document, while in the UAE it must be issued by the court.⁷⁸⁷ It is submitted that arbitration belongs in principle to the third type of contract, so that an arbitration agreement entered into by a minor, will be voidable in his favour, unless permitted by his guardian or ratified by himself after attaining the age of majority. Thus if an arbitration agreement is made by a minor without relevant permission, an award against that minor could be refused on the grounds of Article V (1) (1) of the New York Convention.

- iii. Age of majority (*sinn al-rushd*): Every person who has attained the age of majority shall have full contractual capacity, unless prior to any contract a judgment had been made continuing guardianship or tutorship over their property, or unless they suffer an impediment to capacity.⁷⁸⁸ The age of majority is 21 in Kuwait, Bahrain, and the UAE, and 18 in Qatar and Oman.⁷⁸⁹ In Saudi Arabia there is no provision fixing the age of majority, and *Shari'a* law is followed in this regard. Under *Shari'a* law there is no fixed age of majority. Most *Shari'a* Schools define the age of majority as the age when the person reaches puberty.⁷⁹⁰ Puberty can be determined by significant natural signs, e.g. emission of seminal fluid for boys, and menstruation or pregnancy for girls.⁷⁹¹ If there are no apparent signs, or it is not possible to determine these signs, the age

⁷⁸⁵ Kuwait: Article 87 (2) of Civil Code; Bahrain: Article 74 (2) of the Civil Code; Qatar: Article 111(2); the UAE: Article 159 (2) of the Transaction Law; Oman: Article 144 (c) of the Personal Status law; Saleh, S., op cit. p.23.

⁷⁸⁶ Kuwait: Article 88 of Civil Code; Qatar: 112 of the Civil Code; the UAE: Article 160 (1) of the Transaction Law; Oman: Articles 145 (a) and 152 of the Personal Status law No 32 of 1997.

⁷⁸⁷ Kuwait: Article 90 of Civil Code; Qatar: Article 112 of the Civil Code; UAE: Article 162 of the Transaction Law.

⁷⁸⁸ Kuwait: Article 96 (1) (3) of Civil Code; Bahrain: Article 72 of the Civil Code; Qatar: Article 49 of the Civil Code; the UAE: Article 85 (1) of the Transaction Law.

⁷⁸⁹ Kuwait: Article 96 (2) of Civil Code; Bahrain: Article 13 of the law of Curatorship of Possessions; Qatar: Article 49 (2) of the Civil Code; the UAE: Article 85 (2) of the Transaction Law; Oman: Article 139 of the Personal Status law No 32 of 1997.

⁷⁹⁰ See Saleh, S., op cit. p.24.

⁷⁹¹ *Ibid.*

of puberty in the Hanafi, Shafi, and Hanbali Schools is 15 in the Hegira calendar,⁷⁹² while in the Maliki School the age of majority is always 18.⁷⁹³

Finally, it should be noted that all dates in Kuwait, Bahrain, and Qatar are computed according to the Christian calendar, while Oman and the UAE follow the Hegira calendar.⁷⁹⁴

6.2.1.1.2 Impediments to capacity

Impediments to capacity may manifest themselves before the person attains the age of majority, leading to a judgment continuing guardianship or tutorship. On the other hand, they may manifest themselves after attainment of the age of majority, in which case the person becomes incapacitated or has incomplete capacity. This arises in four circumstances:

- i. Insanity: an insane person has no capacity and all his contacts are void, subject to certain exceptions.⁷⁹⁵ The Kuwaiti Civil Code indicates that contracts a person who is not totally insane are deemed valid if made during a lucid period.⁷⁹⁶ According to the Civil Codes of Qatar and Bahrain, a contract made before the registration of the sentence of interdiction is null only if the state of insanity was a matter of common notoriety at the time the contract was entered into, or if the other party had knowledge thereof.⁷⁹⁷ In Oman and the UAE, disposals during a lucid period and before the registration of the sentence of interdiction are deemed valid.⁷⁹⁸ The *Shari'a* Law says that insane acts are null, but the Maliki School requires the prior issue of a judgement, in order for insanity to be deemed incapacity.⁷⁹⁹

⁷⁹² *Ibid.*

⁷⁹³ *Ibid.*

⁷⁹⁴ Kuwait Article 8 of the Civil Code; Bahrain: Article 8 of the Civil Code; Qatar: Article 9 of the Civil Code; Oman: Article 280 of the Personal Status law; in the UAE while the Transactions law follows the Christian calendar, in the issue of capacity the Hegira calendar is followed - Articles 9 and 85 (2).

⁷⁹⁵ Kuwait: Article 98 (1) of Civil Code; Bahrain: Article 78 of the Civil Codes; Qatar: Article 119 of the Civil Code; Oman: Article 141 (a) (2) of the Personal Status law; the UAE: Article 168 (1) of the Transaction Law.

⁷⁹⁶ See Article 98 (2) of Kuwaiti Civil Code.

⁷⁹⁷ Bahrain: Article 78 of the Civil code; Qatar: Article 119 (2) of the Civil Code.

⁷⁹⁸ Oman: Article 156 (a) of the Personal Status law; the UAE: Article 175 (1) of the Personal Status law No 28 of 2005.

⁷⁹⁹ See Saleh, S., op cit. p.22.

- ii. Feeble-mindedness: in Kuwait and the UAE, disposals made by a feeble-minded person are governed by the same provisions as those for a rational minor,⁸⁰⁰ while in Bahrain and Qatar a feeble-minded person is governed by the provisions for an insane person.⁸⁰¹ In Oman, such provisions are the same as those for a rational minor, but contracts made prior to promulgation of the interdiction order are deemed valid unless they have been executed in collusion or in anticipation of interdiction (i.e. in order to ward it off).⁸⁰²
- iii. Imbecility: disposals made by imbeciles after promulgation of the order of interdiction are governed by the same provisions as those for a rational minor, whilst disposals made prior to promulgation of the interdiction order are deemed valid, unless they have been executed in collusion or in anticipation of interdiction (i.e. in order to ward it off).⁸⁰³ The *Shari'a* also takes the same view.⁸⁰⁴

6.2.1.1.3 Barriers to capacity

The laws of the GCC States recognise several barriers which may affect the competency of a person over the age of majority to enter into an arbitration agreement.

- i. Physical disability: the Civil Codes of Kuwait, Qatar and the UAE provide that “if a person suffers from severe physical incapability which makes it difficult for him to apprehend the circumstances of contracting, or makes it difficult to express his will (intention), particularly if he is a deaf mute, deaf-blind, or a blind mute, the court may appoint a legal assistant to aid him.” In addition, the contracts of such a person after promulgation of the order to assist him will be voidable if made without legal assistance.⁸⁰⁵ Consequently, if a person in such a case enters into an arbitration agreement without legal assistance, it would be

⁸⁰⁰ Kuwait: Article 99 of the Civil Code; the UAE: Article 170 (1) of the Transaction Law.

⁸⁰¹ Bahrain: Articles 77 and 78; Qatar: Articles 118 and 119 of the Civil Code; UAE: Article 169 of the Civil Code.

⁸⁰² Oman: Article 156 (c) of the Personal Status law.

⁸⁰³ Kuwait: Article 101 of Civil Code; Bahrain: Article 79 of the Civil Code; Qatar: Article 120 of the Civil Code; Oman: Article 156 (d) of the Personal Status law; the UAE: Article 170 of the Transaction Law.

⁸⁰⁴ See Saleh, S., op cit. p.24.

⁸⁰⁵ Kuwait: Articles 107-109 of the Civil Code; Qatar: Article 127 of the Civil Law; the UAE: Article 173 of the Transaction Law.

open to him at argued that any award should not be enforced under Article V (1) (a) of the Convention due to his lack of capacity.

- ii. Bankruptcy: the Commercial Codes of Kuwait, Oman, Qatar, and the UAE provide that “From the date the adjudication of bankruptcy is issued, the bankrupt shall be deprived of the right to dispose of and administer his property.”⁸⁰⁶ The same is true in Bahrain.⁸⁰⁷ Therefore, bankrupts person do not have the capacity to enter into an arbitration agreement after the date of bankruptcy, and if they do so, can rely on lack of capacity to resist enforcement of any award under Article V (1) (a) of the Convention. By contrast, in Saudi Arabia a bankrupt is may exercise his rights after obtaining an authorisation from the judge supervising the bankruptcy.⁸⁰⁸ In view of the differences in these provisions, how would an enforcing court deal with an arbitral award relating to a party who had been rendered bankrupt in another state? The critical issue is surely that the capacity of parties to enter arbitrate is governed by their personal law and, as seen above, in the GCC that law is determined by reference to the law of the country of which the person is a national. Therefore, if a party had been rendered bankrupt in Saudi Arabia but had judicial authorisation to enter into arbitration, an application for enforcement of the arbitral award could not be resisted on the basis of lack of capacity, for example, in Kuwait, even though such a person would not have capacity if he was a Kuwaiti citizen.
- iii. Criminal Conviction: The laws of Bahrain and the UAE indicate that any contract made by a convict during a period of imprisonment is null. Any contract must made by a curator who is appointed by the court, his authority being regulated by provisions dealing with curators for interdicted persons.⁸⁰⁹ This means that the law removes the capacity of convicts during periods of imprisonment. Thus if they purport to enter an arbitration agreement, such contract will be considered null and they may resist an application for

⁸⁰⁶ Kuwait: Article 577 (1) of the Commercial Code; Qatar: Articles 626 and 628 of the Commercial Code; Oman: Article 604 of the Commercial Code; the UAE: Articles 683 and 685 of the Commercial Transactions Code.

⁸⁰⁷ Bahrain: Articles 33 and 34 of the Bankruptcy law No. 11 of 1987; Saudi Arabia: Article 5 of the Bankruptcy law issued by Royal Decree No (M/16) on 4/9/1416 H.

⁸⁰⁸ Article 5 of the Bankruptcy Law No M/16 dated 4/9/1416 H.

⁸⁰⁹ Bahrain: Article 59 of the Decree law No (15) of 1976 on Penal Law; the UAE: Article 76 of the Penal law.

enforcement of the arbitral award on the basis of lack of capacity under Article V (1) (a) of the New York Convention. However, in Kuwait and Qatar, a criminal conviction only deprives a person of capacity to work as a contractor with the state, so that capacity to arbitrate is unaffected.⁸¹⁰

6.2.1.2 Trustees

In Kuwait, Bahrain, Oman, Saudi Arabia, and the UAE, trustees are forbidden to enter into arbitration agreements unless authorised to do so by the competent Court, or by the Board of Curatorship in Bahrain.⁸¹¹ But in Qatar, trustees can enter into arbitration agreements without permission.⁸¹²

6.2.1.3 Attorneys

In Kuwait, Bahrain, and Qatar,⁸¹³ an attorney needs a special power of attorney in order to enter into an arbitration agreement. If this is done without power of attorney or an agency made in general terms without any specification therein, then the principal can rely on the lack of capacity of the attorney to resist enforcement of a subsequent award under Article V (1) (a) of the Convention. There is no such provision the UAE. Yet in 1994 the Dubai Court of Cassation decided a power of attorney did not authorise entry into arbitration agreements.⁸¹⁴

Finally, according to the Civil Codes of Qatar and the UAE, in a pecuniary transaction concluded and having effect in these States, should one of the parties be a foreigner subject to an incapacity which is not apparent and cannot be easily detected, the principle of good faith dictates that the foreigner cannot rely on his own incapacity to resist enforcement.⁸¹⁵

⁸¹⁰ Kuwait: Article 68 (1) of the Penal Law No 16 of 1960; Qatar: Article 66 (1) of the Penal law.

⁸¹¹ Kuwait: Article 137 (2) of the Civil Code and the Article 7 of the Public Authority for Minors law No 67 of 1983; Bahrain: Article 30 (3) of the law Curatorship of the possessions; Saudi Arabia: Article 2 of the Arbitration Regulation; Oman: Article 182 (11) of the Personal Status law; the UAE: Article 225 (11) of the Personal Status law.

⁸¹² Bahrain: Article 82 of the Civil Code; Qatar: Article 126 of the Civil Code; the UAE: Article 174 of the Civil Code.

⁸¹³ Kuwait: Article 702 (1) of the Civil Code; Bahrain: Article 644 (a) of the Civil Code; Qatar: Article 712 (1) of the Civil Code.

⁸¹⁴ See, Lew, J. D.M., Loukas, Stefan, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003) Para 26-74.

⁸¹⁵ Qatar: Article 11 of the Civil Code; the UAE: Article 11 (1) of the Civil Transaction Code.

6.2.2 Juristic Persons

The issue of incapacity of juristic persons, unlike the incapacity of natural persons, involves the examination of two factors. The first relates to the existence of that capacity, and the second relates to who is authorised to enter into an arbitration agreement.

The general rule in the GCC States is that when a juristic person is established, it enjoys, within the limits established by law, all legal rights, with the exception of those which are inherent to the nature of an individual. As a result, the law sets out that the juristic person has its own: (a) property; (b) legal capacity; (c) right to sue; (d) domicile. The law also requires that a juristic person has a representative to express its will.⁸¹⁶ The capacity of juristic persons in the GCC States is mainly governed by their constitution or the laws regulating the activities of juristic persons.⁸¹⁷

The concept of juristic persons is a wide one, which includes any legal entity that is authorised by law. For example, according to the Civil Code of Qatar and the Code Civil Transaction of the UAE, the juristic person can be: (i) The state, municipalities, and other administrative units under conditions determined by law; (ii) Administrations, departments, other public bodies and public institutions to which the law has granted the status of juristic persons; (iii) Islamic communities which the state has recognized as juristic persons; (iv) Entails (*Waqf*);⁸¹⁸ (v) Commercial and civil corporations; (vi) Associations and private foundations established in accordance with law; (vii) Any group of persons or properties recognized as juristic persons by the law.

Arabic jurists have divided the juristic personality into two main types.⁸¹⁹ The first is legal personalities of public law, and includes all state bodies e.g. ministries, public

⁸¹⁶ Kuwait: Articles 18- 21 of the Civil Code; Bahrain: Article 18 of the Civil Code; Qatar: Article 54 of the Civil Code; Oman: Articles 2-3 of the Sustain Decree No.116/91Promulgating the system of Public Bodies and Institutions; the UAE: Article 93 of the Civil Transaction Code.

⁸¹⁷ See Kuwait: Article 19 of the Civil Code; Qatar: Article 54 (2) (b) of the Civil Code; Oman: Articles 2-6 of the system of Public Bodies and Institutions; UAE: Article 94 of the Civil Transaction Code.

⁸¹⁸ *Waqf* is withholding one's property to spend its revenue on regularly fulfilling certain needs depending on the choice and conditions made by the '*waqef*' or the person who owns the property. It is said: I endowed something i.e. withheld it, gave it as charity or donated it eternally for Allah. The plural is *Waqfs*. See e.g., Awqaf General Trust, Sharjah. <<http://www.awqafshj.com/indexEnglish.php>>

⁸¹⁹ See, e.g. Zakee, M., *Duroos Fi Mugademat Al-Drassat Al-Ganonyi (Essays in the Introduction of Legal Studies)*, (2nd Edn, Cairo 'in Arabic'), pp.486-496.

bodies, public organisations, municipalities. The second is juristic persons of private law, e.g. societies, association, corporations. Each will be examined separately below.

6.2.2.1 Juristic persons of private law

Although the scope of this study does not permit a detailed examination of all the kinds of capacity of juristic persons, it is worth focusing on the capacity of corporations.

According to the law in Kuwait, Bahrain, Qatar, Oman, and the UAE, the issue of the capacity of corporations is mainly governed by the law of place of their incorporation and the place of their headquarters, or business. The law also applies to corporations whose headquarters are abroad, but which carry out activities and have local management in these States.⁸²⁰ However, Saudi law only governs the capacity of corporations if their place of incorporation and headquarters are in Saudi Arabia.⁸²¹

According to GCC law, all companies other than joint ventures have a legal personality.⁸²² Corporations do not acquire a legal personality until they have been registered in the commercial register, while share companies acquire legal personality as of the date of issue in the official Gazette.⁸²³ Nevertheless, in Kuwait and Oman, third parties acting in good faith may assert the existence of legal personality even when the registration formalities have not been carried out.⁸²⁴ The limits of capacity of corporations are generally determined by three factors: (a) their memorandum of association; (b) their articles of the association; (c) the law regulating their activities.⁸²⁵

⁸²⁰ Kuwait: Articles 20 and 21 of the Civil Code and Article 3 of the Companies law; Bahrain: Article 4 of the Companies law; Qatar: Articles 12 and 55 of the Civil Code; the UAE: Article 2 of the Companies law and Article 93 (2) (d) of the Civil Transaction Code.

⁸²¹ See, Article 14 of the Regulation of Companies No (6) of 1965.

⁸²² Kuwait: Article 2 of the Commercial Companies; Bahrain: Article 8 of the Commercial Companies law; Qatar: Article 8 of the Commercial Companies law; Oman: Article 3 of the Commercial Companies law; Saudi Arabia: Article 13 of the Regulation Companies; the UAE: Article 12 of the Commercial Companies law.

⁸²³ Kuwait: Articles 10, 95, and 195 of the Company law; Bahrain: Articles 8, 81, and 268; Qatar: Articles 8, 24, 75, and 231; Oman: Article 6 of the Commercial Companies law; Saudi Arabia: Article 13 of the Regulation Companies; the UAE: Article 11 of the Commercial Companies law.

⁸²⁴ Kuwait: Articles 10 of the Commercial Companies law; Oman: Article 6 Commercial Companies law.

⁸²⁵ Kuwait: Article 19 of the Civil Code; Qatar: Article 52 (2) (b) of the Civil Code; the UAE: Articles 93 and 94 of the Transaction law and the Article 2 of the Companies law.

In principle, GCC law imposes no special restrictions on the right of a corporation to enter into arbitration agreements.⁸²⁶ This means that a corporation has full capacity to enter into an arbitration agreement as long as it acts within the objectives of the corporation, and there are no express provisions to the contrary in its constitution or the law regulating its activities. Accordingly, a company has no capacity to enter into a transaction if it lies beyond its objectives. Thus if its objectives are limited to selling vehicles, it has no capacity to buy land, and thus no capacity to agree to arbitrate a dispute arising out of such a transaction. In addition, company law sometimes restricts the capacity of a corporation to conduct particular dealings and thus the capacity to enter into a related arbitration agreement. So a limited liability company is not entitled to issue shares or transferable bonds.⁸²⁷ Nor is a company, except for banks and other financial institutions, allowed to make cash loans to any board member or to guarantee any loan agreement made by them.⁸²⁸ Nor may the objective of a limited liability company be conducting the business of banking or insurance or investment of monies for others.⁸²⁹ Since in these cases corporations do not have power so to act, they have no capacity to enter into arbitration agreements to resolve disputes in such cases. An arbitration agreement entered into in regard to such a transaction will be null, and the corporation will be on able to resist enforcement of any award on the grounds of lack of capacity.

Moreover, a corporation is required to operate through its representatives to express its will (e.g. the chairman of the board or directors) in accordance with its constitution and its governing law. In this regard, the question might arise as to what the position is if the representative enters into an arbitration agreement without being empowered to do so. This question needs to be examined practically under the doctrine of *ultra vires*, which can be summarised as follows. First, in principle, a representative does not need special

⁸²⁶ In some cases the law expressly grants the right of corporations to resort to arbitration, e.g. under Qatar investment law, Article 11 sets out that the investment of foreign capital in economic activities has the right to enter into an arbitration agreement to resolve any disputes with others. Under the Companies Law of Saudi Arabia Article 29, and Article 39 in Qatar, the director of the joint company, can request arbitration if it is in the interests of the company.

⁸²⁷ Kuwait: Article 186 of the Commercial Companies law; Bahrain: Article 261 of the Commercial Companies law; Qatar: Article 228 of the Commercial Companies law; Oman: Article 139 of the Commercial Companies law; the UAE: Article 221 of the Commercial Companies law.

⁸²⁸ Bahrain: Article 192 of the Commercial Companies law; Qatar: Article 109 of the Commercial Companies law; Saudi Arabia: Article 71 of the Regulation Companies.

⁸²⁹ Kuwait: Article 186 of the law of Commercial Companies; Bahrain: Article 262 of the Commercial Companies law; Qatar: Commercial Companies law Article 227; Saudi Arabia: Article 159 of the Regulation Companies.

authority under GCC laws to enter into an arbitration agreement, as long as the transaction is made in accordance with the corporation's constitution and the law regulating its activities.⁸³⁰ Secondly, if the act is carried out by the director in the name of the company within his authority, but and he uses the signature of the company on his own account, the company is bound if the third party deals with it in good faith.⁸³¹ Thirdly, no restriction on the power of the director will bind a third party until it has been entered in the Commercial Register, since the law requires that the power of a director should be defined in the memorandum of association and any change in this document must be registered in the Commercial Register.⁸³² Thus if a company changes the memorandum to forbid arbitration but a director enters into an arbitration agreement before this is entered in the Commercial Register, the company cannot resist enforcement on the grounds of the lack of capacity. Fourthly, if a representative enters into an arbitration agreement contrary to the law or the articles of the company, it would be open to the company to plead that the agreement was not binding on it and that it was not obliged to arbitrate. In this respect, GCC company law states out that liability resulting from acting contrary to the law or the articles of the company is a personal liability of the directors, and any term to the contrary will be null and void.⁸³³

Thus the legal capacity of a corporation is limited to conducting business fixed by its constitution or by law. If any transaction is made outwith this context the corporation may plead that it lacked capacity to make the agreement and is thus not bound by the arbitral award. Therefore, it is recommended that before signing any contract parties should look at the constitution of the corporation and the law regulating its activities to

⁸³⁰ However, the situation will be different if the question arises as to whether an arbitration agreement is made by an agent. In this case, the Civil Code of Kuwait, Article 702, provides, *inter alia*, that an agent needs to belong to a specialised agency in order to enter into an arbitration agreement; see part 1.1.1.3 of this chapter.

⁸³¹ Kuwait: Article 17 of the Commercial Companies law; Bahrain: Article 47 of the Commercial Companies law; Qatar: Article 39 of the Commercial Companies law; Oman: Article 37 of the Commercial Companies law; Saudi Arabia: Article 29 of the Regulation Companies.

⁸³² Kuwait: Article 203 of the Commercial Companies law; Bahrain: Article 7 of the Commercial Companies law; Qatar: Article 24 of the Commercial Companies law; Oman: Articles 37, 104 and 153; Saudi Arabia Article 11 of the Regulation Companies; the UAE: Article 11 of the Commercial Companies law.

⁸³³ Kuwait: Articles 17, 148, and 149 of the Commercial Companies law; Bahrain: Articles 7, 185, and 186 of the Commercial Companies law; Qatar: Articles, 24, 112, and 113 of the law of Commercial Companies; Oman: Articles 37 and 109 of the Commercial Companies law; Saudi Arabia: Articles 11, 32, and 76 of the Regulation Companies; the UAE: Articles 11, 45, 111, and 112 of the Commercial Companies law.

make sure it is entitled to do enter into the contract, and that the representative of the corporation is empowered to do enter into the contract.

6.2.2.2 Juristic persons of public law

In general, the capacity of states or public bodies to enter into arbitration agreements depends on constitution of the body or the law concerned with its activities.⁸³⁴ It may also depend upon the law of the forum before which the state is sued, or the provisions of an international convention to which the State is a party.⁸³⁵ In this regard, a clear example can be found under the Washington Convention,⁸³⁶ whereas the New York Convention does not contain an express provision regarding the capacity of a State to enter into an arbitration agreement. However, van den Berg suggests that “the expression in article I (1) ‘differences between persons whether physical or legal’ was inserted into the Convention on the understanding that an arbitration agreement and an arbitral award to which a State is a party are not excluded from the ambit of the convention.”⁸³⁷

The Laws of Kuwait, Bahrain, Qatar, and the UAE impose no special restrictions upon the capacity of a State or public bodies to enter into arbitration agreements, while Omani law clearly provides that persons of public law have the right to enter into arbitration agreements.⁸³⁸

In contrast, Saudi arbitration law imposes certain restrictions upon government agencies who “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.”⁸³⁹ Moreover, the Implementation Rules of 1985 reaffirm this stance and set

⁸³⁴ See van den Berg, A.J., *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation*, p.278; Di Pietro, D. and Platte, M., op cit. p.139.

⁸³⁵ See van den berg, A.J., *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation*, p.278.

⁸³⁶ See Article 36 (1) which states that “Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.”

⁸³⁷ See van den berg, A.J., *The New York Arbitration Convention of 1958: towards a Uniform Judicial Interpretation* p.279; Gaillard, E. and Savage, J., op cit. p.797.

⁸³⁸ See Article 1 of the law of Arbitration in Civil and Commercial Disputes. under the old law of the Decree on the Board for Settlement of Commercial Disputes, the State or government bodies was obligate to obtain approval before entered into arbitration agreement.

⁸³⁹ See Article 3 of the Arbitration law.

out procedural details for government bodies wishing to resort to arbitration.⁸⁴⁰ These restrictions represent Saudi Arabia's reaction to the arbitral award made in the famous *Armc* Arbitration.⁸⁴¹ If a State or public body entered into an international arbitration agreement without obtaining such consent, how would a Saudi court react to an award derived from that agreement? It can be noted that the provision does not distinguish between national and international arbitration agreements concluded by Saudi government agencies,⁸⁴² so the restrictions apply to both national and international arbitration agreements.

The restrictions also apply to arbitration conducted abroad,⁸⁴³ as the Council of Ministers Resolution No. 58 of 1963, mentioned in the preamble of the Saudi Arbitration Regulation of 1983, prohibits governmental bodies referring their disputes with private parties to arbitration without obtaining an approval from the President of the Council of Ministers.⁸⁴⁴ However, the Resolution suffers two exceptions. The first relates to concession contracts of vital interest,⁸⁴⁵ and the second to technical disputes.⁸⁴⁶ In addition, although Resolution No. 58 is still in force, the Saudi government has entered into a number of international agreements which contain clauses permitting resort to arbitration, thus diminishing the scope of the prohibition on arbitration - (i) The agreement with the American Overseas Private Investment Corporation (OPIC) of 1976.⁸⁴⁷ (ii) A similar agreement with Germany.⁸⁴⁸ (iii) The Washington Convention on the Settlement of Investment Disputes between the States and Nationals of other States of 1965, to which Saudi Arabia acceded in 1980.⁸⁴⁹ Of course the restrictions still apply outwith these exceptions.

⁸⁴⁰ The Implementation Rules of 1985, Article 8.

⁸⁴¹ *Arabian American Oil Co (ARAMCO) v Saudi Arabia*, (1963) 27 ILR 117; see also Al-Smann, Y., 'The Settlement of Foreign Investment Dispute By Means of Domestic Arbitration In Saudi Arabia', (1991) 9 *ALQ* 218-223; Sayen, G., 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia', (1987) 9 *Univ Pennsylvania J Intl Econ L* 211 at 216.

⁸⁴² See El-Ahdab, A., op cit. p 556.

⁸⁴³ See Sayen, G., op cit. p.216.

⁸⁴⁴ See Council of Ministers Resolution No. 58, dated 17/1/1383 H (25 June, 1963); Al-smann, Y., op cit. p.220.

⁸⁴⁵ For more information see e.g., El-Ahdab, A., op cit. p 561,

⁸⁴⁶ E.g. in engineering contracts. See El-Ahdab, A., op cit. pp.561-562.

⁸⁴⁷ See El-Ahdab, A., op cit. p.563.

⁸⁴⁸ See Lerrick, A. and Mian, Q.J., *Saudi Business and Labour: Its Interpretation and Application*, (London, Graham & Trotman, 1982), p. 181.

⁸⁴⁹ However, Saudi Arabia made reservations relating to petroleum matters and national sovereignty - see, El-Ahdab, A., op cit. p.565.

Yet in 1997 a Saudi Court (the Board of Grievances) dealt interestingly with the question of whether the incapacity of government bodies to enter into an arbitration agreement could be grounds to deny the enforcement of an award.⁸⁵⁰ In a case between a university (a Saudi public body) and a Dutch party, the court refused the defence of the Saudi party which rested on argument that the arbitration agreement was invalid, because the university had no capacity to enter into it as it had not obtained the approval of the President of the Council of Ministers. The court noted that the contract was an administrative contract, due to it concerning a public service, and also emphasised the prohibition on agreeing to arbitrate. However the court felt compelled by *Shari'a* law to achieve a just result, as *Shari'a* law emphatically upholds the moral obligation to fulfil one's contracts, as expressed in the Qur'an: "O you who believe! Fulfil all obligations."⁸⁵¹ It also, according to the principle adopted by the majority of Muslim scholars, means that arbitral awards are binding. For these reasons, the court granted the request of the Dutch company for enforcement, and refused the plea of Saudi government body.⁸⁵²

It is unknown whether this decision would be upheld by the upper court. If so, the principle will lead to results which are unacceptable. It is clear that the restriction in question is imperative, as is obvious from the words "are not allowed," albeit that the court disregarded the rule, and applied general principles of *Shari'a* law. Accordingly, if grounds for refusing enforcement under Saudi legislation conform to this stance, the enforcing court would have no chance to refuse enforcement unless it was contrary to *Shari'a* law. For example, grounds for refusing enforcement on the basis of non-arbitrability are found in Saudi legislation, i.e. it lays down that disputes relating to administrative contracts must be heard by the Board of Grievances as it has exclusive jurisdiction in this regard.⁸⁵³ Nevertheless, since *Shari'a* law does not forbid resorting to arbitration to resolve disputes, if the Saudi government concluded an administrative contract containing an arbitration clause, enforcement of an award rendered against the government could not be denied by a Saudi court on the ground of non-arbitrability,

⁸⁵⁰ The 9th Administrative Panel, Decision No. 32/D/A9 dated 1418 H (1997).

⁸⁵¹ *The Qur'an, Al-Ma'idah* [5:1].

⁸⁵² Al-Tuwaigri, W., Grounds for refusal of enforcement of foreign arbitral awards under New York Convention of 1958 with special reference to the Kingdom of Saudi Arabia, A thesis Submitted to the University of Glasgow, October 2006, p. 66.

⁸⁵³ The Law of the Board of Grievances of 2007, Article 13 (e). The same provision was found in the old law of 1982, Article 8 (e).

although it would be granted under modern laws. In conclusion, it should be said that we not disagree with the decision *per se*, but disagree rather with the reasons for it.

Finally, it should be emphasised that amendment of such a provision falls into line with the policy of the Saudi government which aims to encourage international investment. This is made clear by the issue of several pieces of legislation relating to this matter.⁸⁵⁴ In addition, it appears that the stance of Saudi Arabia regarding the prohibition on government bodies resorting to arbitration is not very strong. First, the government has made several exceptions regarding that prohibition, as mentioned previously, which means that the restriction does not concern a particular kind of arbitration or subject matter. Secondly, Saudi legislation provides that amendment of this rule can be made by a decision issued by the Council of Ministers.⁸⁵⁵

6.3 Invalidity of the arbitration agreement

A defendant can resist an application for enforcement of a foreign arbitral award in the GCC States if he proves then invalidity of the arbitration agreement. This ground is only found in the New York Convention, the Arab league Convention, and the Riyadh Convention. It does not appear in the Convention on the enforcement of judgment delegations and judicial notices in the GCC States, nor in national provisions governing the enforcement of foreign arbitral awards, except the Bahrain international commercial arbitration law, which has adopted the Model Law.⁸⁵⁶ However, it is important to bear in mind that, even in the absence of such provisions, the invalidity of the arbitration agreement might constitute a ground for refusing enforcement on the basis that the award offended against public policy.

It is a ground for refusing enforcement under the New York Convention provides that “the parties to the [arbitration agreement] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where

⁸⁵⁴ For example, (i) in 2005 the Saudi Arabia acceded to the WTO; (ii) in April the government established the Saudi Arabian General Investment Authority to encourage foreign direct investment in Saudi Arabia.

⁸⁵⁵ See, the last line in Article 3 on the Arbitration law which provides that “This ruling may be amended by resolution of the Council of Ministers.”

⁸⁵⁶ Law of International Commercial Arbitration, Article 36 (1) (a) (1).

the award was made.”⁸⁵⁷ Although the Arab League and Riyadh Conventions include this ground, neither makes any reference to the governing law. The former provides that a request of execution may be refused “if the verdict passed was not in pursuance of a conditional Arbitration Agreement,”⁸⁵⁸ while the latter provides that an award can be refused “if the award was made on the basis of a void agreement to arbitrate or one that has expired.”⁸⁵⁹

In the context of international commercial arbitration, the agreement to arbitrate is considered to be the foundation stone of the intention of the parties to withdraw their disputes from the courts and seek resolution by arbitration.⁸⁶⁰ An arbitration agreement, as any other contract, must satisfy a number of conditions in order to be valid. Consequently, a court cannot enforce a foreign arbitral award when the losing party establishes the invalidity of the arbitration agreement.⁸⁶¹ That invalidity might arise if either the requirements of form have not been fulfilled or if there is substantive invalidity.

This section deals with two main questions arising in this respect. The first is what law governs the validity of the arbitration agreement. This involves analysis of the law applicable to both substantive and formal validity. The second question is what grounds of invalidity can justify denying enforcement. These grounds are also examined from the point of view of formal validity and substantive validity.

6.3.1 The Law Applicable to the Invalidity of the Arbitration Agreement

The question of which law applicable determines the validity of an arbitration agreement has given rise to considerable discussion both theoretical and practical.⁸⁶² This might be due to the fact that provisions governing this matter are not clear, either

⁸⁵⁷ New York Convention, Article V (1) (a).

⁸⁵⁸ Arab League Convention, Article 3 (b).

⁸⁵⁹ Riyadh Convention, Article 37 (b).

⁸⁶⁰ See, Redfern, A., and Hunter, M., *Law and Practice of International Commercial Arbitration*, para 3-1.

⁸⁶¹ See, Kroll, S., ‘Recognition and Enforcement of Foreign Arbitral Award in Germany’, (2002) 5(5) *IntL Arb L R* 165; Lew, J., Mistelis, L. and Kroll, S., op cit. paras 7-5 to 7-32 and 7-34 to 7-58.

⁸⁶² See, Lew, Mistelis and Kroll, op cit. para 6-26; Di Pietro, D. and Platte, M., op cit. p.144; Gaja, G., op cit. p.1; Veeder, V., ‘Summary of Discussion in the First Working Group’ (ICC Congress Series no 9 Paris 1998) p.45; Born, G., op cit.p. 95.

because they deal with the matter ambiguously e.g. the New York Convention,⁸⁶³ or not at all, as under the Arab League and Riyadh Conventions.

Though the laws governing form and substance are usually closely related, in some cases they might be different, and thus need to be examined separately.

6.3.1.1 The Law applicable to substantive invalidity of the arbitration agreement

International conventions take different approaches to this question. The Arab League Convention refers to the invalidity of an arbitration agreement as grounds for refusing enforcement, but does not indicate what the applicable law might be, nor does it set out conflict rules which might help to determine that law. It simply speaks of the award not being “in pursuance of a conditional arbitration agreement.”⁸⁶⁴ Similarly, the Riyadh Convention speaks of if the award being “made on the basis of an arbitration clause or an arbitration agreement that are void.”⁸⁶⁵

There is no doubt that in the absence of provisions determining which laws govern the invalidity of the arbitration agreement in such conventions, enforcing courts in the GCC States will rely on the national conflict of law rules. It should be noted that in this thesis only the rules concerning civil and commercial matters are examined.

In Kuwait, conflict of law rules are found in a separate law,⁸⁶⁶ while in Qatar and the UAE they are regulated by the Civil Code.⁸⁶⁷ These provisions set out that the law of the state is the only authority which will rule to determine the applicable law in the event of a conflict between various laws, unless provisions to the contrary are included in a special law or in an international convention in force in the state.⁸⁶⁸ This means that in the absence of determination of the law governing an arbitration agreement, whether by a special law or in an international convention, in these States the enforcing court must follow the general conflict rules. Accordingly, as there are no provisions under either the Arab League or Riyadh Conventions, nor under general arbitration law, to

⁸⁶³ See Lew, J., Mistelis, L. and Kroll, S., op cit. para 6-26.

⁸⁶⁴ The Arab League Convention, Article 3 (b).

⁸⁶⁵ The Riyadh Convention, Article 37 (b).

⁸⁶⁶ Law No. 5 of 1961 regulation of legal relations having a foreign element.

⁸⁶⁷ See Qatar: Articles 10 to 38 of the Civil Code; The UAE: Articles 10 and 28 of the Transaction law.

⁸⁶⁸ See Kuwait: Articles 31 and 68 of the law regulation of legal relations having a foreign element Qatar: Articles 10 and 33 of the Civil Code; The UAE: Articles 10 and 22 of the Transaction law.

determine which law governs the arbitration agreement, general conflict of law rules in these states will therefore govern this question.⁸⁶⁹

According to general conflict of law rules in these states, the law governing substantive invalidity of the arbitration agreement differs according to whether the agreement concerns contractual obligations. For example, if an arbitration agreement arises from contractual obligations, the Civil Code of the UAE provides that “(1) contractual obligations (form and substance) are governed by the law of the domicile when such domicile is common to the contracting parties, and in the absence of the common domicile by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate that it is intended to apply another law.”⁸⁷⁰ Therefore, if the issue of the substantive invalidity of an arbitration agreement arises, the enforcing court in these states should determine the applicable law either (1) by the law chosen by the parties; or (2) by another law which the circumstances indicate is appropriate to apply; or (3) by the law of the domicile when such domicile is common to the contracting parties; or (4) by the law of the place where the contract was concluded. The same rules apply in Kuwait and Qatar, but only regarding substantive invalidity, as will be seen later.⁸⁷¹ With regard to non-contractual obligations, the applicable law is the law of the state in whose territory the act that gave rise to the obligation took place.⁸⁷²

In addition, there are some exceptions to the above rules. If an arbitration agreement relates to a real property, its validity is governed by the law of the place in which the real property is situated.⁸⁷³ In Kuwait, an arbitration agreement concerning intellectual property is governed by the law of the country where the material was published.⁸⁷⁴

⁸⁶⁹ In contrast, some national laws deal specifically with this issue, e.g. the Swedish Arbitration Act 1999 s.48 provides that “Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place. The first paragraph shall not apply to the issue of whether a party was authorised to enter into an arbitration agreement or was duly represented.”

⁸⁷⁰ The UAE: Article 19 of the Civil Transaction Code.

⁸⁷¹ Kuwait: Law No. 5 of 1961 regulation of legal relations having a foreign element, Articles 51 and 59; Qatar: Civil Code, Articles 25 (1) and 27.

⁸⁷² Kuwait: Articles 66 and 67 of the Law regulation of legal relations having a foreign element; Qatar: Articles 30 and 31 of the Civil Code; the UAE: Article 20 of the Civil Transaction Code.

⁸⁷³ Kuwait: Article 59 of the Law regulation of legal relations having a foreign element; Qatar: Article 25 of the Civil Code; the UAE: Article 18 of the Civil Transaction Code.

⁸⁷⁴ Kuwait: Articles 57 and 58 of the Law regulation of legal relations having a foreign element.

Moreover, the otherwise applicable law shall not be applied if the foreign law is contrary to public policy or to morality in these States.⁸⁷⁵

Saudi Arabian law contains no special provisions regulating such an issue, but it seems that courts follow the rules of private international law, where not contrary to public policy.⁸⁷⁶ Thus in several decisions, Saudi courts have rejected the argument of Saudi parties that arbitration agreements are not valid because they are governed by non-Islamic Law, thus recognising that foreign law should to govern the arbitration agreement where the parties so agree.⁸⁷⁷

In Bahrain, the law contains only specific provisions regulating personal status matters. While the Civil Code indicated that the determination of the applicable law of legal relations having a foreign element may be governed by a special law, no such law has yet been issued.⁸⁷⁸ Moreover, Article 36 (1) (a) (i) of the International Commercial Arbitration Law, contains the same conflict of law rules as Article V (1) (a) of the New York Convention, which will be examined later. However, the Cassation Court will apply Bahrain law unless the parties prove the application of foreign law. While Omani law contains no special conflict of law rules, the law of arbitration in civil and commercial disputes provides that “1. The parties to arbitration shall have the liberty to opt for the law, which the arbitrators shall be required to apply in respect of the subject matter of the dispute. 2. If both the parties to the arbitration agree to subject their legal relationship to the provisions laid down in a standard contract or international treaty or any other document, the provisions of such a document shall be applicable, including the provisions relating to the arbitration.”⁸⁷⁹ This shows that Omani courts should apply foreign law where the parties agree to subject their legal relationship to that law. As regards the enforcement of a foreign arbitral award, if an Omani court believes that the parties have chosen a foreign law to govern the arbitration, *a fortiori* it will apply that

⁸⁷⁵ Kuwait: Article 73 of the Law regulation of legal relations having a foreign element; Qatar: Article 38 of the Civil Code; the UAE: Article 27 of the Transaction law.

⁸⁷⁶ See Yamani, A. and others, ‘Saudi Arabia’, in David, R. and others (eds) *International Encyclopaedia of Comparative Law* (JCB Mohr Dordrecht 1987) Vol 1-S, 21; Lew, J., ‘The Recognition and Enforcement of Arbitration Agreement and Awards in the Middle East’ (1985) 192 *Arb Intl* 161 at 175.

⁸⁷⁷ See, e.g. 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); the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994); the 3rd Review Committee, decision No. 15/T/3 dated 1423 H (2003). Cited, Al-Tuwaigeri, W., Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 With Special Reference to the Kingdom of Saudi Arabia pp.119-121.

⁸⁷⁸ Civil Code of Bahrain, Article 7.

⁸⁷⁹ The Law of Arbitration in Civil and Commercial Disputes, Article 6.

foreign law in this respect. Consequently, it seems that the enforcing court will determine the applicable law that should govern invalidity according to the rules of private international law.

Finally, it should be noted that previous conditions will be adopted in regard to the enforcement of foreign awards in the GCC States when an application is sought under national provisions governing the enforcement of foreign awards or under the international conventions either containing no specific substantive conflict rules or provisions determining what the applicable law should be, i.e. the Arab League and Riyadh Conventions.

Article V (1) (a) of the New York Convention speaks of the agreement not being “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.”⁸⁸⁰ This provision refers both to incapacity and invalidity, but only indicates the governing law in relation to the latter.⁸⁸¹ Article 36 (1) (a) (i) of the Model Law is in similar form. The convention respects the parties’ freedom to choose the law which governs the validity of the arbitration agreement.⁸⁸² In the absence of such choice, that validity is then governed by the law of the place of arbitration.

Despite the New York Convention clearly indicating these two alternatives, the issue of the invalidity of an arbitration agreement under the New York Convention has been the subject of considerable discussion. The issue is whether “the law to which the parties have subjected it,” only allows for an express choice, or extends to implied choices. In particular, if the parties have chosen the law governing the main contract does this constitute an implied choice of the law governing the arbitration agreement? Alternatively, does choosing a seat for the arbitration constitute an implied choice of that law to govern the arbitration agreement? Since the laws of the GCC States do not address this matter directly, it is worth examining these views.

⁸⁸⁰ New York Convention, Article V (1) (a)

⁸⁸¹ See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p. 282.

⁸⁸² It can be observed that the Geneva Convention refers to the validity of an arbitration agreement without determining which applicable law governs this ground. See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.276.

The first view suggests that the law governing the main contract also governs the arbitration agreement unless the parties have agreed otherwise.⁸⁸³ In support of this view, it is in practice uncommon to determine the law governing an arbitration agreement, whereas contracts often contain provisions, such as, “the law governing the substantive issues in dispute shall be the law of England.” Neither does the standard ICC clause (set out in 37 languages), provide any applicable law governing the arbitration clause itself.⁸⁸⁴ In addition, Article V (1) (a) includes the expression “any indication”, which is subject to a broad interpretation. As Davidson points out, “the reference to ‘indication’ of the chosen law suggests that the provision may embrace an implied choice of law.”⁸⁸⁵ Gaja also notes that under the New York Convention “there is no indication that the selection of applicable law should have been made explicitly.”⁸⁸⁶ If the parties expressly determine which law governs the main contract as a whole, it would be unusual to determine another law to govern the arbitration agreement.⁸⁸⁷ This would be the case particularly as regards an arbitration clause, as it is one clause of many clauses in the contract and thus should be governed by the same law as the rest of clauses in the contract. This is the assumption unless the parties have agreed otherwise.⁸⁸⁸

Also against the place of arbitration as determining the law governing the arbitration agreement, is the fact that the link between the law which governs the arbitration agreement and the place of arbitration is still relatively weak.⁸⁸⁹ It is often the case in international commercial arbitration that neither party involved in arbitration has a place of business or residence in the place of arbitration. Arbitrations may take place in a country because it is “neutral” or for reasons of geographical convenience, while

⁸⁸³ See e.g., Davidson, F., op cit. p. 291; Redfern, A., and Hunter, M., op cit. pp. 157-158; Gaja, G., op cit. p.1; Di Pietro, D. and Platte, M., op cit. p.144; Lew, J., Mustill, L. and Boyd, *The Law and Practice of Commercial Arbitration in England*, (London: Butterworths 1989) p. 63; Lew, J., Mistelis, L. and Kroll, S., op cit. para 6-24; Dicey, A., Morris, J. and Collins, L., op cit. p.592. Many Courts around the world have also adopted this view. See, e.g. *Italian Company v German F R firm* (1980) V YBCA 262 (Germany Court of First Instance 24 Apr 1979) 264; *Cia Maritima Zorroza SA v Sesostris SAE* [1984] 1 Lloyd’s Rep 652 (UK QBD Com Ct) 652; *German Assignee of a German Shipping Company v Japanese Shipyard* (1990) XV YBCA 455 (Germany Court of Appeal 17 Feb 1991) 582; *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd’s Rep 48 (UK QBD Com Ct) 50; *Owerri Commercail Inc v Dielle Srl* (1994) XIX YBCA 703 (Netherlands Court of Appeal 1993).

⁸⁸⁴ See <http://www.iccwbo.org/court/arbitration/id4114/index.html>

⁸⁸⁵ See Davidson, F., *Arbitration*, p.393.

⁸⁸⁶ See Gaja, G., op cit. p.2

⁸⁸⁷ See Davidson, F., op cit. p.291.

⁸⁸⁸ See Redfern, A., and Hunter, M., op cit. p.157.

⁸⁸⁹ Gaillard, E. and Savage, J., op cit. para 433.

sometimes the place of arbitration is not chosen by the parties themselves.⁸⁹⁰ This means that in practice, the law governing the arbitration will generally be different from the law of the country in whose territory the arbitration takes place.⁸⁹¹ A noted authority has observed:

“The use of this connecting factor in the absence of a choice by the parties is based on a philosophy which differs considerably from that of the resolutions of the Institute of International Law in 1957 and 1959, which treated the seat of the arbitration as a mandatory connecting factor.”⁸⁹²

On the other hand, it can be argued that, according to the doctrine of the separability of an arbitration agreement, it may be an obstacle for the law governing the main contract also to govern the arbitration agreement, so that in the absence of express choice by the parties, the law of the seat of the arbitration should govern the arbitration agreement.⁸⁹³ However, it is important to bear in mind that the main purpose of the separability is to granting jurisdiction to an arbitral tribunal where invalidity of the main contract is alleged. “It does not render the arbitration clause a totally separate entity from the main contract for the purpose of applicable law.”⁸⁹⁴

Consequently, it is possible to say that in the absence of determination of the law governing an agreement to arbitrate by the parties, it is generally presumed that the law which governs the contract as a whole will also govern the arbitration clause or a submission agreement. Lew states:

“There is a very strong presumption in favour of the law governing the substantive agreement which contains the

⁸⁹⁰ See Redfern, A., and Hunter, M., op cit. para 2-5; Gaillard, E. and Savage, J., op cit. para 433.

⁸⁹¹ See Redfern, A., and Hunter, M., op cit. para 2-5.

⁸⁹² Gaillard, E. and Savage, J. op cit. para 433.

⁸⁹³ See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 293; van den Berg, A.J., ‘Consolidated Commentary’, (2003) XXVIII YBCA 654. *see also Planaverigne S.A v Kalle Bergander i Stockholm AB* (2002) XXVII YBCA 554 (Sweden Court of Appeal 2001) 555; *XI Insurance Ltd v Owens Corning* [2000] 2 Lloyd’s Rep 500 (QBD Com Ct); *Actival International SA v Conservas EI Pilar SA* (2002) XXVII YBCA 528 (Spain Supreme Court 1996) 530; *X v X* (1998) XXIII YBCA 754 (Switzerland Court of the first Instance, 26 May 1994) at 756,7; *Conceria GDe Maio & F snc v EMAG* (1996) XXI YBCA 602 (Italy Supreme Court 20 Jan 1995) at 604; *X v X* (1999) XXIV YBCA 645 (Germany Court of Appeal 17 Sep 1998) 646.

⁸⁹⁴ See Di Pietro, D. and Platte, M., op cit. p.145.

arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration agreement.”⁸⁹⁵

Moreover, several court decisions also conform to this view. For example, in *Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd*, an English Court held that ⁸⁹⁶ “Where the substantive contract contains an express choice of law, but the agreement contains no separate choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.”⁸⁹⁷

6.3.1.2 The law applicable to the formal validity of the arbitration agreement

Different approaches have been taken to determine which law governs the formal validity of the arbitration agreement at the stage of the enforcement of foreign awards in the GCC States, even in the context of international arbitration.

Under the Arab League and Riyadh Conventions, as noted earlier, there are no provisions relating to this matter. Therefore, the substantive rules of conflict law existing under the national laws of the GCC States will regulate this matter, as discussed above.

With regard to the New York Convention, it seems that the question of the law applicable to formal validity of the arbitration agreement under this text is not clear. The problem results from the opening line of Article V (1) (a) making an ambiguous reference to Article II of the Convention, in speaking of “the parties to *the agreement referred to in article II*” being subject to incapacity before going on to mention the invalidity of the arbitration agreement. Article II of the convention lays down formal

⁸⁹⁵ See Lew, J., ‘The Law Applicable to the Form and Substance of the Arbitration Clause’, ICCA Congress Series No.14, 1998, Paris, para.136.

⁸⁹⁶ [2002] 1 All E.R (Comm) 627.

⁸⁹⁷ See als, *Italian Company v German F R Firm* (1980) V YBCA 262 (Germany Court of First Instance 24 Apr 1979) 264; *Cia Maritime Zorroza ST v Sesostris SAE* [1984] 1 Lloyd’s Rep 652 (UK QBD Com Ct) 652; *Germany assignee of a German Shipping Company v Japanese Shipping* (1990) XV YBCA 455 (German Court of Appeal 17 Feb 1989) 457; *Adda Officine Elettromeccaniche v Alstom Atlantique SA* (1996) XXI YBCA 580 (Italy Court of the First Instance 13 Feb 1991) 582; *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd’s Rep 48 (UK QBD Com Ct) 50; *Owerri Commerical Inc v Dielle SrlI* (1994) XIX YBCA 703 (Netherlands Court of Appeal 1993).

requirements for the arbitration agreement. As a result, the question arises as to whether there is a difference between the rules in Article II governing the formal validity of the arbitration agreement and the conflict rules in Article V (1) (a) which determine the law governing the validity of an arbitration agreement. In other words, will the reference to Article II restrict the application of the rule of Article V (1) (a), so that that the formal validity of the arbitration agreement will only be governed by Article II? There is a variety of views concerning this question.

The first view maintains that the formal requirements of an arbitration agreement should be determined by Article II. This view considers that the reference in Article V (1) (a) to “the parties to *the agreement referred to in article II*” requires that the enforcing court should examine the form of the agreement under Article II of the Convention.⁸⁹⁸ In this regard, Prof. Pieter Sanders states “when enforcement of the award is sought, no other criteria apply to the form of the agreement than those laid down in Article II, to which Article V, ground *a* itself refers.”⁸⁹⁹ In addition, several court decisions have adopted this view; e.g. a German Court of Appeal held that:

“The obligation to recognize foreign arbitral awards further requires that the award be issued on the basis on a valid agreement between the parties according to Art. II Convention. This ensues in particular from the wording of the ground for refusal in Art. V (1) (a) Convention, which provides that the parties must have concluded an agreement within the meaning of Art. II Convention.”⁹⁰⁰

Yet many authors have given their support to formal validity being governed by the Article V of the Convention, i.e. the law chosen by the parties or, failing any indication,

⁸⁹⁸ See Van den Berg, A.J., *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* 284; Sanders, P., ‘Consolidated Commentary’ (1981) VI YBCA 211; Garnett, R., *op cit.* p.104; Kroll, S., ‘Recognition and Enforcement of Foreign Arbitral Award in Germany’, (2002) 5(5) *IntL Arb L R* 160; Alvarez, G., *Article II (2) of the New York Convention and the Courts*, ICCA Congress Series no.9 (1999 Praise) 71.

⁸⁹⁹ See Sanders, P., ‘Consolidated Commentary’ (1981) VI YBCA 211.

⁹⁰⁰ See *X (UK) v X (Germany)* YBCA XXIX (2004) 736; *see also* (Federal Supreme Court 21 September 2005), YBCA XXXI (2006) 680; *PAG (Zurich) v V (Vienna)* (1976) I YBCA 183 (Austria Supreme Court 17 Nov 1971) 183; *Czechoslovakian Export Organization v Greek Shipping Co* (1989) XIV YBCA 636 (Greece Court of Appeal 1982) 636; *Charter (Norway) v Shipowner (Russian Federation)* (2002) XXVII YBCA 519 (Norway Court of Appeal 16 Aug 1999) 522; *Smita Conductors Ltd. v Dealer* (2004) XXIX YBCA 482 (Indian Supreme Court 31 Jan 2002) 750.

the law of the place of arbitration.⁹⁰¹ This view has only been adopted by the Italian Supreme Court, which held that “Article II (2) is applicable at the stage of enforcement of the arbitration agreement under Article II (3) only, but not at the stage of the enforcement of an arbitral award.”⁹⁰² Under the legislative history of the Convention there is no clear explanation as to why this reference was included in Article V (1) (a).⁹⁰³ In this regard, one author mentioned that “the reference to the Article II is considered a superfluous additional description of the arbitration agreement.”⁹⁰⁴

It is submitted that the second view complies with Article V (1) (a), since, on the one hand, the Convention indicates a clear-cut rule, that the law applicable to governing an arbitration agreement is the law chosen by the parties or the law of the place of arbitration, while, on the other hand, Article II (1) of the Convention does not address the question of the applicable law. Yet practically Article II might yet govern the formal validity of the arbitration agreement at the stage of enforcement of the arbitral award, because of its requirement that the arbitration agreement be in “writing.” It seems difficult to see how an enforcing court in the GCC States could grant enforcement under the New York Convention if the winning party does not furnish a copy of the agreement, as demanded by Article IV, unless it meets the above requirement under this Article. Article IV (1) (a) of the Convention requires at the stage of enforcement of the arbitral award that the winning party must supply “the original agreement *referred to in article II* or a duly certified copy thereof”, otherwise the GCC enforcing court will refuse the application.⁹⁰⁵ While Article VII allows a party seeking enforcement to rely on more favourable provisions of national law, there are none in the GCC laws. As a result, the GCC enforcing courts will require the formal validity according to Article II of the Convention, unless the GCC States apply more lenient provisions governing the enforcement of foreign arbitral awards in the future. Accordingly, the proper approach to determine applicable law governing the formal invalidity of the arbitration agreement at the stage of the enforcement of foreign awards is to consider Articles II and V as

⁹⁰¹ See e.g. Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-77; Di Pietro, D. and Platte, M., op cit. pp. 83-87.

⁹⁰² *Lanificio Walter Banci S.a.S v Bobbie Borooks Inc* (1981) VI YBCA 233; also see *Conceria G. De Maio &F. snc (Italy) v EMAG AG (Switzerland)* (1996) XXI YBCA 604-605; *Vento &C snc (Italy) v E.D.&F .Man (Coffee) Limited (UK)* (1992) XVII YBCA 545-550.

⁹⁰³ See Di Pietro, D. and Platte, M., op cit. pp.84-85.

⁹⁰⁴ See Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-77.

⁹⁰⁵ It has already been mentioned that the Cassation Court in Kuwait refused to grant enforcement of a foreign arbitral award due to the winning party’s failure to supply a copy of the arbitration agreement according to Article IV of the New York Convention. See Chapter Five

governing this issue together in order to reach to an integrated regime governing the recognition and enforcement of arbitration agreements and awards, at all stages of the arbitral process.⁹⁰⁶

Only the laws of Kuwait and Qatar contains special provisions determining which applicable law governs the form of a contract. According to these provisions, if the issue of the formal invalidity of an arbitration agreement arises, the enforcing court in these states should determine the applicable law either (1) by the law of the place where the contract was concluded; or (2) by the law governing the substantive conditions of the contract; or (3) by the law of common domicile or national law of the parties.⁹⁰⁷ With regard to the rest of the GCC States, the formal validity of the arbitration agreement is governed by the same rules determining which applicable law governs the substantive validity of an arbitration agreement, as discussed in the previous sub-section.

6.3.2 Grounds for invalidity

Under this title we will deal with the second question concerning the grounds for invalidity of an arbitration agreement. An arbitration agreement is like any other contract, in that the requirements for the conclusion of a contract must be fulfilled. In general these requirements are divided into the formal requirements or substantive validity. The absence of one or more of these requirements will invalidate the arbitration agreement, and thus allow a court to refuse to enforce a foreign award. The formal grounds for invalidity will be examined first.

6.3.2.1 Formal grounds for invalidity

In the context of international conventions that apply in the GCC States, the New York Convention is the only one which indicates the requirements for formal validity of an arbitration agreement. The Arab League and Riyadh Conventions do not include any such provisions, so that this matter will be governed by the law that governs the arbitration agreement. The national laws of the GCC States contain provisions regulating the formal requirements of the arbitration agreement. Both the New York

⁹⁰⁶ See Born, G., op cit. pp.2787-88.

⁹⁰⁷ Kuwait: Article 63 of the Law regulation of legal relations having a foreign element; Qatar: Article 29 of the Civil Code.

Convention and the national law of the GCC require an arbitration agreement to be either in writing or at least to be evidenced in writing.⁹⁰⁸

The rationale underlying this requirement is obvious. Since an arbitration agreement deprives the parties of their constitutional right to resolve their disputes in court, the requirement of writing aims to make sure that both parties are completely agreed on resolving the dispute by arbitration.⁹⁰⁹

It has been observed that one view supports the requirements for an arbitration agreement under Article II of the New York Convention also governing the formal requirements of an arbitration agreement at the stage of enforcement. On this view, if the arbitration agreement does not meet with these requirements, a court cannot grant enforcement. Thus these requirements may constitute formal grounds of invalidity of the arbitration agreement. Therefore, it is worth examining the requirement of writing under the New York Convention before discussing the provisions mentioned in the national laws of the GCC States.

Under the New York Convention it is provided that “the term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”⁹¹⁰ This raises several issues. Firstly, is Article II an absolute rule or a maximum requirement? Second, how should it be interpreted? Third, are the signatures necessary for validity of an arbitration agreement?

As regards the first question, the prevailing view is that Article II establishes a maximum standard for the formal requirements of validity of an arbitration agreement.⁹¹¹ It appears to be accepted that Article II does not constitute a minimum

⁹⁰⁸ See New York Convention, Article II (2). Under the national laws, see Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 233 (2) of the Code of Civil and Commercial Procedure; Qatar: Article 190 (2) of the Code of Civil and Commercial Procedure; Oman: Article 12 of the Law of Arbitration in Civil and Commercial Disputes; Saudi Arabia: Article 5 of the the Arbitration Regulation of 1983; the UAE: Article 203 (2) of the Code of Civil Procedure.

⁹⁰⁹ See Redfern, A., and Hunter, M., op cit. para 3-7; Lew, J., Mistelis, L. and Kroll, S., op cit. para 7-7; van den Berg, A. J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 171; Di Pietro, D. and Platte, M., op cit. p. 67.

⁹¹⁰ New York Convention, Article II (2).

⁹¹¹ See Kroll, S., op cit. p.166; Gaillard, E. and Savage, J. (eds), op cit. para 271; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-77; Alvarez, G., Article II (2) of the New York Convention and the Courts, 71; Di Pietro, D. and Platte, M., op cit. pp.81-84

requirement for the formal requirements of a validity arbitration agreement, as it is evidenced by the form of Article 7 (2) of the Model Law, which goes much further than the New York Convention in its definition of “writing.”⁹¹² Therefore, according to the view supporting Article II as governing the formal requirement of validity of an arbitration agreement at the stage of the enforcement of an arbitral award, there is no chance of enforcement of the award being refused if the requirements of writing of Article II are met, even if the national law adopts a more onerous requirement for the form of an arbitration agreement.

The second question concerns how the writing requirement should be interpreted. When the New York Convention was drafted in 1958, the concept of “agreement in writing” did not mean what it does in the present day, since modern means of communication such as Telefax and e-mail are not contemplated by Article II. Many authors and courts favour a liberal interpretation of Article II, lending support to the view that modern communication would satisfy its requirements. For example, Kaplan states that:

“Given all these developments it is not unreasonable to propose that the time has come for another look at Article II (2). In my view, its emphasis on writing or exchange is outmoded. It would be helpful to see a general reconsideration of Article II (2) in the light of existing commercial practices and also in the light of the many developments which have occurred since 1958 in the field of international commercial law.”⁹¹³

Furthermore, one writer has suggested that “the writing requirement should be interpreted dynamically in the light of modern means of communication.”⁹¹⁴ The Swiss Supreme Court followed this approach in *Tradax Export SA v Amoco Iran Oil Co* in

⁹¹² See Di Pietro, D. and Platte, M., op cit. p.82; Mbaye, K., ‘Arbitration Agreement: Conditions Governing Their Efficacy’ in van den Berg, A.J., (ed) *ICC Congress Series no 9 Paris 1998* (Kluwer Law International, the Hague 1999) 94 at 100; Veeder, V., ‘Summary of Discussion in the First Working Group’ (ICC Congress Series no 9 Paris 1998)44; Alvarez, G., op cit. p.71; Kaplan, N., ‘Is the Need for writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?’ (1996) 12 (1) *Arb Intl* 27; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-77. See also *Compagnie de Navigation et Transports SA v MSC – Mediterranean Shipping Company SA* (1996) XXI YBCA 690 (Switzerland Supreme Court 16 Jan 1995) 696; *Jiangxi Provincial Metal and Minerals Import and Export Corp v Sulanser Co Ltd* (1996) XXI YBCA 546 (Hong Kong high Court 1995) 549.

⁹¹³ Kaplan, N., op cit. p.44.

⁹¹⁴ See Lew, J., Mistelis, L. and Kroll, S., op cit. para 7-10.

affirming that that general reference in the written communications to general conditions between parties is sufficient,

“[Article II (2)] has to be interpreted in accordance with its object, and with a view to the interests it is clearly designed to protect. The purpose of the Convention is to facilitate the resolution of disputes through arbitration, taking particular account of the needs of international commerce.”⁹¹⁵

Moreover courts in the GCC States would be supported in a liberal interpretation of Article II (2) by a recommendation which was recently adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the New York Convention. The recommendation affirms the following:

“Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of formal requirements governing arbitration agreement, arbitration proceedings and the enforcement of arbitral award,

Considering that, interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,”

⁹¹⁵ See, *Tradax Export SA v Amoco Iran Oil Co* (1986) XI YBCA (Federal Supreme Court, 7 February 1984), 534-35.

As a result, the United Nations Commission on International Trade recommends that

“... Article II paragraph 2, of the Convention on the recognition and enforcement of foreign arbitral awards, done in New York, 10 June 1958, be applied, recognizing that the circumstances described therein are not exhaustive...”⁹¹⁶

The important issue in this recommendation is its reference to the new definition for the “writing” which is set out in the revised Article 7 of the UNCITRAL Model Law. Article 7 was amended in 2006 in order to modernise the formal requirement of an arbitration agreement, the better to conform to international contract practices.⁹¹⁷ In that respect, the new Article covers several issues that have often given rise to debate as to the definition of “writing” under Article II of the New York Convention.

According to this definition, it will recognize a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing.” The agreement to arbitrate may be entered into in any form (e.g. including orally), as long as the content of the agreement is recorded.⁹¹⁸ This view has been espoused by several authors who note that arbitration is no longer deemed a dangerous waiver of the right to litigate but rather the natural forum for international commercial disputes.⁹¹⁹

The requirement that an arbitration agreement be in writing is met by an electronic communication. “Electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.⁹²⁰ It covers the issue of “an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by

⁹¹⁶ UN Doc. A/61/17 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

⁹¹⁷ UNCITRAL Model Law with amendments as adopted in 2006. See <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>

⁹¹⁸ UNCITRAL Model Law, Article 7 (3) amendment in 2006.

⁹¹⁹ See Herrmann, “The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts,” ICCA Congress series no 6, 46; Lew, J., Mistelis, L. and Kroll, S., op cit. para 7-8, 7-9; Redfern, A., and Hunter, M., op cit. para 3-9.

⁹²⁰ UNCITRAL Model Law, Article 7 (4).

another.”⁹²¹ It also includes an arbitration agreement allegedly made “by reference” which lays down that “the reference in a contract to any document,” e.g. general conditions, “containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract.”⁹²²

Finally, with regard to the question as to whether signatures are necessary for validity of arbitration agreement, it has been noted that in currently in trade, many contracts even in writing, were not signed by the parties.⁹²³ According to the general view and previous recommendation, for an arbitration agreement to be valid without the signatures of the parties, it is sufficient that the content of the agreement be recorded.⁹²⁴ It also noted, “the reference to exchanging letters and telegrams under the New York Convention had been interpreted as importing no requirement that signature should appear.”⁹²⁵

Therefore, in the light of the considerations leading to rendering this recommendation, and as the recommendation is considered a source under International Commercial Arbitration Law, the author supports its adoption by enforcing Courts. Thus, it seems that the formal requirements in the New York Convention will not cause any problems.

In situations where the form of arbitration agreement does not conform to Article II (2), even when interpreted in accordance with the above recommendation, the second part of the recommendation might also help the party to rely on national laws or treaties offering a regime more favourable than that of the Convention, where it is set out that:

“Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought

⁹²¹ *Ibid*, Article 7(5); *see also* Redfern, A., and Hunter, M., *op cit.* para 3-8.

⁹²² *Ibid*, Article 7 (6).

⁹²³ Kaplan, N., *op cit.* p. 39.

⁹²⁴ *See* Redfern, A., and Hunter, M., *op cit.* para 3-7; Di Pietro, D. and Platte, M., *op cit.* pp. 69-70.

⁹²⁵ *See*, Davidson, F., *International Commercial Arbitration*, 50.

to be relied upon, to seek recognition of the validity of such an arbitration agreement.”⁹²⁶

In this respect, if the legislators in the GCC adopted more lenient requirements for formal arbitration agreements than those set out under the New York Convention, then the enforcing party may be able to rely on national provisions to avoid any rejection of the enforcement of an award.⁹²⁷ However, the major obstacle that could arise in this respect is that the arbitration agreement must be in writing in order to meet with the evidence requirement in Article IV (1) of the Convention; otherwise the court cannot grant enforcement.

However, it still seems difficult to see how, under the Convention, courts in the GCC States could grant the enforcement if the winning party did not furnish a copy of the agreement in writing, as required by Article IV. Article IV (1) (a) of the Convention requires at the stage of enforcement of the arbitral award that the winning party must supply “the original agreement *referred to in article II* or a duly certified copy thereof”, otherwise the GCC enforcing court will refuse the application.⁹²⁸ There are no more favourable provisions in the GCC laws which would aid a party under Article VII. As a result, the GCC courts will require formal validity according to Article II of the Convention, unless the GCC States apply more lenient provisions governing the enforcement of foreign arbitral awards in the future.

With regard to the formal requirements in the GCC States as to which might be the applicable law to govern this question, those states have adopted different views concerning the form of arbitration agreements. In this regard, a brief overview of the position of the GCC law regarding formal requirements for arbitration agreement will be given.

⁹²⁶ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

⁹²⁷ For example, in England, under the Arbitration Act 1996 s.5(3) an oral agreement which refers to a document containing an arbitration clause will be a valid arbitration agreement, which means that English courts cannot assume jurisdiction by referring to the non-fulfilment of the form requirements of Article II (2). See Lew, J., Mistelis, L. and Kroll, S., *op cit.* para 6-44.

⁹²⁸ See Kuwaiti Cassation Court decision no. 67/85 commercial dated 18/12/1985, where the court refused enforcement on the basis of an applicant’s failure to furnish an arbitration agreement as required under Article IV of the New York Convention.

Omani law expressly requires that an arbitration agreement must be in writing; the requirement is met “if it is contained in a document which the two parties have signed, or if it is contained in letters, telegrams or other written means of communication which the two parties have exchanged.”⁹²⁹ In Bahrain, under the International Commercial Arbitration Act, it appears that the formal requirement of an arbitration agreement will not cause any problems as it is based upon the Model Law.⁹³⁰

In Kuwait, Qatar, the UAE and Bahrain the provisions regarding arbitration in the Code of the Civil and Commercial Procedure contain no reference to the meaning of “writing,” other than the stipulation that the arbitration agreement can only be proven in writing.⁹³¹ In this context, many writers support the idea of the arbitration agreement having to be in writing to be valid.⁹³² However, the author does not agree with this view, as the provision that “an agreement to arbitrate may only be evidenced in writing”⁹³³ is obviously nothing more than a requirement of evidence of proof of an arbitration agreement. In addition, the principles adopted by the cassation courts that the rules of evidence regarding civil and commercial matters are not related to public policy means that parties can agree expressly or implied to the contrary.⁹³⁴ For example, if parties choose the national law of any of these states to govern the dispute, and the agreement to arbitrate is made orally, a losing party who has any objection regarding this requirement must present it before the tribunal of merit, whether the arbitral tribunal or the competent court where arbitration was made. Therefore, if the losing party participates in arbitration by oral agreement without objecting to the invalidity of the

⁹²⁹ The Law of Arbitration in Civil and Commercial Disputes, Article 12.

⁹³⁰ See the International Commercial Arbitration Act, Article 7 (2) which provides that “the arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”

⁹³¹ See, Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 233 (2), Code of the Civil and Commercial Procedure; the UAE: Article 203 (2) of the Code of Civil Procedure; Qatar: Article 190 (2) of the Code of Civil and Commercial Procedure.

⁹³² See, e.g. El-Ahdab, A., op cit. pp.103 and 517; Radhi, H., ‘Arbitration In Bahrain’ (1987) 2 *Arab L.Q.* 267.

⁹³³ See, Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 203 (2), Code of the Civil and Commercial Procedure; the UAE: Article 203 (2) of the Code of Civil Procedure; Qatar: Article 190 (2) of the Code of Civil and Commercial Procedure.

⁹³⁴ See, e.g. the Kuwaiti Cassation Court, Decision No. 205/86 commercial dated 22/4/1987; Decision No. 287/88 commercial dated 26/3/1989; Decisions No. (807/2000) and (810/2000) commercial dated 17/6/2001; decision No. (16/94) Civil dated 7/11/1994; decision No. (225/86) commercial dated 15/4/1987.

arbitration agreement, its silence waives the requirement of form. As a result, it appears that an oral arbitration agreement is valid as long as the other party does not object at the beginning of the arbitral proceedings.

Under Saudi Arabian law there are no express provisions requiring that the agreement must be in writing.⁹³⁵ However, there is disagreement among writers⁹³⁶ as to the meaning of the provision of Article 5 of the Arbitration Law of 1983 which provides that “The parties to the dispute shall file the arbitration instrument with the Authority originally competent to hear the dispute. The instrument shall be “(i) signed by the parties or their authorized attorneys, and by the arbitrators, (ii) state the details of the dispute, (iii) the names of the arbitrators, (iv) their acceptance to hear the dispute. Copies of the documents relating to the dispute shall be attached.”⁹³⁷ Some writers say this supports the arbitration agreement having to be in writing and signed to be valid,⁹³⁸ while others make a distinction between an arbitration agreement and an arbitration clause, arguing that Article 5 only applies to an arbitration agreement.⁹³⁹

In the researcher’s opinion, the requirements set out in the previous text should not be applied with regard to the enforcement of a foreign arbitral award, even if the Saudi law is expressly the applicable law governing the formal validity of an arbitration agreement. It should, however, be first understood that the formal arbitration agreement requirements apply in the context of arbitration that has taken place in Saudi Arabia. Second, it is obvious that the aims of the article concern conditions of procedural approval of authority, and not conditions of the validity of the arbitration agreement. This is clear from the opening line of the text, which provides that “*the parties to the dispute shall file the arbitration instrument with the Authority originally competent to*

⁹³⁵ See Lew, J., ‘The Recognition and Enforcement of Arbitration Agreement and Awards in the Middle East’ (1985) 1 (2) *Arb Intl* 174.

⁹³⁶ See Saleh, S., op cit. pp. 304-307; Sayen, G., ‘Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia’ (2003) 24 *Univ Pennsylvania J Intl Econ L*, pp 913—15; Turck, N, ‘Arbitration in Saudi Arabia’ (1990) 6 (3) *Arb Intl* pp.287-288; Turck, N, ‘Saudi Arabia, in van den Berg, A.J., and Sanders, P., (eds) *International Handbook on Commercial Arbitration* (Kluwer, Deventer 1994) pp. 6-7; El-Ahdab, A, op cit. p.569; Van den Berg, A.J., National Reports: Saudi Arabia, (1984) IX YCAB, pp7, 15.

⁹³⁷ The Arbitration Regulation of 1983, Article 5.

⁹³⁸ See e.g., Saleh, S, op cit. pp. 304-307; Sayen, G, op cit. p.218.

⁹³⁹ See Turck, N, ‘Arbitration in Saudi Arabia’ (1990) 6 (3) *Arb Intl* pp.287-288; Turck, N, ‘Saudi Arabia, in Van den Berg, A.J., and Sanders, P., (eds) *international Handbook on Commercial Arbitration* (Kluwer, Deventer 1994) pp. 6-7; El-Ahdab, A, op cit. p.569; Van den Berg, A.J., National Reports: Saudi Arabia, (1984) IX YCAB, 7 and 15.

hear the dispute” with the aim of taking “a decision approving the arbitration instrument.”⁹⁴⁰ Third, also with regard to the effectiveness of these requirements in the context of arbitration inside Saudi Arabia, in cases in which the arbitration agreement does not meet the requirements as prescribed by Article 5, it seems such a defect will not lead to the arbitration agreement being declared null. Although the Article requires that “*the instrument shall be signed by... the arbitrators, and ... the names of the arbitrators and their acceptance to hear the dispute*”, the Arbitration Regulation stipulates the appointment of an arbitrator by the authority originally competent to hear the dispute, “if the parties have not appointed the arbitrators.”⁹⁴¹ In addition, Saudi Court practice has shown that it goes further than this view in approving the submission to arbitrate even if one party insists on not signing the submission.⁹⁴² Accordingly, there is no doubt that the previous requirements are unfeasible for governing formal requirements for the validity of an arbitration agreement relating to foreign arbitration. Hence, in light of the absence of such requirements under modern Saudi legislations, the enforcing court will examine this issue according to *Shari’a* law. Under *Shari’a* law, it seems there are no special form requirements for an arbitration agreement, which means the arbitration agreement is valid even if oral.⁹⁴³

With regard to modern means of communications, Bahrain, the UAE and Dubai, recently issued new laws regarding transactions and electronic commerce. These laws state that where a rule of law requires information to be in writing, that requirement is met by an electronic record, provided the information contained therein is sufficiently accessible for it to be used for subsequent reference whether by transmission, printing or other means. They also set out that a contract shall not be denied validity or enforceability on the sole grounds that it was concluded by means of one or more

⁹⁴⁰ See The Arbitration Regulation of 1983, Article 6.

⁹⁴¹ See The Arbitration Regulation of 1983, Article 10. *See also*, the 4th Review Committee, decision No. 22/T/4 dated 1413 H (1992).

⁹⁴² The 4th Review Committee, decision No. 105/T/4 dated 1413 H (1992), mentioned in Al-Tuwaigri, W., *Grounds for refusal of enforcement of foreign arbitral awards under New York Convention of 1958 with special reference to the Kingdom of Saudi Arabia*, 122; Al-Ajlan, I, *Compilation of Judicial principles confirmed by the Commercial Review Committee in the Board of Grievances from 1407 H (1987) to 1419 H (1999)* (the Board of Grievances Riyadh 2004) 56.

⁹⁴³ See Rashid, S., ‘Alternative Dispute Resolution in the Context of Islamic Law’ (2004) 8 *Vindobona J Intl Comm L & Arb* 95 at 106; Alqurashi, Z., ‘Arbitration under the Islamic Shariah’ (2003) 1 (2) *Oil, Gas & Energy Law Intelligence*, available at <<http://www.gasandoil.com/ogel/>>20/06/2008.

electronic communications.⁹⁴⁴ An arbitration agreement in accordance with the law in these states is considered to be an unofficial paper. Therefore, it seems that electronic records are sufficient to satisfy the writing requirement for the arbitration agreement.

In Oman, the law of Arbitration in Civil and Commercial Disputes provides that “An agreement to arbitrate shall be in writing if it is contained in a document which the two parties have signed, or if it is contained in letters, telegrams *or other written means of communication which the two parties have exchanged.*”⁹⁴⁵ It seems the expression “*other written means of communication which the two parties have exchanged*” will cover modern means of communications and will be considered as satisfying the requirement of the writing.

In Kuwait, Qatar, and Saudi Arabia, there are as yet no laws governing the use of modern means of communications in order to conclude a contract or for evidence. In Kuwait and Qatar, the draft of a law regarding transaction and electronic commerce has recently been completed. However, it should be pointed out that existing general rules might, to some extent, lead to modern means of communication being sufficient in this respect in cases that rest on commercial custom. Commercial custom is considered an alternative resource under the law where the text is unavailable.⁹⁴⁶ In these states generally, modern means of communication are used in many ways, e.g. banking procedures. Thus, it seems that modern means of communication may be an acceptable method of meeting the writing requirements.

In Saudi Arabia, under *Shari'a* law, which is the applicable law in the absence of modern Saudi legislation, it appears that the use of modern means of communication is sufficient for concluding valid contracts. The Islamic Fiqh Academy (IFA) in Jeddah,⁹⁴⁷

⁹⁴⁴ See Bahrain: Articles 5 and 10 of the Decree No. 28 of 2002 with respect to Electronic Transactions; in the UAE: Articles 7 and 11 of Federal Law No. 1 of 2006 on Electronic Commerce and Transaction; Dubai: Article 9 and 13 of the Electronic Transaction and Commerce Law No. 2 of 2002.

⁹⁴⁵ The Law of Arbitration in Civil and Commercial Disputes, Article 12.

⁹⁴⁶ See, Kuwait Article 1 of the Civil Code, Articles 2 and 96 of the Commercial Code; Qatar: Article 1 (1) of the Civil Code, Article 86 of the Commercial Code.

⁹⁴⁷ It was created by the decision of the third summit of the Organisation of Islamic Conferences (OIC) 1981 and launched in February 1988.

which is accorded considerable recognition by Saudi courts,⁹⁴⁸ has decided the following:

“First, if the agreement is made between parties who are not present in one place, and one cannot directly see and hear one another, and the communication means between them is writing, letter, messenger, telegram, telex, fax, or computer (i.e. e-contract), in this case the agreement would be validly concluded once the offer is accepted by the offeree after it arrives to him.

Second, if the agreement is made at one time between parties who are not present in one place, but can hear each another simultaneously, such as by the telephone and wireless, it is equivalent to concluding the agreement between attending parties, and thus it is subject to the general rules concluding a normal contract.”⁹⁴⁹

6.3.2.2 Substantive grounds of invalidity of the arbitration agreement

What are the grounds of invalidity? It is noted that is unusual for a party to seek to have an arbitration agreement ruled to be ineffective on the basis of there existing any grounds of invalidity.⁹⁵⁰

None of the conventions applied in the GCC States contains any special provisions determining substantive grounds of invalidity of the arbitration agreement as grounds for denying enforcement of the awards. The exception is the New York Convention, when it refers to the law governing the validity of the arbitration agreement “... 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*.”⁹⁵¹

However, if it is agreed that an arbitration agreement, like any contract, is subject to the conditions of validity of the contract itself, the arbitration agreement must therefore be

⁹⁴⁸ See, the 2nd Review Committee. Decision No. 235/T/2 dated 1415 H (1994).

⁹⁴⁹ The Islamic Fiqh Academy, ‘Decision No. 52 (3/6) about concluding Contracts by Modern Means of Communications’ (1990) 2 (6) *The Islamic Fiqh Academy Journal* 785.

⁹⁵⁰ See, Gaillard, E. and Savage, J., op cit. para 525.

⁹⁵¹ New York Convention, Article V (1) (a)

vitiated by substantive grounds of invalidity in the applicable law. The jurisprudence of international commercial arbitration suggests that those grounds are (i) lack of the consent; (ii) a defined legal relationship between parties; (iii) inarbitrability.⁹⁵²

Lack of consent: Enforcement of award might be denied if a losing party states that his consent to arbitration was in some way vitiated. The question of what vitiates consent is subject to the law applicable to substantive validity of the arbitration agreement.⁹⁵³ It is important to bear in mind that in the context of international commercial arbitration, it is a commonly accepted principle that interpretation of the arbitration agreement is subject to good faith.⁹⁵⁴

The court decisions in the GCC States do not show any practice in this area in the context of the enforcement of foreign arbitral awards. Under GCC laws ‘defect of consent’ arises from mistake, misrepresentation, duress, exploitation, or lesion.⁹⁵⁵ However, under the provisions governing the defect of consent, particularly in civil law (Kuwait, Bahrain, Qatar, the UAE), it might be difficult for the losing party to succeed in gaining refusal of the enforcement if the plea of invalidity of the arbitration agreement rested only on his defective consent. This view is held for the following reasons:

(i) According to national law of Kuwait, Bahrain, and Qatar, the effect of the existence of defects of consent e.g. mistake, fraud, and duress, will not annul an arbitration agreement where it is considered voidable. A voidable contract stands, unless it is adjudged null. There is no doubt that such a decision should be rendered by the tribunal of merits.⁹⁵⁶ Consequently, if a losing party believes that the arbitration agreement is invalid due to his having given consent which was in some way defective, he should first raise that defence of defect of consent before the competent court, whether the Arbitral Tribunal or the court in the place of arbitration. This can be done in two ways.

⁹⁵² See e.g. Redfern, A., and Hunter, M., op cit. paras 3-07- 3-24; Lew, J., Mistelis, L. and Kroll, S., op cit. paras 7-34 to 7-58; Gaillard, E. and Savage, J., op cit. paras 452 to 592; Di Pietro, D. and Platte, M., op cit. pp. 90-104.

⁹⁵³ See Section 6.3.1.1. dealing with the law applicable to substantive invalidity of the arbitration agreement.

⁹⁵⁴ Gaillard, E. and Savage, J., op cit. para 477.

⁹⁵⁵ See Kuwait: Articles 147 to 166 of the Civil Code; Bahrain: Articles 84 to 102 of the Civil Code; Qatar: Articles 130 to 147 of the Civil Code; the UAE: Articles 167 to 189 of the Civil Transaction Code.

⁹⁵⁶ See Kuwait: Articles 179 to 183 of the Civil Code; Bahrain: Articles 113 to 117, Civil Code; Qatar: Articles 158 to 162 of the Civil Code.

The first way is to raise an objection before an arbitral tribunal which has jurisdiction under the “competence-competence” principle. This is provided for clearly in Omani and Bahraini laws. The Omani law of Arbitration in Civil and Commercial Disputes sets out that the arbitral tribunal has exclusive jurisdiction and that the ruling on the pleas on the invalidity of the arbitration agreement must be rendered by the arbitral tribunal.⁹⁵⁷ In Bahrain under the law on International Commercial Arbitration (the same rule as in the Model Law), an arbitral tribunal may rule on such pleas “either as a preliminary question or in an award on the merits” but under the control of the court. If the arbitral tribunal rules as a preliminary question, and if the losing party has an objection, he must raise a plea before the competent court within thirty days after having received notice of that ruling.⁹⁵⁸ However, the laws in Kuwait, Qatar, Oman, Saudi Arabia, and the UAE are silent in this respect, which means that questions of the validity of a contract containing an arbitration clause could not be examined by the arbitrators but only by the courts, particularly as these laws do not recognise the principle of the severability of arbitration clauses. The second way is used in the post-award stage when the party should raise objections through the institution of recourse for annulment of the arbitral award disposing of the whole dispute; this can be made if the arbitral tribunal rules to dismiss such pleas in an award on the merits, or when he fails to do so.⁹⁵⁹

(ii) Under the principle of good faith, the losing party cannot enter a plea once he is participating in the arbitration proceeding. A good example can be found in Bahrain under the law on International Commercial Arbitration (the same rule as in Model Law), which provides that “A party who knows that ... any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such noncompliance without undue delay or, if a time limit is provided thereof, without such period of time, shall be deemed to have waived his right to object.”⁹⁶⁰ The same provision is found in Omani Arbitration law, but it stipulates that such an objection must fail within sixty days from the date he becomes aware of it.⁹⁶¹ In

⁹⁵⁷ The Law of Arbitration in Civil and Commercial Disputes, Article 22.

⁹⁵⁸ Law International Commercial Arbitration, Article 16 (3).

⁹⁵⁹ See Kuwait: Article 186 (a) of the Code of Civil and Commercial Procedure; Bahrain: Article 243 (1) of the Code of Civil and Commercial Procedure and Article 34 (2) (a) (1) of the Law International Commercial Arbitration; Qatar: Article 207 (1), Code of the Civil and Commercial Procedure; Oman: Article 53 (1) (a) of the he Law of Arbitration in Civil and Commercial Disputes; the UAE: Article 216 (1) (a) of the Code of Civil Procedure.

⁹⁶⁰ Law International Commercial Arbitration, Article 4.

⁹⁶¹ The Law of Arbitration in Civil and Commercial Disputes, Article 8.

Kuwait, Bahrain, Qatar, and the UAE under the Civil Code this concept can only be available where “a person whose consent had been given due a mistake may not invoke his mistake in a manner which is inconsistent with the requirements of good faith.”⁹⁶² Similarly, in the case of misrepresentation, when the losing party has practised misrepresentation, he cannot invoke the nullification of the contract.⁹⁶³

(iii) Under the principle of time limitation for actions, if the defects of consent relate to exploitation and lesion, the action must be brought within one year from the date of concluding the contract where it would be impossible in less than this time to get a decision for annulment of the arbitration agreement.⁹⁶⁴

A defined legal relationship between parties: since the arbitration agreement forms the basis of the arbitral proceedings, it is thus supposed be a defined legal relationship between parties. Although it is common that an arbitration agreement on International Commercial Arbitration arises out of a contractual relationship between the parties, there is no bar to an arbitration agreement that arises out of a non-contractual relationship.⁹⁶⁵ The New York Convention requires that there should be a “defined legal relationship” between the parties “whether contractual or not.”⁹⁶⁶ Thus, an arbitration agreement might arise out of a non-contractual relationship between parties, e.g. compensation arising from unlawful acts; tortious liability.⁹⁶⁷ In this respect, Davidson states that “in fairness, it should be observed that Article II (1) has never caused problems of interpretation.”⁹⁶⁸ The remainder of the conventions applied in the GCC States are silent in this regard, although it may be assumed that the enforcing courts in

⁹⁶² See Kuwait: Article 149 of the Civil Code; Bahrain: Article 87 of the Civil Code; Qatar: Article 132 of the Civil Codes; the UAE: Article 198 of the Civil Transaction Code.

⁹⁶³ See Kuwait: Article 155 of the Civil Code; Bahrain: Article 93 of the Civil Code.

⁹⁶⁴ See Kuwait: Articles 161 (1) and 166 of the Civil Code; Bahrain: Articles 97 (a) and 102 of the Civil Code; Qatar: Articles 124 (1) and 147 of the Civil Codes; the UAE: Article 198 of the Civil Transaction Code.

⁹⁶⁵ See Redfern, A., and Hunter, M., op cit. para 3-10; Rashed, S., *Arbitration in Private International Relations*, (Cairo, Dar Al-nahdah Al-Arab 1984), p.390.

⁹⁶⁶ New York Convention, Article II (1).

⁹⁶⁷ See Redfern, A., and Hunter, M., op cit. Para 3-10; Van den Berg, A.J., “Scope of the Arbitration Agreement” (1996) XXI YBCA 415. See also *Kaverit Steel Crane Ltd v Kone Corporation* (1994) XVII YBCA 346; *ABI Group Contracts Pty v Transfile Pty Ltd Mealy’s* (1999) XXIV YBCA 591; *Multistar Leasing Ltd v Twinstar Leasing Ltd* ((2000) XXV YBCA 871 (US District Court, August 28, 1998); *American Bureau of Shipping v Tencara SpA*, (2002) XXVII 509 (Italian Corte di Cassazione, June 26, 2001).

⁹⁶⁸ See Davidson, F., *Arbitration*, p.130.

these States will apply the same underlying principles in accordance with the applicable law.

The national law of the GCC States goes further than defining the legal relationship between parties, as it requires that “The subject matter of the dispute must be specified in the agreement for arbitration.”⁹⁶⁹ In case of a submission agreement, it seems that the enforcing court cannot adopt wider interpretations, since the wording of the provision is related to specifying the subject matter of the dispute. However, in Kuwait, Bahrain, Qatar and the UAE, the law is flexible in this regard, as the subject matter of dispute can be specified during the hearing of the suit.⁹⁷⁰ With regard to arbitration clauses, in the researcher’s opinion, the requirement of specification of the subject matter of the dispute is supposed not to be required under the arbitration clause, due to the dispute not yet having arisen.⁹⁷¹ However, in general, it is sufficient to determine the object of a defined legal relationship between parties, as it mentions that “all disputes arising out of or in connection with this contract shall be settled by arbitration.” In this situation, the referral to arbitration will not cover other disputes that arise between the parties themselves under another contract.⁹⁷²

Arbitrability: The concept of arbitrability means that the agreement must relate to subject matter which may be resolved by the arbitration. An arbitration agreement is considered valid if it conforms to the requirements concerning arbitrability. The New York Convention requires that an arbitration agreement should concern “a subject matter is capable of settlement by arbitration.”⁹⁷³ Each state determines which matters may or may not be referred to arbitration in accordance with its own political, social and

⁹⁶⁹ See Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 233 (3) of the Code of Civil and Commercial Procedure; Qatar: Article 190 (3) of the Code of Civil and Commercial Procedure; Oman: Article 10 (2) the Law of Arbitration in Civil and Commercial Disputes; the UAE: Article 203 (3) of the Code of Civil Procedure; Saudi Arabia: Articles 1 and 5 of Arbitration Law as well as Article 6 of Arbitration Regulation.

⁹⁷⁰ See Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 233 (3) of the Code of Civil and Commercial Procedure; Qatar: Article 190 (3) of the Code of Civil and Commercial Procedure; Oman: Article 10 (2) the Law of Arbitration in Civil and Commercial Disputes; the UAE: Article 203 (3) of the Code of Civil Procedure; Saudi Arabia: Articles 1 and 5 of Arbitration Law as well as Article 6 of Arbitration Regulation.

⁹⁷¹ This is clear as the first Article in the provisions governing arbitration in these States lays down that “Agreement to arbitrate may be made in respect of a specified dispute. Likewise, agreement to arbitrate may be made in respect of all disputes which arise from the implementation of a specific contract.”

⁹⁷² Dubai Cessation Court, decisions no. 48, 70 year 1992 date 23/5/1992 and no. 91/89 date 6/3/1999.

⁹⁷³ New York Convention, Article II (1).

economic circumstances.⁹⁷⁴ Consequently, where the ground of non-arbitrability arises under the applicable law governing the arbitration agreement, it is considered to be grounds for the invalidity of the arbitration agreement, which means that the enforcing court must deny the enforcement of a foreign arbitral award.

All the national laws of the GCC States contain the same condition, as they set out that “Arbitration is not permitted in matters which permit compromise.”⁹⁷⁵ Non-arbitrability is also considered to be a main reason for refusal of the enforcement of foreign arbitral awards, whether under international conventions or the national laws of the GCC States, and thus this point will be examined in more detail in the following chapter.

Finally, it should be noted that there might be additional substantive grounds regulating the validity of an arbitration agreement within the relevant applicable law, although the grounds mentioned previously are the principal ones, as was appreciated by the commentaries. For example, the capacity of parties to enter into an arbitration agreement in accordance with the civil codes in Kuwait, Bahrain, Qatar, and the UAE is considered substantive grounds for invalidity of contracts. In addition, in a case where the arbitrators are authorised to settle the subject matter of the dispute by compromise, according to the arbitration provisions in Kuwait, the arbitration agreement must contain the names of the arbitrators specifically; otherwise, the arbitration agreement will be annulled.⁹⁷⁶ In this regard, however, the Kuwaiti Court of Cassation has held that an annulment of an arbitration agreement in such a case will not harm the validity of the arbitration agreement, as long as an arbitrator is restricted to ruling upon the subject matter of the dispute in accordance with the law.⁹⁷⁷

⁹⁷⁴ See Redfern, A., and Hunter, M., *op cit.* para 3-12.

⁹⁷⁵ See Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 203 (4) of the Code of Civil and Commercial Procedure; Qatar: Article 190 (2) of the Code of Civil and Commercial Procedure; Oman: Article 11 of the Law of Arbitration in Civil and Commercial Disputes; the UAE: Article 203 (4) of the Code of Civil Procedure; Saudi Arabia: Articles 2 of Arbitration Law as well as Article 1 of Arbitration Regulation.

⁹⁷⁶ The Code of Civil and Commercial Procedure, Article 176.

⁹⁷⁷ See e.g. Kuwaiti Court of Cassation decision no. 146/85 Commercial date 5/3/1986.

6.4 Lack of Due Process in Arbitration Proceedings

The third ground on which a defendant might resist an application for enforcement of a foreign arbitral award in the GCC States is if he can prove lack of due process in the arbitration proceedings.

Enforcement of a foreign award may be refused under the New York Convention, if the defendant proves that he "... was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."⁹⁷⁸ In addition, the Arab League Convention sets out that an application of enforcement may be refused "if the parties had not been duly summoned to appear,"⁹⁷⁹ as does the Riyadh Convention.⁹⁸⁰ Under the Convention on the enforcement of judgment delegation and judicial notices in the GCC, enforcement shall be refused "if it is passed in absentia and the party against whom the [award] is invoked was not given proper notice of the suit or the [award] is sought."⁹⁸¹ Under national laws, an arbitral award can be granted enforcement if the enforcing court has verified that "that the parties to the proceeding where the [award] was made were regularly summoned and represented."⁹⁸²

It has been observed the lack of due process is the most important ground relied upon by parties resisting enforcement.⁹⁸³ The purpose of a due process requirement is to ensure that parties are given a fair hearing.⁹⁸⁴ Thus, a party wishing to resist enforcement must prove how the lack of due process breached the fairness of the hearing, so that an enforcing court must determine, in case of an objection on this ground, whether or not there was a lack of due process.

⁹⁷⁸ New York Convention, Article V (1) (b).

⁹⁷⁹ Arab League Convention, Article 3 (d).

⁹⁸⁰ Riyadh Convention, Article 37 (d).

⁹⁸¹ The Convention on enforcement of judgement delegation and judicial notices in the GCC states, Article 2 (b).

⁹⁸² Kuwait: Article 199 (b) of the Code of Civil and Commercial Procedure; Bahrain: Article 252 (2) of the Code of Civil and Commercial Procedure; Qatar: Article 380 (2) of the Code of Civil and Commercial Procedure; Oman: Article 352 (b) of the Code of Civil and Commercial Procedure; in the UAE: Article 235 (2) (c) of the Code of Civil Procedure.

⁹⁸³ See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 297; Redfern, A., and Hunter, M., op cit. para 10-39.

⁹⁸⁴ See Redfern, A., and Hunter, M., op cit. para 10-39; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-81.

The concept of due process is not uniform in the above regimes. The most developed concept for due process is found under Article V (1) (b) of the New York Convention, where it covers two different aspects - the first related to a party's right to be given proper notice, the second relating to a party's ability to present his case. However, in the other conventions and national laws, the concept of due process only concerns the party's right to be duly summoned and/or properly represented. It is important to bear in mind that the reference to the expression "properly represented" is found under the provisions governing the enforcement of both foreign judgments and foreign arbitral awards. The term indicates that a lawyer is necessary to represent the defendant in cases such as hearings before a criminal court, but is not necessary in the context of arbitration procedure. For this reason, it seems that this question will not give rise to any difficulty in the enforcement of foreign arbitral awards.

It is commonly recognised that the principle of due process under the New York Convention constitutes part of public policy under the Convention.⁹⁸⁵ For this reason, it is now settled that lack of due process of Article V (1) (b) overlaps with public policy defence of Article V (2) (b).⁹⁸⁶ Consequently, it has become common for parties to raise lack of due process under either provision.⁹⁸⁷ Other regimes applied in the GCC States produce the same effect, as will be seen later in this section.

This section addresses six issues, (i) the law governing violation of due process; (ii) lack of proper notice; (iii) when a party is considered unable to present his case; (iv) default

⁹⁸⁵ United Nations Conference on Trade & Development, *Dispute Settlement: International Commercial Arbitration* (Module 5.7 Recognition & Enforcement of Arbitral Awards: The New York Convention), UN Doc UNCTAD/EDM/Misc.232/Add.37 (2003) 32. In Australia, e.g., International Arbitration Act 1974-section 19 expressly provides that "... an award is in conflict with the public policy of Australia if: ... (b) a breach of the rules of natural justice occurred in connection with the making of the award."

⁹⁸⁶ See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* pp 299-300; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-82; Gaillard, E. and Savage, J. op cit. para 1697; Di Pietro, D. and Platte, M., op cit. p.149; Kroll, S., op cit. p.168. See also in case, *Presse Ohhice SA v Centro Editorial Hoy SA* (1979) IV YBCA 301 (Mexico Court of First Instance 1977) pp 301-2; *Madlen Mills Inc v Lourdes SA* (1979) IV YBCA 320, (Mexico Court of Appeal 1977) pp 303-4; *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* 415 FSupp 133, (US District Court New Jersey 1976); *X (Syria) v X* (2004) XXIX YBCA 663 (Germany Court of Appeal 1998) 668.

⁹⁸⁷ In *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* (1999) 1 HKLDR 552 (Hong Kong Court of Final Appeal 9 Feb 1999), the court stated that "It has become fashionable to raise the specific grounds in ... (Art V (1) (b)), which are directed to procedural irregularities, as public policy grounds (Art V (2) (b)). There is no reason that this course cannot be followed."

of a party; (v) waiver of due process violation; and (vi) whether it is a requirement that violation of due process must affect the result of the arbitral award.

6.4.1 The Law Governing Lack of Due Process

The standard of due process adopted in the GCC States may differ according to the law of the place of arbitration or the law governing the arbitration agreement. Therefore, where lack of due process is raised as a ground for refusing enforcement of a foreign arbitral award, the question may arise as to which law and enforcing court in the GCC States should apply.

Under the New York Convention, Article V (1) (b) is unclear which law should govern the issue. There is no case-law in the GCC States dealing with this issue. Different views on the issue have been adopted by national courts and authors.

The first view advocates that Article V (1) (b) sets out a genuinely international substantive rule on lack of due process which is sufficient in itself as a standard of due process.⁹⁸⁸ This view is based on the fact that the wording of Article V (1) (b): “is expressed in terms of substantive rules, and not in choice of the law terms.” Therefore, a violation of the substantive rule set out in Article V (1) (b) will be adequate for denial of the enforcement award.

However, this view is rejected by some commentators, since Article V (1) (b) would then impose a rather vague international standard of due process.⁹⁸⁹ According to this view, possible choices as to the law governing the standard of due process include the law chosen by parties to govern the arbitral process or, in the absence thereof, the law of the arbitration seat.⁹⁹⁰

⁹⁸⁸ See Gaillard, E. and Savage, J. op cit. 1696. See also, van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p. 298, with reference to case law in footnote 186; Kaufman-Kohler, G., ‘Globalisation of Arbitral Procedure’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, 1322; Mantilla-Serrano, F., ‘Towards a Transnational Procedure Public Policy’ (2004) *Arbitration International* 333; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-81.

⁹⁸⁹ See e.g. Mehren, R., ‘Enforcement of Foreign Arbitral Awards in the United States’ (1998) 1 *International Arbitration Law Review* 198, 200; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-81.

⁹⁹⁰ See e.g. Martinez, R., ‘Recognition and Enforcement of 1958: The Refusal Provisions’, (1990) 24 *Int’l Law*. 487, 499; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-81; Garnett, R., ‘International Arbitration Law: Progress Towards Harmonisation’ (2002) 3 *Melbourne Journal of International Law* 400,406; Tweeddale, A. and K., op cit. pp.233 and 241.

The third view suggests the law of the place where enforcement is sought should be applied, and this is adopted by many national courts,⁹⁹¹ and supported by a number of writers.⁹⁹² Accordingly, courts in these states can refuse enforcement of a foreign arbitral award if there has been a failure of due process in accordance with their national law. Moreover, some courts, e.g. in Hong Kong, the Court of Final Appeal, have taken into consideration the rules and law chosen by the parties as well as their own law.⁹⁹³

In the GCC States, there is no case-law dealing with this subject. In addition, the national laws of the GCC States, with the exception of the UAE, contain no provisions determining which law should be applied. However, in the researcher's opinion, an enforcing court should not adopt its own law, whether enforcement is sought under an international convention or national provisions governing the enforcement of foreign arbitral awards. This view is based on following reasons. Firstly, national laws contain no provisions which would allow the application of that law. Secondly, the law leaves the arbitrators complete freedom to select the *lex arbitri*, unless the parties agree otherwise.⁹⁹⁴ Accordingly, if national law does not apply in the context of national arbitration, *a fortiori*, an enforcing court should not apply its own law to govern the issue of due process in the context of enforcement of a foreign award, as long as another law has been chosen by parties or arbitrators to govern the arbitration. Thirdly, courts in applying statutory provisions governing the enforcement of foreign judgments (which also govern the enforcement of foreign arbitral awards), do not apply their own law. Fourthly, Article V (1) (d) of the New York Convention, emphasises that party

⁹⁹¹ See e.g. *Parsons & Whittemore Overseas Co v RAKTA I YBCA* 205 (1976) (US Court of Appeals 2nd Cir 1974) 975; *Dubois & Vanderwalle v Boots Frites BV* 640 XXIVa YBCA (1999) (Paris Court of Appeal 22 Sep 1995) 641; *Firm P (US) v Firm (Germany)* (1977) II YBCA 241 (Germany) Court of Appeal 3 Apr 1975); *Carters Ltd v Francesco Ferraro* (1979) IV YBCA 275 (Italy Court of Appeal 1975) 276; *Biotronik Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Co* 415 F. Supp. 133 (US District Court New Jersey 1976) 140; *Renault Jacquinet v Sicea* (1979) IV YBCA 284 (Italy Court of Appeal 1977)286; *Dutch Seller v Swiss buyer* (1979) IV YBCA 309 (Switzerland Court of Appeal 1971) 310; *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412 (English Court of Appeal); *Kanoria v Guinness* [2006] 2 All ER (Comm.) 413 (English Court of Appeal).

⁹⁹² See e.g. Redfern, A., and Hunter, M., op cit. para 10-40; Di Pietro, D. and Platte, M., op cit. p.147.

⁹⁹³ *Hebei Import & Export Corporation (PR Chain) v Polytek Engineering Company Limited (Hong Kong)* [1999] 1 HKLRD 665 (Hong Kong Court of Final Appeal 1999) 685 available at < <http://.hklii.org>> 22 Jun. 2008; also see *Ukrvneshprom State Foreign Economic Enterprise v Tradeway Inc* 1996 WL 107285 (US District Court SD NY 1996) 5.

⁹⁹⁴ Kuwait: Articles 179, 182 of the Code of Civil and Commercial Procedure; Bahrain: Article 238 (1) (2) of the Code of Civil and Commercial Procedure and Article 19 of the International Commercial Arbitration Law; Qatar: Articles 198, 200 (1) of the Code of Civil and Commercial Procedure; Oman: Articles 25, 30, and 33 the Law of Arbitration in Civil and Commercial Dispute; in the UAE: Articles 208 (2) (1), 212 of the Code of Civil Procedure; Saudi Arabia: Article 39 of the Implementation Rules of the Arbitration Law.

autonomy to in determining the law governing the arbitral procedure prevails over both the law of the forum where enforcement is sought and the law of the place of arbitration. Thus, enforcing courts in the GCC States should more appropriately address the issue of due process so in accordance with the law chosen by the parties to govern the arbitration, or the law of the arbitral seat.⁹⁹⁵

UAE law contains a conflict rule, which states that “all questions of procedure are governed by the law of the country in which the action is brought, or in which the proceeding takes place.”⁹⁹⁶ Accordingly, the enforcing court should apply the law of the arbitration seat when the question of lack of due process is raised.

Finally, it should be borne in mind that, irrespective of the law governing due process, there should be a basic core of due process, such as the right to state a defence, the equal treatment of both parties, and that no measure should be taken of which any party is unaware. An enforcing court must always refuse if arbitrators fail to respect these principles.

6.4.2 Lack of Proper Notice

As can be seen above, enforcing courts in the GCC States will not apply their own standard for establishing violation of due process, unless the national law of the place of enforcement has been selected by the parties to govern the arbitral proceedings. Thus, it is useful to examine the provisions of the GCC laws.

However, the most important issue to be taken into consideration in this respect is that the resisting party must prove the lack of due process, as well as providing a translation of the governing law, if it is not written in Arabic.

It should be borne in mind that the question of whether notice is not considered proper depends essentially on the facts of the case.⁹⁹⁷ Several issues may arise under this head - the standard of proper notice, the length of time limits, disclosure of the arbitrator's name, the language of the notice, and what address it should be delivered to.

⁹⁹⁵ See decision of the Cassation Court in Egypt no. 2660 year 59 date 27/3/1996. The court examined a due process violation, under Article V (1) (b) of the New York Convention in accordance with the law chosen by parties, which was Swedish law.

⁹⁹⁶ The UAE Civil Transactions Code, Article 21.

⁹⁹⁷ See van den Berg, A.J., ‘Consolidated Commentary’ (2003) XXVIII YBCA 655.

6.4.2.1 The Standard of Proper Notice

Proper notice always must be given, irrespective of whether the party has been in attendance or not, otherwise the court will refuse to enforce a foreign award. What standard of notice is deemed to be sufficient? It is generally accepted that the notice need not be in a particular form.⁹⁹⁸ However, the standard of proper notice essentially depends on the requirements that should be observed under the law governing this issue. Therefore, it is worth highlighting that standard, whether under international arbitration laws or the national laws of the GCC States where these are chosen by the parties to govern the arbitration.

In the context of the international arbitration laws, it can be observed that there are no excessive details regarding notice requirements. For example in the UNCITRAL Model Law,⁹⁹⁹ if the parties do not agree on a certain procedure, notice is proper if it is made by any written communication and delivered by ordinary post or registered letter,¹⁰⁰⁰ or any other means which provides a record of the attempt to deliver it, such as modern electronic means of communication. A similar standard is found under the UNCITRAL Rules¹⁰⁰¹ and the ICC Rules,¹⁰⁰² while, according to the Arbitral Rules of Procedure in the GCC Commercial Arbitration Center, notification will be sufficient only if made by registered letter.¹⁰⁰³

Under the GCC laws, the requirements for notice used in arbitration proceedings are different to those used before court proceedings in the Code of Procedure.¹⁰⁰⁴ The law

⁹⁹⁸ See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 303; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-84. also see *Generica Limited v Pharmaceuticals Basics Inc* (1998) XXIII YBCA 1076 (Court of Appeals US 1997) 1130; *Shipowner v Charterer (Germany)* (2007) YBCA XXXII 381 (Germany Court of Appeal 14 December 2006) 372; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 299-300; *Consortio Rive SA De CV v Briggs Of Cancun Inc* 796; *Presse Office SA v Centro Editorial Hoy SA* pp 301-2; *Malden Mills Inc v Hilaturas Lourdes SA* 304.

⁹⁹⁹ The UNCITRAL Model Law, Article 3.

¹⁰⁰⁰ It recommends using registered letters in order to avoid the objection that no letter was received, since the proof is guaranteed. See Davidson, F., *International Commercial Arbitration*, p.34; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-84.

¹⁰⁰¹ UNICTRAL Rules, Article 2 (1).

¹⁰⁰² ICC Rules, Article 3 (2).

¹⁰⁰³ Arbitral Rules of Procedure in the GCC Commercial Arbitration Centre, Article 10.

¹⁰⁰⁴ In Kuwait: Article 179 of the Code of Civil and Commercial Procedure; Bahrain: Article 238 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 200 (1) of the Code of Civil and Commercial Procedure; Oman: Articles 7, 30 of the Law of Arbitration in Civil and Commercial Disputes; Saudi Arabia: Article 39 of the Implementation Rules of the Arbitration Law; UAE: Article 208 of the Code of Civil Procedure.

indicates that if the parties do not agree on a certain procedure, or the procedure is determined by the arbitrators, the arbitrators are only bound by the requirements contained in the chapter of the Code of Civil and Commercial Procedure.¹⁰⁰⁵

In Kuwait and the UAE it is obvious that there are no compulsory requirements regarding notice, as it is merely provided that “the arbitrators ... shall notify the adversaries of the date of the first sitting for the hearing of the dispute and its place.”¹⁰⁰⁶ Consequently, as clarified by the Explanatory Memorandum, notice can be sufficient if it is made either “by a registered letter, or under any of the simplified forms which guarantee that notify the parties of the date and the place of the hearing.”¹⁰⁰⁷ It is clear that these requirements concentrate on the fact of notification, and not its form. For this reason, as long as the party is notified of the procedure, it does not matter which form is used. This may lead enforcing courts to adopt a liberal interpretation in this regard, emphasising compliance with standards in international arbitration law, such as in the UNICTRAL Rules. In addition, since arbitration proceeding can be held where one party is absent, if the losing party knew of the arbitration, there is no ground for denying enforcement, as “an award may be made in accordance with a submission by one party if the other party failed to appear on the dated fixed.”¹⁰⁰⁸

In Bahrain and Qatar, the arbitration chapter of the Code of Civil and Commercial Procedure does not contain any requirements concerning proper notice. The arbitrators have power to choose arbitral procedure as long as the rights of the parties are ensured.¹⁰⁰⁹ Bahrain and Oman having adopted the same text as in the UNICTRAL Model Law, the notice need not be in a specific form.

Saudi Arabian arbitration law does contain formal requirements for the notification of parties. These requirements are mainly similar to the procedural rules of the Board of Grievances, e.g. the notification must be made by a clerk of authority, and must contain

¹⁰⁰⁵ In Kuwait: Article 182 of the Code of Civil and Commercial Procedure; Qatar: Article 198 of the Code of Civil and Commercial Procedure; Oman: Article 25 of the Law of Arbitration in Civil and Commercial Disputes; Saudi Arabia: Article 39 Implementation Rules of Arbitration Law; in the UAE: Article 212 of the Code of Civil Procedure.

¹⁰⁰⁶ In Kuwait: Article 179 of the Code of Civil and Commercial Procedure; in the UAE: Article 208 (1) of the Code of Civil Procedure.

¹⁰⁰⁷ See The Explanatory Memorandum of the Kuwaiti Code of Civil and Commercial Procedure.

¹⁰⁰⁸ In Kuwait: Article 179 of the Code of Civil and Commercial Procedure; in the UAE: Article 208 (2) of the Code of Civil Procedure.

¹⁰⁰⁹ See Radhi, H., *Judiciary and Arbitration in Bahrain*, pp.186-187.

various particulars.¹⁰¹⁰ Yet as these requirements cannot be applied in the context of arbitration made outside the territory of Saudi Arabia, even if the parties have agreed to select the Saudi arbitration law to govern the arbitration procedure, it seems that the enforcing court cannot consider them. However, according to Article 36 of the arbitration regulations, which refers to the general principle of due process which should be observed by the arbitral tribunal, “the arbitration panel shall observe the principles of litigation, so as to include conformation in proceedings, and to permit either party to take cognizance of the claim proceedings...” Therefore, it might be said that the enforcing court can rely on the previous text to adopt a liberal interpretation in order that notice need not be in a specific form as long as the party knew of the notification.

Briefly, the requirements of notice would not give rise to any problem as long as the party attended or knew of the arbitration proceeding. However, as the arbitration can be made unbeknownst to a party, it is always recommended that the requirement of the registered letter be fulfilled in order to avoid the risk of a claim that no notice was received.

6.4.2.2 Shortness of Time Limits

Another issue is whether unduly short time limits can lead an enforcing court to conclude that there was a denial of fairness. This issue is raised in the New York Convention under different aspects: the appointment of the arbitrators or preparation of defences, the service of summonses, or the submission of a party’s evidence. In general, it seems that short time limits are not deemed a violation of due process, because speed plays a central function in the effectiveness of international arbitration.¹⁰¹¹ For instance, it was held that a request to appoint an arbitrator within seven days would not amount to a denial of due process under the Article V (1) (b) of the New York Convention.¹⁰¹² Nevertheless, an enforcing court should not ignore a time limit determined by agreement of the parties or set out in applicable arbitration rules. The time limit within

¹⁰¹⁰ The Arbitration Law, Article 8. The Implementation Rules, Articles 11 to 15.

¹⁰¹¹ See van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 304; Di Pietro, D. and Platte, M., op cit. p.105; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-83; Garnett, R., op cit. p.105.

¹⁰¹² See e.g., *Dutch Seller v Swiss Buyer* (1979) IV YBCA 309 (Switzerland Court of Appeal 1971) 310; *Carters Ltd v Francesco Ferraro* (1979) IV YBCB (Italy Court of Appeal 1975) 276.

which a party must appoint an arbitrator is 30 days under the Model Law,¹⁰¹³ 20 days under the Arbitral Rules of GCC Commercial Arbitration Center,¹⁰¹⁴ and 15 days under the ICC Rules.¹⁰¹⁵ Therefore, if these provisions applied and a party had been given less time than they granted, the notice would be untimely, which might lead a court to deny enforcement.

In the GCC States, court decisions do not demonstrate any practice in this area. However, under the laws of these States, (except in Bahrain and Oman, as will be seen later), if the parties do not agree on a specific procedure, it is assumed that short notice does not normally lead to a violation of due process. This view is based on several factors. First, the GCC laws do not contain rules for time limits that should be considered for notification of the parties during the arbitration proceeding, and in some cases give the arbitrators complete freedom to fix such time limits.¹⁰¹⁶ Secondly, short notice is also adopted in the context of the court procedure, which means that short time is not *per se* a violation of due process.¹⁰¹⁷ Thirdly, it should be taken into account that the philosophy of short notice overlaps with demands that the arbitration must be concluded within a time limit, which is usually a short period. For instance, in Bahrain (chapter on arbitration in the Code of Civil and Commercial Procedure) and Qatar the arbitrators must make their award within three months following the date of acceptance of their mission.¹⁰¹⁸ Moreover, in certain industry and trade sectors, the use of short notice is regarded as a common feature in arbitration proceedings.¹⁰¹⁹

The law in Bahrain (International Commercial Arbitration Law) and Oman, however, stipulates a period of 30 days for the appointment of the arbitrator.¹⁰²⁰ Thus, shorter

¹⁰¹³ UNCITRAL Model Law, Article 11 (3) (a).

¹⁰¹⁴ Arbitral Rules, Article 11.

¹⁰¹⁵ ICC Rules, Article 8 (2).

¹⁰¹⁶ See e.g. in Kuwait: Articles 175 and 179 of the Code of Civil and Commercial Procedure; Bahrain: Articles 235 and 238 (1) (2) of the Code of Civil and Commercial Procedure; Qatar: Article 195 of the Code of Civil and Commercial Procedure; Oman Article 30 and 33 (2) of the Law of Arbitration in Civil and Commercial Disputes; the UAE: Articles 204 and 208 of the Code of Civil Procedure.

¹⁰¹⁷ For example, in Kuwait, according to Article 48 the Code of Civil and Commercial Procedure, the time limit for attendance before the court is five days. Moreover, the period given for any adjournment must not exceed three weeks (Kuwait: article 72 the Code of Civil and Commercial Procedure)

¹⁰¹⁸ Bahrain: Article 237 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 197 Code of Civil and Commercial Procedure.

¹⁰¹⁹ See Lew, J., Mistelis, L. and Kroll, S., *op cit.* para 26-83.

¹⁰²⁰ Bahrain: Article 11 (3) (a) of the International Commercial Arbitration Law; Oman: Article 17 (1) (b) of the Law of Arbitration in Civil and Commercial Disputes.

notification would appear to be a violation of due process, unless the parties agree otherwise.

6.4.2.3 Disclosure of the Arbitrator's Name

The concept of proper notice also extends the issue of non-disclosure of the name(s) of the arbitrator(s).¹⁰²¹ In an exceptional case, such non-disclosure led the German Court of Appeal to refuse the enforcement of an award on the basis of Article V (1) (b) of the New York Convention. The arbitration procedure in this case was conducted in accordance with the Arbitration Rules of the Copenhagen Committee for Grain and Foodstuffs Trade, which allow no disclosure of the names of arbitrators. The parties can only protest against undesirable names from a list of arbitrators presented by the institution in advance. However, the court considered that the rules of institution were not effective in giving the party the right to examine whether or not any of the undesirable names had been appointed as arbitrators, since the award was signed only by the President of the Committee. Moreover, the court found that most of the names on the list of arbitrators had business contacts or common economic interests with the parties, which could have given rise to issues of bias. For this reason, the court considered that the parties not having the right to know the names of arbitrators was a violation of the due process and thus enforcement was denied.¹⁰²²

Such circumstances are of course rarely, because national and international law gives parties are freedom to appoint arbitrators, failing which a court or other institution will appoint the arbitrators, notifying the parties.¹⁰²³

¹⁰²¹ See Di Pietro, D. and Platte, M., op cit. pp.151-152; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-85.

¹⁰²² *Danish buyer v German (F.R.) seller* (1979) IV YBCA 258 (Germany Court of Appeal 1979) pp 259-60.

¹⁰²³ See e.g. Kuwait: Article 175 of the Code of Civil and Commercial Procedure; Bahrain: Article 235 of the Code of Civil and Commercial Procedure; Oman: Article 17 the Law of Arbitration in Civil and Commercial Arbitration Disputes; Qatar: Article 193 (2) of the Code of Civil and Commercial Procedure; Saudi Arabia: Article 6 of the Implementation Rules of the Arbitration Law; the UAE: Articles 203 and 204 of the Code of Civil Procedure; The Rules in GCC Arbitration centre, Article 12 (1); ICC Rules, Article 8 (2).

6.4.2.4 The Language of The Notice

Another issue that could arise under the concept of “proper notice” is its; for example, whether or not it constitutes a breach of due process if a request for arbitration is in a foreign language.

In some cases this issue arose when the resisting party argued that the first invitation to participate in the arbitration proceedings was drafted in the language of the seat of the arbitration - a language that he did not understand - without translation, so that the award violated Article V (1) (b) of the New York Convention. The enforcing court found that there was no evidence that the parties had expressly agreed to a language for the arbitration other than the language of the seat, and therefore the court could not find that there had been improper notice.¹⁰²⁴

It appears that this issue will not cause difficulty the GCC, as it is not necessary that the language of the arbitration the same as that or those of the parties. The arbitrators therefore have complete freedom to select the arbitral language which must be used in arbitration procedure unless the parties have agreed otherwise.¹⁰²⁵

Such a position is reflected in all major institutional rules¹⁰²⁶ and rules applied in *ad hoc* arbitrations, such as UNCITRAL.¹⁰²⁷ In contrast, the GCC Commercial Arbitration Center Rules provide that “Arbitration shall be conducted in the Arabic language. ... The tribunal may authorize the presentation of memoranda and statements and submission of pleadings in a foreign language provided that they are accompanied by an Arabic translation. In all cases the award shall be rendered in Arabic.”¹⁰²⁸ Accordingly, a failure to notify the party in accordance with a previous text would make the notice improper, and violate Article V (1) (b) of the New York Convention.

¹⁰²⁴ See *Seller (China) v Buyer (P.R. Japan)* (2002) XXVII YBCA 515 (Japan District Court 1999) pp 517-18; *N.Z. v I* (1992) XVII YBCA 581 (Switzerland Court of Appeal) 583.

¹⁰²⁵ See Kuwait: Articles 179 and 182 of the Code of Civil and Commercial Procedure; Bahrain: Article 22 of the International Commercial Arbitration Law; Qatar: Article 198 of the Code of Civil and Commercial Procedure; Oman: Articles 29 of the Law of Arbitration in Civil and Commercial Disputes; UAE: Article 212 of the Code of Civil Procedure.

¹⁰²⁶ See e.g., ICC Rules Article 16; AAA ICDR Rules Article 14; LCIA Article 17; CIETAC Article 75; ICAC Rules 10; Stockholm Institute Article 23; GCC commercial Arbitration Centre Rules Article 7.

¹⁰²⁷ See UNCITRAL Rules Article 17.

¹⁰²⁸ Arbitral Rule of procedure for the GCC Commercial Arbitration Centre, Article 7.

6.4.2.5 The address it should be delivered to

Proper notice may also cover the issue of the address to which it should be delivered in order to satisfy the requirements of due process. For example, if the request for arbitration proceedings is sent to the addressee's last known address, then it can be considered that the party knew of the arbitration. This issue was successfully invoked before the German Court of Appeal. In this case, a Russian party sought enforcement of a Moscow award in Germany under the New York Convention. Notification had been sent to the defendant's previous address. The court found that although Article 3 of Russian law of International Commercial Arbitration, indicated that a notification made to the defendant's last known address is sufficient if no other address can be found after making a reasonable inquiry, there was no evidence here that any attempt had been made to find the present address of the German party, which was easily known. The Court therefore considered that the German party had not been duly informed of the arbitration, and refused enforcement of the award.¹⁰²⁹

In the GCC states, except in Bahrain and Oman, the laws do not specify to which address notice may be served. However, when the parties enter into an agreement, their contract usually contains the specific address to which any notice must be sent, and it is submitted that notice is not proper unless sent to such address. In the absence of such agreement, notification is deemed to be received if delivered to the party personally, or to his place of business, habitual residence, or mailing address. It suggested that in the context of international commercial arbitration none of these addresses is preferred to another.¹⁰³⁰

Bahrain (International Commercial Arbitration Law) and Oman follow the Model Law, which states that service may be effected either by: (1) delivery to the addressee personally; (2) delivery to his place of business, habitual residence or mailing address; (3) being sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter; or (4) any other means which provides a record of the attempt to deliver it.¹⁰³¹ It will be noted that method 3 can only be used if none of

¹⁰²⁹ *Seller (Russian federation) v Buyer (Germany)* (2002) XXVII YBCA 445 (Court of Appeal of Bavaria 2002) pp 446-47.

¹⁰³⁰ See Davidson, F., *International Commercial Arbitration*, p. 34.

¹⁰³¹ See Bahrain: Article 3 of the International Commercial Arbitration Law; Oman: Article 7 (1) the Law of Arbitration in Civil and Commercial Arbitration Disputes.

the addresses given in methods 1 and 2 can be found after making a reasonable inquiry,¹⁰³² and if this is not done, notification is considered improper if injury to the other party results.

6.4.3 Inability Present Case

It suggested that the phrase “unable to present his case” used in the New York Convention, generally covers any serious irregularity in the arbitral proceedings that may lead parties to miss an opportunity to present their case.¹⁰³³ A clear interpretation of this ground is provided by a US Court,

“[T]he defence basically corresponds to the due process defence that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner. ... Therefore, an arbitral award should be denied or vacated if the party challenging the award proves that the due process jurisprudence defines it. ... It is clear that an arbitrator must provide a fundamentally fair hearing. ... A fundamentally fair hearing is one that meets the minimal requirements of fairness - adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”¹⁰³⁴

In the GCC States, as has been seen previously, arbitrators are not bound to comply with the procedural rules used in court. However, it should be borne in mind here that even if the provisions dealing with fundamental principles of legal proceedings are not explicit in some GCC laws, arbitrators must adhere to the fundamental principles which guarantee that each party has a fair opportunity to present its case. Thus, the enforcing court in these States, whether their legal system is based on Civil Law or *Sharia* Law, must consider these fundamental principles of legal proceedings in deciding whether a party “was unable to present his case.” In general, these fundamental principles are: (i) respect of the right to defence; (2) the equality of the parties; (3) that no measure should

¹⁰³² See Bahrain: Article 3 of the International Commercial Arbitration Law; Oman: Article 7 (2) the Law of Arbitration in Civil and Commercial Arbitration Disputes.

¹⁰³³ See Di Pietro, D. and Platte, M., op cit. p.151.

¹⁰³⁴ *Generica Limited v Pharmaceuticals Basics Inc* (1998) XXIII YBCA 1076 (Court of Appeals US 1997) 1078-9.

be taken of which one or both of the parties are unaware; and (4) impartiality of the arbitrator.¹⁰³⁵

It can be observed that whatever attempt is made to simplify arbitration procedure in order to ensure the speed and flexibility of arbitration, the fundamental principles of legal proceedings must be taken into consideration.

6.4.3.1 Respecting the right to defence

It is an internationally accepted principle that parties should be given the chance to present and support their cases during arbitration proceedings.¹⁰³⁶ Thus, if the arbitral tribunal did not respect this principle, the enforcing court might deny enforcement.

Various aspects of this principle can be raised in this regard. For example, in accordance with the GCC legal system, parties have the right to ask the arbitral tribunal for the production of evidence which is in the possession of the opposing party.¹⁰³⁷ In this connection, it is useful to point out that institutional rules, such as those of the ICC, the LCIA, and the GCC Commercial Arbitration Centre, frequently contain the same right, as do rules applied in *ad hoc* arbitration, particularly the UNICTRAL Rules.¹⁰³⁸ It is sufficient ground to refuse enforcement if evidence which is in the possession of the opposing party and which could affect the award is withheld.

Furthermore, adjournments should be granted if a party was unable to participate for reasons outside his control. Yet, according to GCC Court practice, the arbitral tribunal is not required to grant such a request in all circumstances. If, for example, the tribunal

¹⁰³⁵ See e.g. Explanatory Memorandum of the Kuwaiti Code of Civil and Commercial Procedure under Article 182; Oman: Article 26 the Law of Arbitration in Civil and Commercial Arbitration Disputes; Qatar: Article 198 of the Code of Civil and Commercial Procedure the; Saudi Arabia: Article 36 of the Implantation Rules of Arbitration Law; the UAE: Article 212 of the Code of Civil Procedure; *also see* UAE Federal Cassation Court decision No: 831, 67 dated 23/5/2004 Issuance 2 year 26 (2004) p 1306; Dubai Court Cassation decision No: 537dated 23/4/2000, Issuance 11 year 2000 p 342; decision No: 40 Dated 26/11/2004, Issuance 15 first part year 2004p 1601; El-Ahdab, A., *op cit.* pp.521 and 727; in *Sharia Law* see Ibn Qudamah, *Al-Mughnai* vol 13 pp 577-82; Ibn Qasim, *Haashiyat Alrrawd* vol 7, 526; Majeed, N., 'Good Faith and Due Process: Lessons form the Shari'ah' (2004) 20 (1) Arb Intl 97 at 106.

¹⁰³⁶ See Di Pietro, D. and Platte, M., *op cit.* p. 153.

¹⁰³⁷ Kuwait: Article 180 (2) (b) of the Code of Civil and Commercial Procedure and Article 22 of the Law of Evidence in Civil and Commercial Procedure; Bahrain: Article 238 (3) of the Code of Civil and Commercial Procedure; Qatar: Article 200 of the Code of Civil and Commercial Procedure; Saudi Arabia: Article 28 of the Implementation Rules of Arbitration Law; the UAE: Article 209 (2) (b) the Code of Civil Procedure.

¹⁰³⁸ See under the ICC Rules, article 20 (5); UNICTRAL Rules, article 24 (3); the LCIA Arbitration Rules, Article 22 (1) (e); Arbitral Rules of Procedure for the GCC Commercial Arbitration Centre, Article 23.

found that argument and evidence mentioned in the submissions to re-open the hearing contained no new arguments, or the tribunal would not rely on the new evidence for its decision, the denial of such a request would not constitute a lack of due process.¹⁰³⁹ On the other hand, if there is an allegation of forgery of any document, or if any criminal incident occurs, the arbitral tribunal must suspend the arbitration until a final judgment has been given on this matter.¹⁰⁴⁰

Another example is when an arbitral tribunal rejects a method for presenting evidence used by party which had been suggested by the tribunal itself.¹⁰⁴¹

Moreover, in the UAE and Bahrain an arbitral tribunal is required to hear witnesses under oath. This is considered a fundamental requirement, the law providing that “the arbitrator shall cause the witnesses to take oath.”¹⁰⁴² Therefore, if the arbitral tribunal reaches the conclusion in accordance with key evidence given by witnesses who were not examined under oath, this contravenes a party’s right to have a fair opportunity to present his case, which might lead the enforcing court in these States to deny the enforcement under Article V (1) (b).

Finally, it should be pointed out that the methods and requirements of presenting evidence in international commercial arbitration differ from those requirements in litigation before national courts. This means, for example, that an arbitrator is empowered to rule whether to hold an oral hearing for the presentation of evidence, or

¹⁰³⁹ Dubai Cassation Court decision...

¹⁰⁴⁰ Kuwait: Article 180 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 199 of the Code of Civil and Commercial Procedure; Oman: Article 38 the Law of Arbitration in Civil and Commercial Arbitration Disputes; Saudi Arabia: Article 28 of the Implementation Rules of Arbitration Law; the UAE: Article 209 (2) the Code of Civil Procedure.

¹⁰⁴¹ This issue was considered by the US Court of Apple in *Iran Aircraft Industries v Avco Crop* 980 F2d 141 (US Court of Appeals 2nd Cir 1992) pp 145-46. In this case, a dispute arose between an Iranian and an American and was referred to the Iran-US Claims Tribunal for binding arbitration. During the a pre-hearing conference, the Tribunal found voluminous and complicated data and in order to save time and costs and to avoid difficulty with thousands of pages of invoices, the Tribunal allowed the American party to submit evidence of invoices through summaries, tabulations, charts, graphs or extracts prepared by an independent international auditor. By that time, the chairman of the Tribunal had resigned and had been replaced by new member, who disagreed with the method of presenting proof. The tribunal did not inform the respondent that such a method of giving evidence was no longer accepted and he was required to present the actual invoices. The US Court of Appeals affirmed that under these circumstances, the respondent was prevented from presenting its case before the tribunal, and enforcement was therefore denied.

¹⁰⁴² In the UAE: Article 211 of the Code of Civil procedure; Bahrain: Article 238 (4) of the Code of Civil and Commercial Procedure.

whether the proceedings shall be conducted on the basis of documents only.¹⁰⁴³ This is clearly the case in the GCC Laws, unless the parties agree otherwise,¹⁰⁴⁴ and in institutional rules, such as those of the ICC, the LCIA, the GCC Commercial Arbitration Rules, as well as rules that are applied in *ad hoc* arbitration and the UNICTRAL Rules.¹⁰⁴⁵

6.4.3.2 No measure should be taken of which one or both of the parties are unaware

It is an internationally accepted principle that the arbitral tribunal must give each party a real opportunity to comment on the relevant facts and evidence on which it wishes to rely in its decision. Failure to comply with this requirement, without legitimate excuse, contradicts a party's right to have a fair opportunity to present his case, which could be considered as a ground to deny enforcement under Article V (1) (b); for example, where the award is rendered without a party being given the right to comment on an expert's report appointed by the tribunal.¹⁰⁴⁶ This is also the case where documents are submitted to the tribunal without other party having been given the chance to present its argument,¹⁰⁴⁷ or without informing it of counterclaims.¹⁰⁴⁸

This issue is mentioned expressly in Omani law, which provides that “a copy of any memorandum, document or other documentary material which either of the two parties submits to the arbitral tribunal shall be sent to the other party. There shall likewise be sent to each of the two parties a copy of all experts' reports, documents and other

¹⁰⁴³ See Di Pietro, D. and Platte, M., op cit. pp.153-54;

¹⁰⁴⁴ See Kuwait: Articles 179,182 of the Code of Civil and Commercial Procedure; Bahrain: Article 238 of the Code of Civil and Commercial Procedure; Oman: Article 33 (1) the Law of Arbitration in Civil and Commercial Arbitration Disputes; Qatar: Articles 198 and 200 of the Code of Civil and Commercial Procedure; the UAE: Article 212 (1) of the Code of Civil Procedure.

¹⁰⁴⁵ See, ICC Rules Article 20 (2); LCIA Article 19 (1); GCC commercial Arbitration Centre Rules Article 21; UNCITRAL Rules Article 15 (1) and (2).

¹⁰⁴⁶ See *Paklito Investment Limited v Klockner East Asia Limited* (1994) XIX YBCA 664 (Supreme Court of Hong Kong, High Court 1993) 664-74.

¹⁰⁴⁷ See e.g. *G.W.L. Hersten & Co.B.V (Nederland) v Societe Commerciale Raoul-Duval et Cie (France)* (1994) XIX YBCA 708 (the Amsterdam Court of Appeal 1992) 708-9; *Rice Trading Ltd v Nidera Handelscompagnie BV* (1998) XXIII YBCA 731, (Netherlands Court of Appeal 1998) 732.

¹⁰⁴⁸ See *Portuguese Company A v Trustee in bankruptcy of German Company X* (1987) XII 486 (Court of First Instance of Bremen, 20 January 1983) 486 (the court dismissed the request for enforcement under Article V (1) (b) of the New York Convention because the losing party was not informed of the arguments presented by the winning party. As the court stated: “the mere possibility to submit documents on a disputed contract or to give its view without knowing the arguments of the opponent, is not sufficient for due process.”

evidential items submitted to such a tribunal.”¹⁰⁴⁹ The same can be found in the Bahraini International Arbitration Law.¹⁰⁵⁰ In the rest of the GCC although the arbitration laws contain no such provisions, such steps can be considered fundamental principles of legal proceedings under the Code of Civil and Commercial Procedure.¹⁰⁵¹

6.4.3.3 Impartiality of the arbitrator

The issues of fairness or the independence and impartiality of the arbitrator are fundamental principles of legal proceedings.¹⁰⁵² It is a fundamental principle of natural justice, which establishes that an adjudicator has a duty to act without bias, fairly, in good faith and judiciously.¹⁰⁵³ Moreover, in the civil law system, an arbitrator cannot produce the evidence to issue the award. This same principle applies to the judge. The impartiality of the arbitrator in this respect means that the arbitrator must issue an award only in accordance with the evidence and facts presented by the parties. Therefore, if the arbitrator had previously seen evidence relating to the dispute, he should not rely on that knowledge to make the award.

In the researcher’s opinion, the possibility of refusing to enforce a foreign arbitral award on the grounds of lack of impartiality and independence relies essentially on the procedural law of the arbitration, whether or not it contains a provision obliging an arbitrator to declare any reasons that may lead a party to challenge him. Accordingly, a failure to make a full disclosure to a party contradicts his right to a fair hearing, and amounts to a violation of Article V (1) (b).¹⁰⁵⁴

Oman and Bahrain (International Commercial Arbitration Law) are the only jurisdictions to provide specifically that the arbitrator must “disclose any circumstances such as may give rise to doubts as to his independence or impartiality. If any such circumstances come into being subsequent to his appointment or during the arbitration

¹⁰⁴⁹ Article 31 of the Law of Arbitration in Civil and Commercial Disputes.

¹⁰⁵⁰ Article 24 (3) of the International Commercial Arbitration Law.

¹⁰⁵¹ Kuwait: Article 61 of the Code of Civil and Commercial Procedure; Qatar: Article 52 of the Code of Civil and Commercial Procedure; the UAE: Article 52 of the Code of Civil Procedure.

¹⁰⁵² See Tweeddale, A. and K., op cit. p. 415.

¹⁰⁵³ In some national laws this issue has been explicitly expressed; for example, Section 1 of the English 1996 Act; see also Article 10 of the Universal Declaration of Human Rights, which lays down that: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

¹⁰⁵⁴ See *Danish buyer v German (F.R.) seller* (1979) IV YBCA 258 (Germany Court of Appeal 1979) pp 259-60.

proceedings, he shall of his own accord declare the same to the two parties to the arbitration and the other arbitrators.”¹⁰⁵⁵ In the rest of the GCC, the law only allows the arbitrators to be challenged granted at the stage prior to the hearing being closed or issuance of the final arbitral award.¹⁰⁵⁶ This means that the parties can no longer raise a challenge at the stage of enforcement, even if they become aware of the reasons for such a challenge after the award has been made.

6.4.4 Default of a party

It should be noted that according to the Article V (1) (b) of the New York Convention, the principle of due process requires that an arbitral tribunal has given each party the opportunity to present their case, irrespective of whether the losing party had used this opportunity or elected instead to default. In other words, the question of the “inability to present its case” as a ground for refusal of the enforcement cannot result from that party’s own conduct. It can also be said that the party has no right simply to use the refusal to participate in proceedings as a pretext for obstructing the arbitration. Therefore, where the losing party refuses to attend the proceedings, or fails any respond to the submission of evidence, after being given a fair opportunity to do so, he cannot subsequently plead he was unable to present his case in order to resist enforcement. This principle has been generally accepted by commentators and national courts.¹⁰⁵⁷

This approach is followed by all GCC states except Qatar. For example, Kuwait law provides that “An award may be made in accordance with a submission by one party who has failed to appear on the date fixed.”¹⁰⁵⁸ Accordingly, if a party does not appear

¹⁰⁵⁵ Oman: Article 16 (3) the Law of Arbitration in Civil and Commercial Arbitration Disputes; Bahrain: Article 12 (1) of the International Commercial Arbitration Law.

¹⁰⁵⁶ Kuwait: Article 178 of the Code of Civil and Commercial Procedure; Qatar: Article 194 of the Code of Civil and Commercial Procedure; Oman: Article 19 the Law of Arbitration in Civil and Commercial Arbitration Disputes; Saudi Arabia: Article 12 of the Arbitration Law; the UAE: Article 207 of the Code of Civil Procedure.

¹⁰⁵⁷ See Gaillard, E. and Savage, J. (eds), op cit. para 1698; Van den Berg, A.J. *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* 306; Lew, J., Mistelis, L. and Kroll, S.. op cit. para 26-88; Garnett, R., op cit. 105; David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement*, 2005, 440; see also *Geotech Lizenz AG v Evergreen System Inc* 697 F.Supp 1248 (US District Court ED NY 1988) 1253; *Fitzroy Engineering Ltd v Flame Engineering Inc* 1994 WL 700173 (US District Court ND Illionis 1994) pp5-6; *Biotronik Mess-Und Therapiegeraete GmbH & Co v Medford Medical Instrument Co* 415 F.Supp 133,(US District Court New Jersey 1976) pp 140-41; *AIS Ganger Rolf v Zeeland Transp., Ltd*, 191 F.Supp. 359, 363 (S.D.N.Y. 1961); *SA v T. Ltd* (1990) XV YBCA 509 (Swiss Federal Tribunal, 12 January 1989) 512.

¹⁰⁵⁸ See in Kuwait: Article 179 of the Code of Civil and Commercial Procedure; Bahrain: Article 25 (c) of the International Commercial Arbitration; Oman: Article 35 the Law of Arbitration in Civil and

before the tribunal after being correctly given notice, or if he fails to produce his defence before a date fixed by the tribunal, the award made against him could not be refused enforcement on the ground of “inability to present his case” under Article V (1) (b). In Qatar, while arbitration provisions contain no rules dealing with such an issue, the enforcing court can refuse such a request, under general principles of litigation, which indicate that a party who caused a nullity of procedure may not invoke it.¹⁰⁵⁹

The same can also apply under the Model Law and institutional rules, such as those of the ICC, the LCIA and the GCCs, as well as rules applied in *ad hoc* arbitration, particularly the UNICTRAL Rules.¹⁰⁶⁰

6.4.5 Waiver of due process violation

It is suggested, generally, that if a party has an objection relevant to the lack of due process, it is his duty to raise that objection during the arbitration, as long as he was aware of the relevant fact.¹⁰⁶¹ Otherwise, an enforcing court may consider that the party has waived its right to resist enforcement.¹⁰⁶² To allow a party to raise a lack of due process for the first time at the stage of enforcement would violate the goal and the purpose of the New York Convention, as well as, in general, undermining the effectiveness of arbitration.¹⁰⁶³

Some also argue that where the law governing the arbitral procedure allows application to the courts of the arbitral forum during the arbitration and no such application is made, such objections should not be entertained by the enforcing court.¹⁰⁶⁴ However, in the researcher’s opinion, such issues should be capable of consideration at both stages,

Commercial Arbitration Disputes; Saudi Arabia: Article 18 of the Implementation Rule of Arbitration Law; the UAE: Article 208 (2) of the Code of Civil Procedure.

¹⁰⁵⁹ See Article 17 of the Code of Civil and Commercial Procedure.

¹⁰⁶⁰ UNCITRAL Model Law, Article 25; ICC Rules, Article 21 (2); the GCC Commercial Arbitration Centre Rules, Article 26; UNCITRAL Rules, Article 28.

¹⁰⁶¹ See Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-89; Di Pietro, D. and Platte, M., op cit. p.158; Garnett, R., op cit. p.105.

¹⁰⁶² Different jurisdictions have affirmed this view, even in the absence of express agreements to this effect; e.g. *Dardana Ltd v Yukos Oil Co.* [2002] EWCA Civ. 543 (English Court of Appeal); *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All E.R. (Comm.) 315; *Qinhuangdao Tongdo Enter. Dev. Co. v Million Basic Co.* (1994) XIX YBCA 675 (Hong Kong Supreme Court, 5 January 1993) 676-77; *Chrome Resources SA v Leopold Lazarus Ltd* (1986) XI YBCA 538 (Swiss Federal Tribunal, 8 February 1978) 541-42. See also *International Standard Electric Corp v Bidas Sociedad Anonima Petrolera, Industrial y Commercial* (1992) XVII YBCA 639 (US District Court, 24 August 1990) 645-47; *Hebei Import & Export Corp v Polytek Engineering Co.* 669.

¹⁰⁶³ See Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-89; Di Pietro, D. and Platte, M., op cit. p.158.

¹⁰⁶⁴ See Garnett, R., op cit. 105.

especially if the objection relates to public policy. In civilian systems a party has no right to waive the lack of due process if such an issue relates to public policy, since the parties cannot conclude an agreement which offends against public policy. Thus any purported waiver in such cases would be invalid.¹⁰⁶⁵

Only Oman and Bahrain provide specifically for the concept of “waiver” in the context of arbitration law. In both states, the law widens the possibilities of a waiver, where all aspects of lack of due process arising from provisions of the arbitration law would be covered.¹⁰⁶⁶ According to Omani law, a party must raise his objection within the agreed time or within sixty days from the date of knowledge where there is no agreement, otherwise he is considered to have waived his right to object.¹⁰⁶⁷ Under the Bahraini International Arbitration Law it is required that a party should raise a timely objection.¹⁰⁶⁸ In this, the Bahraini law follows the Model Law. It is clear that the question of what is considered as “a timely objection” is left to the decision of the enforcing court.¹⁰⁶⁹

In the rest of the GCC, States Kuwait, Qatar, Saudi Arabia and the UAE, arbitration law is silent on the issue of waiver. However, if the issue of a lack of due process relates to public policy, a party will not be barred from raising an objection at the stage of enforcement, even if he has not raised that objection during the arbitral proceedings.¹⁰⁷⁰ This is clear, as we have seen earlier, since the law provides that an arbitral tribunal shall issue its award without being bound by the procedure laid down by the law, except provisions specifically governing arbitration, and the rules relating to public policy.¹⁰⁷¹

¹⁰⁶⁵ See e.g., Kuwait: Articles 20 Article 77 (1) of the Code of Civil and Commercial Procedure; Oman: Articles 22 and 110 of the Code of Civil and Commercial Procedure; Qatar: Article 17 of the Code of Civil and Commercial Procedure; the UAE: Articles 14 and 84 (1) of the Civil Procedure Code.

¹⁰⁶⁶ Oman: article 8 the Law of Arbitration in Civil and Commercial Arbitration Disputes; Bahrain: article 4 of the International Commercial Arbitration Law.

¹⁰⁶⁷ Oman article 8 the Law of Arbitration in Civil and Commercial Arbitration Disputes.

¹⁰⁶⁸ Bahrain article 4 of the International Commercial Arbitration Law.

¹⁰⁶⁹ UN Doc. A/N.9/246, para. 180.

¹⁰⁷⁰ In contrast, it is noted that procedural law in these states sets out a general rule governing estoppel before national courts. For example, article 77 of Kuwait Code of Civil and Commercial Procedure provides that “... pleas concerning measures not related to public policy must be adduced together, prior to adducing any other procedural defence, claim or defence in the suit or a plea of inadmissibility, on penalty for forfeiture of the right with regard to that not adduced.”

¹⁰⁷¹ Kuwait: Article 182 of the Code of Civil and Commercial Procedure; Qatar: Article 198 of the Code of Civil and Commercial Procedure; Saudi Arabic: Article 39 of the Implementation Rules of the Arbitration Law; the UAE: Article 212 of the Code of Civil Procedure.

6.4.6 Must violation of due process affect the result of the arbitral award?

Must a severe violation of due process must affect the arbitral award in order to justify refusal of enforcement? There are different views on this matter.

There is support for the view that violation of due process justifies non-enforcement, without the need to establish that it caused actual damage to the party concerned. This view is based on the New York Convention, which censures a violation of due process itself, without making refusal of enforcement subject the party resisting enforcement proving damage suffered as a result of the breach. Any other interpretation would be considered to add a gloss to the Convention, and detract from its intended dissuasive effect.¹⁰⁷²

However, the prevailing view adopted by many writers and courts supports the concept that a severe due process violation might not lead to a refusal of enforcement, unless the irregularity had an effect on the award.¹⁰⁷³ In other words, the court would enforce an arbitral award, even if there was a serious violation, if the result of the award would not have been different had the opportunity to be heard been granted.

In the GCC States neither court decisions nor national provisions governing the enforcement of foreign arbitral awards cast any light on this issue. However, if the view that it is unnecessary to treat lack of due process as a separate ground for refusing to set aside or enforce an arbitral award is taken into consideration,¹⁰⁷⁴ this may assist in predicting the attitude of the enforcing court in the GCC States. In this regard, the laws of Kuwait, Bahrain, Oman, Qatar, and the UAE suggest that a party may request the court to set aside an award when there is a procedural defect that might affect the

¹⁰⁷² See Gaillard, E. and Savage, J., (eds), op cit. para 1699. See also *Rice Trading Ltd. V Nidera Handelscompagnie BV* (1998) XXIII YBCA 731 (Gerechtshof Court of Appeal, 28 April 1998) 733-34.

¹⁰⁷³ See Wheelless, Elise, 'Article V (1) (b) of the New York Convention' (1993) 7 *Emory International Law Review* 805, 814; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* pp.301-2; Kroll, S, op cit. p.169; Tweeddale, A and K, op cit. p.415. See also *Apex Trading Ltd v Chuang's Development* [1996] 2 HKLR 155 (Hong Kong Court of Appeal 1996) pp 158-59; *Rice Trading Ltd v Nidera Handelscompagnie BV* 734; *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1998] 1 HKLRD 287 (Hong Kong Court of Appeal 1998) pp300-1; *K Trading Company v Bayerischen Motoren Werke AG* (2005) XXX YBCA 568 (German Court of Appeal, 32 September 2004) 572-73.

¹⁰⁷⁴ See Gaillard, E. and Savage, J. op cit. para 1638.

award.¹⁰⁷⁵ Moreover, it is a general principle that nullity of procedure will not be adjudged in spite of provisions to that effect if the procedure did not result in injury to the other party.¹⁰⁷⁶ Therefore, it seems to be that the courts in these states also accept this rule at the stage of enforcement of a foreign arbitral award. Consequently, due process violation by itself will not automatically cause rejection. Rather the enforcing court will examine the violation of due process in order to make sure that such an irregularity in the procedure has affected the award. Otherwise it will reject the objection of the party, which leads to the imposition of a high standard of proof in this regard.¹⁰⁷⁷

6.5 Tribunal Has Exceeded Its Jurisdiction

The fourth reason which can be used by a defendant for resisting an application for enforcement of a foreign arbitral award in the GCC States is that the tribunal has exceeded its jurisdiction.

This is a possible ground for refusing enforcement of foreign awards under several regimes in the GCC States. The New York Convention allows the court to refuse to enforce a foreign award if the defendant proves that “the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decision on matters submitted to arbitration may be recognised and enforced.”¹⁰⁷⁸ The ground is also mentioned under the Arab League and Riyadh Conventions, where enforcement of foreign awards may be refused “if the arbitrators were not competent under the agreement to arbitrate, or the law under which the award was made.”¹⁰⁷⁹ In addition, under the provisions which govern the enforcement of foreign arbitral awards in

¹⁰⁷⁵ See Kuwait: Article 186 (c) of the Code of Civil and Commercial Procedure; Bahrain: Article 243 (4) of the Code of Civil and Commercial Procedure; Oman: Article 53 (1) (g) the Law of Arbitration in Civil and Commercial Arbitration Disputes; Qatar: Article 207 (4) of the Code of Civil and Commercial Procedure; the UAE: Article 216 (1) (c) of the Code of Civil Procedure; Kuwait cassation court commercial /3 decision no. 531/2002) dated 8/2/2003.

¹⁰⁷⁶ See Kuwait: Article 19 (2) of the Code of Civil and Commercial Procedure; Oman: Article 21 of the Code of Civil and Commercial Procedure; Qatar: Article 16 of the Code of Civil and Commercial Procedure; the UAE: Article 16 of the Civil Procedure Code.

¹⁰⁷⁷ See Kuwait Cassation Court decision no. 531/2002 dated 8/2/2003.

¹⁰⁷⁸ New York Convention, Article V (1) (c).

¹⁰⁷⁹ Arab League Convention, Article 3 (c); Riyadh Convention, Article 37 (c).

national laws, an arbitral award can be granted enforcement if the enforcement court has verified that “that the [award] was rendered by a competent [tribunal], in accordance with the law of the country in which it had been rendered.”¹⁰⁸⁰

This defence requires that the tribunal award does not exceed the scope of the arbitration agreement. In this respect, it should be pointed out that resisting enforcement whether under Article V (1) (c) of the New York Convention, or Article 3 (c) of the Arab League Convention, or Article 37 (c) of the Riyadh Convention, does not relate to the case where the whole authority of the tribunal is disputed because of the lack of a valid arbitration agreement.¹⁰⁸¹ As we have seen previously, in such a case a party should resist enforcement under Article V (1) (a) of the New York Convention, Article 3 (b) of the Arab League Convention and Article 37 (b) of Riyadh Convention. The present ground assumes that there is a valid arbitration agreement. However, the tribunal has either lacked jurisdiction (*extra petita*) or has gone beyond the scope of the submission to arbitration (*ultra petita*).¹⁰⁸²

It has been suggested that the expression “submission to arbitration” used in Article V (1) (c) of the New York Convention regarding the question of scope and excess of jurisdiction was intended to include, not only the scope of an arbitration agreement, (submission agreement and arbitral clause), but also a scope found under the submission to arbitration (mandated by the parties).¹⁰⁸³ This is also supported by the French of Article V (1) (c), which is as valid as the English text.¹⁰⁸⁴ The French text refers to “a

¹⁰⁸⁰ Kuwait: Article 199 (a) of the Code of Civil and Commercial Procedure; Bahrain: Article 252 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 380 (1) of the Code of Civil and Commercial Procedure; Oman: Article 352 (a) of the Code of Civil and Commercial Procedure; in the UAE: Article 235 (2) (a) of the Code of Civil Procedure.

¹⁰⁸¹ See Section 2 in this chapter.

¹⁰⁸² See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.312; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-91; Di Pietro, D. and Platte, M., op cit. pp.158-59. See also, *Dardana Ltd v yukos Oil Co* [2002] 1 Lloyd’s Rep 225 (UK QBD Com Ct) para 20-22.

¹⁰⁸³ See Davidson, F., *International Commercial Arbitration*, p.227; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.314-16; Tweedale, A. and K., op cit. p.417. In addition, most courts uphold awards if they arguably fall outside the formal submission, but arbitrators act within the scope of their authority - see. e.g., *Management & Technical Consultants SA v Parsons-Jurden International Corp.*, 820 F2d 1531 (US Court of Appeals 9 th Cir 1987) 1534; *Parsons & Whittemore Overseas Co v RAKTA* 976; *Joint Venture Partner A v Joint Venture Partner B* (2000) XXV YBCA 761 (Russian Federation Supreme Court 16 December 1999) 763-64; *Sojuznefteexport v JOC Oil Ltd* (1990) XV YBCA 384 (Bermuda Court of Appeal 7 July 1989) 396.

¹⁰⁸⁴ According to Article XVI of the New York Convention, both the English and the French texts are authentic.

difference not contemplated by the submission agreement or not falling within the terms of arbitral clause.”¹⁰⁸⁵

Another question is under which law those issues should be decided. Once again, the New York Convention fails to specify what law should be applied to determine these issues. However, it has been suggested that article V (1) (c) squares with Article V (1) (a) by relying on the law chosen by the parties or, in the absence of a choice by the law of the place of arbitration.¹⁰⁸⁶ Furthermore, both the Arab League and the Riyadh Conventions state that it is the law chosen by both parties or the law which governs arbitration procedure.¹⁰⁸⁷ On the other hand, under the national provisions relating to the enforcement of foreign arbitral awards, this issue is only governed by the law of the state where an award was made.¹⁰⁸⁸ This position came about due to the enforcement of foreign arbitral awards being subject to provisions relating to foreign judgments. This confirms the need to set out separate provisions to determine the difference between the enforcement of foreign awards and foreign judgments.

A further issue is whether the Tribunal exceeding its jurisdiction concerns an award in which the tribunal has not settled all the claims submitted to it by the parties. This category is known as an incomplete award or an award *infra petita*.¹⁰⁸⁹ The fact an award is incomplete award is not a ground for refusing enforcement under the New

¹⁰⁸⁵ In addition, the Spanish text, another valid translation of the New York Convention, also supports the view that Article V (1) (c) refers to the tribunal’s jurisdiction generally, where it reads: “una diferencia non prevista en el compromiso ou comprendida en las disposiciones de la clausa de la compromisoria.” See da Silverira, M., and Levy, L., ‘Transgression of the Arbitrators’ Authority: Article V (1) (c) of the New York Convention’, Gaillard, E. and Di Pietro, D., (eds), op cit. p.645.

¹⁰⁸⁶ See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.312; Martinez, R, op cit. p.502; Gaja, G., “Introduction” in Gaja, G., op cit.p.2. See also *Rumanian Firm v German (F.R.) Firm* (1977) II YBCA 242 (German Federal Court 12 February 1976) pp.242-3.

¹⁰⁸⁷ Arab League Convention, Article 3 (c); Riyadh Convention, Article 37 (c).

¹⁰⁸⁸ See Kuwait: Article 199 (a) of the Code of Civil and Commercial Procedure; Bahrain: Article 252 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 380 (1) of the Code of Civil and Commercial Procedure; Oman: Article 352 (a) of the Code of Civil and Commercial Procedure; in the UAE: Article 235 (2) (a) of the Code of Civil Procedure.

¹⁰⁸⁹ It should be noted that most modern arbitration laws provide for the possibility of rendering an additional award on claims presented in the arbitral proceedings but omitted from the award. For example, Article 33 (3) of the UNICITRAL Model Law provides that “Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.”

York Convention.¹⁰⁹⁰ Article V is exhaustive, and this ground is not sanctioned by the text of that Article, which only deals with an award which is *ultra* or *extra petita*, as will be examined below.¹⁰⁹¹ However, it is noted in such a case, that if the law of the forum state allows a court to set aside an incomplete award, the resisting party can avoid enforcement of the incomplete award by attempting to have it set aside in the country where it was made. The resisting party can then resist enforcement under Article V (1) (e) of such an award.¹⁰⁹²

6.5.1 Extra petita

The first part of Article V (1) (c) of New York Convention indicates that arbitrators exceed their authority if “the award deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration.” This type may be described as an ‘*extra petita*’ because the arbitral tribunal does not respect the arbitration agreement, and deals with matters outside the jurisdiction conferred upon it by the parties.

This defence, like other grounds available under Article V, has been pleaded unsuccessfully in most cases.¹⁰⁹³ This is because courts generally believe that the grounds under Article V should be narrowly construed and the arbitration agreement should be interpreted broadly.¹⁰⁹⁴ Furthermore, arbitrators are required to deal only with disputes submitted to them by the parties.¹⁰⁹⁵ An example of such an unsuccessful defence occurred where it was argued that an arbitration tribunal exceeded its authority and acted beyond the scope of the parties’ agreement by awarding damages, although

¹⁰⁹⁰ See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, pp.320-21; Gaillard, E. and Savage, J., (eds), *op cit.* para 1700. In addition, the Luxembourg Court confirmed this view, holding that “this ground, even if established, could not hinder the recognition (and enforcement) of the awards, as an *infra petita* decision is not sanctioned by the New York Convention.” See *Kersa Holding Co v Infancourtage* (1995) XXI YBCA 617 (Luxembourg Court of Appeal 1993) 625. See also *Sovereign Participations International SA v Chadmore Developments Ltd* (1999) XXIVa YBCA 741 (Luxembourg Court of Appeal 28 January 1999) 721.

¹⁰⁹¹ See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 320; also see *Kersa Holding Co v Infancourtage* (1996) XXI YBCA 617 (Luxembourg Court of Appeal 1993) p.625.

¹⁰⁹² See for Article 190(2) (c) of the Swiss Private International Law which lays down that an award can be set aside if “the arbitral tribunal ... failed to decide one of the claims”. See also Articles 1061 (1) and 1065 (6) of the Netherlands Arbitration Act.

¹⁰⁹³ See Lew, J., Mistelis, L. and Kroll, S., *op cit.*, para 26-91; Van den Berg, A.J., *Why Are Some Awards Not Enforceable?* ICCA Congress series no. 12 (2005) p.301.

¹⁰⁹⁴ See Diana G. Richard, *Enforcement of Foreign Arbitral Awards under the United Nations Convention of 1958: A Survey of Recent Federal Case Law*, (1987) 11 Maryland. Journal of International Law and Trade 13, 31; Redfern, A., and Hunter, M., *op cit.* para 3-38.

¹⁰⁹⁵ See Sanders, P., ‘A Twenty Years’ Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1979) 13 Int’l Law 274.

the arbitration agreement expressly excluded this power.¹⁰⁹⁶ Another was where the resisting party maintained that the arbitral tribunal exceeded its authority by awarding extra-contractual remedies not contemplated determined by the parties' agreement, in spite of his objection.¹⁰⁹⁷ A further example was a case where the tribunal had rendered an award in excess of the amount claimed.¹⁰⁹⁸

On the other hand, rare cases can be found in which enforcement was refused on this ground when the enforcing court has parsed the arbitration agreement very carefully, resulting in a narrow interpretation of the scope of the clause.¹⁰⁹⁹

With the exception of Bahraini International Arbitration Law, all regimes in the GCC States refer to this ground for refusing the enforcement of foreign awards,¹¹⁰⁰ but without making any further explanation as to the way in which the tribunal may exceed its authority, as Article V (1) (c) of New York Convention does. However, because these regimes stipulate that an award may be refused "if the arbitrators were not

¹⁰⁹⁶ See *Fertilizer Corporation of India v IDI management Icn* 517 F.Supp 948, (US District Court SD Ohio 1981); see also *Parsons & Whittemore Overseas Co v RAKTA* pp 976-77; *Triton Container International, Ltd, v Baltic Shipping Co* 1995 WL 729329 (E.D. La. 1995); *International Standard Electric Corp. (ISEC) v Bidas Sociedad Anonima Petrolera Industrial Y Comercial* 745 F.Supp 172 (SDNY 1990).

¹⁰⁹⁷ See *Millicom International VN.V v Motorola Inc and Proempres Panama, SA* (2002) XXVII YBCA 948 (SDNY 28 March 2002) pp 954-59.

¹⁰⁹⁸ See *Seller v Buyer* (2004) XXIX YBCA 742 (Germany Court of Appeal 6 December 2001) 744 and 746; *X v X* (2006) XXXI YBCA 640 (Germany Court of Appeal 30 September 1999) pp 644-6.

¹⁰⁹⁹ In *Tiong Huat Rubber Factory BUD v Wah Chang International co Ltd* (1992) XVII YBCA 516 (Hong Kong High Court 28 November 1990) the parties concluded five contracts which were subject to the terms and condition of the International contract for technically specified rubber and the regulations of The Malaysian Rubber Exchange and Licensing Board FOB Contract. That contract contains a clause reading as follows: "All disputes as to quality or condition of rubber or other dispute arising under these contract regulations shall be settled by Arbitration between the seller and buyer." A dispute arose between the parties as to whether the defendant had failed to open the necessary letters of credit as provided for each contract. Later, an arbitrator appointed by the parties rendered seven awards on the issue of non-payment. Thereupon, the winning party sought enforcement of the awards in Hong Kong, where the High Court granted leave to enforce them. However, this decision was reversed by the Hong Kong Court of Appeal which held that the phrase "or other dispute arising under these contract regulations" was not wide enough to cover claims for non-payment by reason of a failure to open the requisite Letter of Credit. The court added that "these regulations, if they apply at all, only apply to claims based on quality, size and weight ... These claims are obviously covered by the phrase "all disputes as to quality or condition of the rubber." Therefore, the court found that the arbitrators made their awards in excess of jurisdiction and so that the awards should not be enforced. See also the decision of the Supreme Arbitration Court of the Russia Federation, case No. 2853/00 in *Pressindustria S.p.A v Tobol'skii Neftkhemicheskii Kombinat*, quoting Conference paper, the Russian-American Symposium on Private International Law, Moscow State Institute of International Relations (June 29, 2004) presented Glenn, H, 'International Judicial Assistance from American Courts in Russian Litigation and Arbitration Proceedings, available in <www.agg.com> (9/2/2009).

¹¹⁰⁰ I.e. Arab League Convention, Riyadh Convention, and national provisions governing the enforcement of foreign arbitral awards.

competent under the agreement to arbitrate,”¹¹⁰¹ the term “not competent” might lead the enforcing court to apply a wide interpretation of these grounds. This is because lack of jurisdiction might arise in several contexts including: (i) where the tribunal goes beyond the terms of the arbitration agreement; (ii) where the tribunal is not properly constituted; (iii) where the matters submitted to arbitration cannot be arbitrated in accordance with the law where an award was made; or (iv) where an award was made after the expiry of specific time limits.¹¹⁰² Where the issue is that of the tribunal “not being competent,” two points should be taken into account. Firstly, such a plea should be made at the earliest stage in the arbitral proceedings, since otherwise a party might be regarded as having waived his right to object.¹¹⁰³ The second point relates to how the arbitration agreement is interpreted, which will be examined below. The International Commercial Arbitration Law in Bahrain deals with this issue in the same way as Article V (1) (c) of New York Convention since it is based on the Model Law.¹¹⁰⁴

There are as yet no court decisions in GCC States in this area. However, the writer suggests that the Courts’ attitude to this question depends, essentially, on the interpretation of the language used in arbitration agreement, particularly whether it fulfills the intentions of the parties to refer a dispute to arbitration, in the light of the law governing the arbitration agreement.

Where an arbitration agreement is governed by one of the national GCC laws, the law in Kuwait, Bahrain (chapter arbitration of the Code of Civil and commercial Procedure), Qatar and the UAE does not define the arbitration agreement. These laws only indicate the right of the parties to agree to submit disputes to arbitration.¹¹⁰⁵ As a result, if the scope of an arbitration agreement is debatable or in doubt, it is subject to the same rules applied to contracts in general.

In this respect, there a number of criteria to be considered. In the first place, as a general rule, the interpretation of the contracts requires that if the wording of a contract is clear

¹¹⁰¹ Arab League Convention, Article 3 (c); Riyadh Convention, Article 37 (c).

¹¹⁰² See e.g., Redfern, A., and Hunter, M., *op cit.* para 9-13.

¹¹⁰³ See e.g., Article 22 (2) of the UNCITRAL Model Law; the Omani Law of Arbitration in Civil and Commercial Disputes, Article 22 (2).

¹¹⁰⁴ Article 36 (1) (a) (3) of the Bahraini International Commercial Arbitration Law.

¹¹⁰⁵ See Kuwait: Article 173 (1) of the Code of Civil and Commercial Procedure; Bahrain: Article 233 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 190 (1) of the Code of Civil and Commercial Procedure; in the UAE: Article 203 (1) of the Code of Civil Procedure.

it is not permissible to deviate from it by interpreting it to ascertain the intent of the parties.¹¹⁰⁶ Secondly, where the words used in the arbitration agreement are not clear, and there is room for interpretation, the common intent of the contracting parties must be ascertained from the totality of its tenor and the circumstances of its execution without considering the literal meaning of its words or phrases, and be guided by the nature of dealing and current customs.¹¹⁰⁷ In this situation, the intentions and meanings should prevail over words and the construction of sentences used in the contract.¹¹⁰⁸ Thirdly, if it is impossible to clear up an ambiguity leaving a doubt as to the real intent of the parties, the GCC Courts generally view the arbitration process as an exceptional method of settlement.¹¹⁰⁹ They tend to adopt a narrow reading of the scope of the arbitration agreement and parse its language very carefully. As a result, if there is a doubt, the courts interpret the agreement in favor of not going to arbitration. For example, it has been held that an arbitration agreement in a certain contract will not cover other contracts between the same parties as long as there is no express reference to it.¹¹¹⁰ Also, it held that an arbitration clause containing such wording as “disputes arising in relation to the of the interpretation present contract” could not be referred to arbitration, but would be decided by the courts instead.¹¹¹¹ Moreover, where a clause in a contract establishing a company provides that any dispute which might arise from the application of the contract will be referred to arbitration, this clause will not cover the

¹¹⁰⁶ Kuwait: Article 193 (1) of the Civil Code; Bahrain: Article 125 (a) of the Civil Code; Qatar: 169 (1) of the Civil Code; the UAE: Article 265 (1) of the Civil Transaction Code.

¹¹⁰⁷ Kuwait: Article 193 (2) Civil Code; Bahrain: Article 125 (b) of the Civil Code; Qatar: 169 (2) of the Civil Code; the UAE: Article 265 (2) of the Transaction Civil Code.

¹¹⁰⁸ In the UAE: Article 258 (1) of the Civil Transaction Code See also the decision of the Egypt Cassation Court no. 52 dated 27/2/1994. In this case the parties entered into a craftsman’s contract which contained an arbitration clause providing that disputes between parties should settled by arbitration. Later, the employer submitted the cost of work by debenture presented to the contractor, but the employer refused the payment. The contractor filed a case applying for the amount in accordance with the debenture; however the court refused to hear the case, according that the claimant should be heard by arbitration. In Jordan Cassation Court decision no. 2126/2002 dated 15/10/2002 it was found that a contract providing for the referral of a dispute to persons who had been appointed in order to settle the dispute by determination. The court held this clause to be considered as an arbitration agreement as the meaning was found to be in accordance with arbitration law, although the term ‘arbitration’ was not used in the clause. Available at < <http://www.adaleh.info>> (19/2/2009).

¹¹⁰⁹ See e.g. Kuwait Cassation Court decision no 287 dated 16/6/2004 available at < www.mohamoon-ju.com>(24/3/2009);

¹¹¹⁰ See e.g. Dubai cassation court, decisions no. 48,70/1992 dated 23/5/1992

¹¹¹¹ See Dubai cassation court decision no. 65 year 1991, issued 2 p 285 available at < www.mohamoon-ju.com>(18/3/2009); Egypt Cassation Court decision no. 91 dated 6/1/1976.

liquidation of the company.¹¹¹² Nor does such an agreement cover receivership unless the parties explicitly agree otherwise.¹¹¹³

Yet enforcing courts should understand questions of interpretation should not be examined at the enforcement stage, and do not relate to the validity of the arbitration agreement. Therefore, if party has participated in the arbitration without raising the issue of jurisdiction, this would suggest implied agreement that the arbitration agreement covered the subject-matter of the dispute, and would weaken the case for refusing enforcement based the tribunal having exceeded its authority.

6.5.2 Ultra petita

The second part of the Article V (1) (c) of the New York Convention indicates that the arbitrators' exceed their authority if the award "contains decisions on matters beyond the scope of the submission to arbitration." This category can be described as *ultra petita*, in which a tribunal's award partly exceeds its jurisdiction. In other words, the arbitral tribunal has decided a claim which was not submitted by the parties, while the rest of the decision is within the terms of the submission to arbitration.

Once again, this defence has been unsuccessfully invoked in most cases.¹¹¹⁴ In some countries, when such a defence is invoked, there is a powerful presumption that the arbitral tribunal acted within its authority.¹¹¹⁵ However, when the requirements of this ground are satisfied it is thought that the enforcing court cannot ignore the objection. This is clear where the parties agree that a matter was not submitted. For example, it was held that an arbitral tribunal had exceeded its jurisdiction where it made a decision on a technical matter, whereas the parties had only referred a non-technical matter. For this reason, the court refused to enforce the part of the award which dealt with the

¹¹¹² See e.g. in Jordan where it applied the same principles under its Civil law, the cassation Court decisions no. 159/88 lawyer journal (1990) p1113; no. 1774/94 (1995) p1985.

¹¹¹³ See Dubai Cassation Court decision no. 274/1993 dated 29/1/1994 available at < www.mohamoon-ju.com>(18/3/2009).

¹¹¹⁴ See Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-93; van den Berg, Why Are Some Awards Not Enforceable? ICCA Congress Series no. 12 (2005) pp 301-2.

¹¹¹⁵ See e.g., *Parsons & Whittemore* 976; *Isaa Glycer v Moses Israel Glycer & Estera Glycer- Nottman* (1996) XXI YBCA 635, (Netherlands Court of First Instance 1970) 640 ; *Joint Venture Partner A v Joint Venture Partner B* (2000) XXV YBCA 761 (Russian Federation Supreme Court 16 December 1999) 763-64; *Sojuzenfteexport v JOC Oil Ltd* (1990) XV YBCA 384 (Bermuda Court of Appeal 7 July 1989) 396; *Seller v Buyer* (2004) XXIX YBCA 742 (German Court of Appeal 6 December 2001) 744. See also Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-93; Bishop, R. and Martin, E., 'Enforcement of Foreign Arbitral Awards' (2001) 21 available at <<http://www.kslaw.com/library/pdf/bishop6.pdf>> (10/2/2009).

technical matter.¹¹¹⁶ Another example is where an award is made against a third party. A court held that an arbitral tribunal exceeded its authority when it made an award against someone who was not a party to the arbitration agreement. Therefore, the award was not enforced against the third party, but was enforced against a party to the arbitration agreement.¹¹¹⁷

GCC Laws (except in Bahrain), contain no specific provision to deal with this issue. National provisions governing the enforcement of foreign awards indicate that an award may be refused on the ground that the tribunal was not competent, but do not explain the ways in which the tribunal may exceed its jurisdiction. As we have seen earlier, the question of a tribunal rendering an award beyond the terms of the arbitration agreement is one aspect of lack of jurisdiction. Therefore, when the defendant proves that tribunal ruled on a matter not within the terms of the submission to arbitration, the court may refuse the enforcement of a foreign award. Bahrain's International Arbitration Commercial Law is based on the UNICTRAL Model Law, and thus deals with this issue in the same way as Article V (1) (c) of the New York Convention.¹¹¹⁸

There are no court decisions in the GCC States in this area as yet, except for Saudi Arabia. There Saudi and Dutch parties concluded a contract relating to the construction of prefabricated buildings in a university, which included an arbitration clause. The parties also entered into a subcontract for supplying laboratory equipment. Later, a dispute between parties was referred to arbitration, and the decision went against the Saudi party. The Dutch party sought to enforce the decision in Saudi, but the Saudi party objected to enforcement on the grounds that the tribunal had exceeded its authority by ruling on a matter relating to the supply of laboratory equipment. It argued that the subcontract was wholly independent and separate from the construction contract and did not contain an arbitration clause. However, the court rejected this defence, finding that the arbitration agreement covered both contracts.¹¹¹⁹

¹¹¹⁶ See *General Organisation of Commerce and Industrial of Cereals of the Arab Republic of Syria v S.p.a Simer* pp 386-88.

¹¹¹⁷ See, e.g., *Fiat S.p.A v Ministry of Finance & Planning of Suriname* 1989 WL 122891, (US District Court SD NY 1989) 5.

¹¹¹⁸ Article 36 (1) (a) (3) of the Bahraini International Commercial Arbitration Law.

¹¹¹⁹ The Board of Grievances, 9th Administrative panel, decision No. 32/D/A/9 dated 1418 H (1997) cited in Al -Tuwaigeri, W., *Grounds For Refusal of Enforcement of Foreign Arbitral Awards Under The New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia*, pp 185-86.

6.5.3 Partial enforcement

The second half of Article V (1) (c) of the New York Convention deals with the possibility of enforcing an award if that tribunal ruling is *ultra petita*.

If only part exceeds the tribunal's jurisdiction, Article V (1) (c) provides that the award may be enforced in part "if the decisions on the matters submitted to arbitration can be separated from those not so submitted." It is thus clear that the discretion to grant partial enforcement is subject to the possibility of separating matters which have been submitted to arbitration from those which are *ultra petita*. Otherwise the enforcement of the whole award should be denied. In this regard the Convention attempts to find a balance between the losing party's right to resist enforcement where the tribunal exceeds and the winning party's right to seek enforcement where award was within the terms of the submission to arbitration.

An example such partial enforcement can be seen in an Italian case. The court found that an award rendered in Syria had exceeded the tribunal's jurisdiction by covering both non-technical and technical matters, while the arbitration agreement provided for arbitration in Syria in respect of "non-technical" disputes and for arbitration according to the ICC Rules in respect of "technical" matters. The court noted that separation could be made simply and thus granted partial enforcement.¹¹²⁰ Another example is where the arbitral tribunal rules against a third party. In such a case the court refused to enforce the award against a person who was not a party to the arbitration agreement, but did enforce it against a party who to the agreement.¹¹²¹

That principle is also adopted clearly under the Riyadh Convention, where it provides that "the request for enforcement may cover the entire [award] or only one of its parts, provided it is possible to separate them."¹¹²²

Under the Arab League Convention partial enforcement is not mentioned in the context of the tribunal exceeding its authority, but the doctrine of partial enforcement can be found elsewhere in the convention, where it provides that a court can reject a request for

¹¹²⁰ See e.g., *General Organisation of Commerce and Industrial of Cereals of the Arab Republic of Syria v S.p.a Simer* pp 386-88.

¹¹²¹ See e.g. *Fiat S.p.A v Ministry of Finance & Planning of Suriname 4*;

¹¹²² Riyadh Convention, Article 32.

enforcement “if the award is contrary to public policy or to the moral order of the state where enforcement is sought, and the authority shall decide whether the case is to be considered as such and non-enforcement of what is contrary to the public policy.” The last part of this text indicates that the state has the right to refuse part of an award if that part is contrary to public policy.¹¹²³ Accordingly, it can be said as that long as the separation of both parts is possible, the enforcing court can rest on this text in order to apply the partial enforcement if the tribunal had exceeded its authority.

As regards GCC national laws, except for Bahrain, no national provisions governing the enforcement of foreign awards contain provisions regulating the question of partial enforcement. Yet in Qatar and Oman, this concept clearly applies to all the grounds for setting aside an arbitral award, as the law indicates that the court may either confirm the award or set it aside, totally or partially.¹¹²⁴ Thus, by analogy, the court can apply the concept of partial enforcement as long as it can separate the invalid part from other parts of the award. In the rest of the GCC, while the laws contain no provisions concerning partial annulment, the courts have adopted this principle in the context of enforcing an award.¹¹²⁵ Finally, the Bahrain International Commercial Arbitration Law is identical to the UNICTRAL Model Law so that a provision similar to Article V (1) (c) of the New York Convention may be found.¹¹²⁶

To the researcher’s knowledge, there is no case-law in the GCC States dealing with partial enforcement of foreign arbitral awards under Article V (1) (c) of the New York Convention or Article 32 of the Riyadh Convention.

Another issue that could arise under the principle of “partial enforcement” is whether this principle is wide enough to cover other grounds under Article V of the New York Convention other than ground (c). In fact, although the Convention contains no other reference to separability, in accordance with the discretion in favour of the enforcement and by analogy with ground (c), the court can resort to this concept. This view has been adopted in relation to Article V (2) (b) (public policy). For instance, under the New

¹¹²³ Arab League Convention, Article 3 (e).

¹¹²⁴ Qatar: Article 209 of the Code of Civil and Commercial Procedure; Oman: Article 53 (1) (f) the Law of Arbitration in Civil and Commercial Dispute.

¹¹²⁵ See e.g., Dubai Cassation Court decision No. 307 dated 30/11/2002 available at < www.mohamoon-ju.com>.

¹¹²⁶ Article 36 (1) (a) (3) of the Bahraini International Commercial Arbitration Law.

York Convention the Saudi Arabian Board of Grievances has often denied enforcement of parts of awards on the ground of public policy, while granting enforcement of other parts.¹¹²⁷ It is thought that the same approach might be taken by other GCC Courts.¹¹²⁸

6.6 Irregularities in the Composition of the Tribunal or Arbitral Procedure

The fifth ground on which a defendant may resist an application for enforcement of a foreign arbitral award in the GCC States is where he can prove irregularity in the composition of the arbitral tribunal or arbitral procedure.

This defence is available only under the New York Convention and in Bahrain. Other regimes governing the enforcement of foreign awards in the GCC States contain no provisions on this question. According to the New York Convention, the enforcement of an arbitral award may be refused if the party can prove that “the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”¹¹²⁹ Bahrain’s International Commercial Arbitration Law employs the same text.¹¹³⁰

The main point to note about this provision is the priority given to the agreement of the parties regarding tribunal composition and arbitral procedure. Only in the absence of agreement on these matters must the law of the country where the arbitration took place be taken into account.¹¹³¹ This means, according to the most common interpretation of Article V (1) (d), that any issue of violation of tribunal composition and arbitral procedure must be determined only under the rules set out by the parties, even if that

¹¹²⁷ See e.g., The Board of Grievances, 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996); the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997); the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003); the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004), cited in Al-Tuwaigeri, W., Grounds For Refusal of Enforcement of Foreign Arbitral Awards Under The New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia.

¹¹²⁸ This view has been adopted in many national courts, for example, in *Buyer (Austria) v Seller (Serbia and Montenegro)* (2005) XXX YBCA 421 (Supreme Court 26 January 2005) pp 435-6; *JJ Agro Industries Ltd v Texuna International Ltd* (1993) VXIII YBCA 396 (Hong Kong High Court 1992) pp 399-402; *Laminoirs-Trefileries-Cableries de Lens SA v Southwire Co & Southwire International Corp* 484 FSupp 1063 (US District Court ND Georgia 1980) 1069.

¹¹²⁹ New York Convention, Article V (1) (d).

¹¹³⁰ See Article 36 (1) (a) (4) of the Bahraini International Law.

¹¹³¹ See UN Doc. E/CONF. 26/SR.3, 4.

agreement is contrary to the mandatory rules of the place of arbitration.¹¹³² It should also be borne in mind that the intention of the parties may result either from direct agreement on procedural rules or from an indirect reference to a particular law or arbitration rules.¹¹³³ Therefore, the Convention affirms the supremacy of the parties' agreement by reducing the importance of the place of arbitration and omitting any role for the procedural law of any other jurisdiction, thus performing a vital role in creating the legal framework for international arbitral proceedings.¹¹³⁴

However, notwithstanding that the provision establishes the supremacy of the parties, the requirements of due process must to be taken into account, otherwise the enforcement of the award may be refused under Article V (1) (b) or Article V (2) (b).¹¹³⁵ This illustrates the overlap between Article V (1) (b) and Article V (1) (d), as both provisions relate to alleged procedural breaches in arbitral proceedings. Thus, for example, where the agreement of the parties provides that the names of the arbitrators will not be disclosed to the parties, this is undoubtedly contrary to the essential principles of due process, and therefore the enforcement of the award may be refused under Article V (1) (b) or Article V (2) (b).¹¹³⁶

Although ground *d* has given rise to much comment in academic writing, it has been noted that courts rarely uphold an objection based thereto.¹¹³⁷ One commentator explained this as follows:

First, one of the benefits of arbitration is the ability of the parties to choose panel members who are experts in the field of the

¹¹³² See e.g., Davidson, F., *Arbitration*, p.394; Di Pietro, D. and Platte, M., op cit. p.161; Gaillard, E. and Savage, J. op cit. para 1702; Gaja, G, op cit. p.3.; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 324-31; Bockstiegel, K., Kroll, S., and Nacimiento, P., *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International 2008) p.544; Poudret, J. and Besson, S., op cit. p.838. See also *SEEE v Yugoslavia* (1976) I YBCA 195 (Netherlands Supreme Court 1973) 198; *Joseph Muller A.G. v Sigval Bergesen* (1984) IX YBCA 437, (Swiss Supreme Court 1991) pp.439-40.

¹¹³³ See David, R., *Arbitration in International Trade* p.399; Gaillard, E. and Savage, J. op cit. para 1702; Gaillard, E. and Di Pietro, D. op cit. p.730; Gaja, G., op cit. p.3.; see also *X v X* (2006) XXXI YBCA 640 (Germany Court of Appeal 30 Sept 1999) 646.

¹¹³⁴ See Born, G., *International Commercial Arbitration*, op cit. p.2765.

¹¹³⁵ See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 312-31; Bockstiegel, K., Kroll, S., and Nacimiento, P., op cit. para 95.

¹¹³⁶ See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 301.

¹¹³⁷ See, e.g., Bishop, R. and Martin, E., 'op cit. p.22; Di Pietro, D. and Platte, op cit. p.163; Lew, Mistels and Kroll, op cit. para 26-95.

dispute. Because of the tremendous demand for a small number of renowned experts, many of these experts may jointly serve on many arbitration panels, possibly in other disputes involving one or both of the parties now in disagreement. Secondly, in an effort to advance the goals of the Convention, courts will often be very sceptical of broad brushed assertions of bias, not raised before the arbitral panel itself, and subsequently raised to block enforcement of the award. Courts may even characterize these attempts as made in bad faith.¹¹³⁸

In addition, most parties, arbitration rules and laws usually grant arbitrators wide discretion as to the conduct of the arbitration making it difficult to establish this defence.¹¹³⁹ There are only a few cases where foreign awards have been refused enforcement on the basis of Article V (1) (d), which are analysed below.

6.6.1 Irregularities in the composition of the Arbitral Tribunal

The first ground for refusing enforcement under Article V (1) (d) is that the composition of the arbitral tribunal contravenes the arbitration agreement or, in the absence of agreement, the law of the place where the arbitration took place.

A survey of court applications shows that an irregularity in the composition of the arbitral tribunal is often unsuccessfully pleaded in resisting enforcement. The refusal of such a defence can derive from one of four reasons: (i) the violation being minor; (ii) under application of the doctrine of estoppel; (iii) where the court ignores the arbitration agreement and allows the enforcement of an award that complies with the laws of the country where the arbitration was made; or (iv) where the court considers that the parties have later (tacitly) consented to the modification of the composition of the arbitral tribunal.

First, courts often discount minor irregularities in the composition of the arbitral tribunal. For example, in a Hong Kong case it was pleaded that the body which rendered the award (CIETAC) was not the arbitral body named in the contract. However the

¹¹³⁸ Richard, D. op cit. p.32.

¹¹³⁹ See Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.323; Bockstiegel, K., Kroll, S., and Nacimiento, P., op cit. pp 547-48.

Supreme Court rejected a defence that the composition of the arbitral authority was not in accordance with the agreement of the parties, finding that as the. The name of China's international arbitration organisation had been changed from the Foreign Economic Trade Arbitration Commission (FETAC) to CIETAC, both organisations were legally the same entity.¹¹⁴⁰

Secondly, the enforcing court may rely on the application of the doctrine of estoppel. Estoppel is not mentioned in the New York Convention, but numerous court decisions have adopted the doctrine in the context of Article V (1) (d), particularly where the parties had failed to raise their objections timeously during the arbitration. For example, in a Hong Kong case the losing party argued that arbitral tribunal was improperly composed due to the arbitrators having been selected from the Shenzhen list when they were supposed to be from the Beijing list, in accordance with agreement of the parties. Although the High Court affirmed that this ground for refusing enforcement had been established, the defence was rejected on the basis of estoppel, since the party had not raised the objection of during the arbitral proceedings.¹¹⁴¹ Estoppel has also prevented a defence succeeding where an arbitrator appointed was not able to speak German, as had been agreed,¹¹⁴² and where the arbitration agreement had provided that the third arbitrator should have no direct or indirect connection with either party.¹¹⁴³

Thirdly, courts sometimes allow enforcement of an award, where the composition of the tribunal does not accord with the parties' agreement but complies with the law of the seat of arbitration. For example, in a US case the losing party objected that the award had been made by a sole arbitrator, whereas the arbitral agreement provided for three arbitrators. However, the US Court of Appeal enforced the award, since the composition was in accord with English arbitration law, and England was the seat of arbitration.¹¹⁴⁴

¹¹⁴⁰ *Shenzhen Nan Da Industrial & Trade United Company Limited v FM International Limited* (1993) XVIII YBCA 377, (Hong Kong Supreme Court 1991) 379.

¹¹⁴¹ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* (1995) XX YBCA 671, (Hong Kong High Court 1994) 673-77. Similarly, see *Tongyuan International Trading Group v Uni-Clan* [2001] 4 Int.A.L.R. N-31, quoting Redfern, A., and Hunter, M., op cit. para 10-43 footnote 105.

¹¹⁴² *X v X* (2004) XXIX YBCA 673, (Germany Court of Appeal 20 Oct 1998) 675-76.

¹¹⁴³ See, e.g., *Imperial Ethiopian Government v Baruch- Foster Corp* 535 F2d 334, (US Court of Appeal 5th Cir 1976).

¹¹⁴⁴ *Al Haddad Bros Enterprises Inc v M/S AGAP* 635 F Supp 205 (D Del, 1986), aff'd (3d Cir, 1987). See also *Associated Bulk Carriers of Bermuda v Mineral Import Export of Bucharest* (1984) IX YBCA 462 (US District Court 30 Jan 1980) pp 463-64.

The same conclusion has been adopted by other national courts,¹¹⁴⁵ adopting an interpretation of this ground which favours enforcement. However, this seems to contradict the clear wording of the Convention, which gives priority to the parties' agreement over the law of the seat, particularly when that agreement does not violate mandatory rules of the seat.

Finally, a court may reject this defence where it considers that parties have later (tacitly) consented to the modification of the composition of the arbitral tribunal. Thus the German Court of Appeal enforced an award despite the tribunal not conforming to the original agreement, as it considered the fact the parties had concluded a contract with the arbitrator as tacitly consenting to modification of the composition of the arbitral tribunal.¹¹⁴⁶

In contrast, only two cases have been found in which a court has refused enforcement on the ground of irregularities in the composition of the arbitral tribunal. These cases, saw the court giving priority to the parties' agreement. Thus the Italian Court of Appeal refused enforcement of an award because it was made by two arbitrators, while the arbitration agreement provided for three, despite this approach being in accordance with English law (the law of the seat).¹¹⁴⁷ A similar decision was made by the US Court of Appeals where the third arbitrator was not appointed by the Commercial Court in Luxembourg, as provided for in the agreement of the parties.¹¹⁴⁸

With regard to the GCC states, there have as yet been no cases dealing with this subject. The exception is a 1981 decision of the Kuwait Court of Cassation which enforced a foreign award even though the stipulations of the parties' agreement with respect to the composition of tribunal had not been followed. The agreement provided for a panel of three arbitrators from the London Maritime Arbitrators Association, one to be appointed by each of the parties and the third by the two so chosen. However, an award was made

¹¹⁴⁵See, e.g., *X v Naviera Y.S.A* (1986) XI YBCA 527 (Spain Supreme Court 1982) 528; *Conceria G. De Maio & F. snc v EMAG AG* (1996) XXI YBCA 602 (Italy Court of Appeal 20 Jan 1995) 606; *Efxinos Shipping Co Ltd v Rawi Shipping Lines Ltd* (1983) VIII YBCA 381 (Italy Court of Appeal 1980) 382.

¹¹⁴⁶OIG Naumburg, Int'l Arb. L. Rev. 2006, N-61 (Naumburg Court of Appeal, Germany). Cited in Nacimiento, P, Article V (1) (d) in Kronke, Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. (Kluwer Law International, 2010) ft 45.

¹¹⁴⁷*Rederi Aktiebolaget Sally v S.r.l Termarea* (1979) IV YBCA 249 (Italy Court of Appeal 1978) 295-96.

¹¹⁴⁸*Encyclopaedia Universalis S.A v Encyclopaedia Britannica* 403 F3d 85, (US Court of Appeals 2nd Cir 2005).

in London by a sole arbitrator. The respondent challenged the enforcement of the award on the basis that the composition of tribunal was not in accordance with the agreement of the parties. The Court of Cassation noted that under English law, a sole arbitrator appointed by one of the parties may decide a dispute when the other party failed to appoint an arbitrator under the agreement after being called upon to do so. The court therefore dismissed the challenge and granted enforcement.¹¹⁴⁹ This case demonstrates that the court restricted the effectiveness of the defence by applying the law of the seat, indicating that the respondent had no right to use its refusal to participate in the proceedings as a pretext for obstructing the arbitration. This may be seen as an indication that of the courts concur with the intended purpose of the New York Convention to facilitate enforcement wherever possible.

6.6.2 Irregularities in Arbitral Procedure

The second ground for non-enforcement under Article V (1) (d) is that the arbitral tribunal violated the procedural rules agreed by the parties or, in the absence of agreement, the law of the place where the arbitration took place.

The term “arbitral procedure” is used comprehensively to cover all aspects of the arbitral proceedings, beginning from the filing of the complaint to the handing down of the award.¹¹⁵⁰ Therefore, in practice, courts will deal with widely different claims of violation of procedure; for example, failure to render an award within time limits imposed by agreement or by applicable procedural rules; failure to make a reasoned award; failure to apply agreed procedural rules; failure to conduct the arbitration in the agreed arbitration seat; failure to deal with or reject explicitly any request relating to evidentiary matters.

Does every violation of procedure then lead to a refusal to enforce the award? Fouchard, Gaillard and Goldman¹¹⁵¹ have noted that Article V (1) (d) contains a weakness because “it provides no criteria enabling the determination of which procedural rules are sufficiently important to justify the refusal of enforcement of an award in the event that the arbitrators fail to comply with them”. To compensate for this weakness, the

¹¹⁴⁹ Kuwait Cassation Court decision no 62/1980 dated 27/5/1981 (unpublished)

¹¹⁵⁰ Gaillard, E. and Di Pietro, D., *op cit.* p.730; Poudret, J. and Besson, S., *op cit.* p.840.

¹¹⁵¹ Gaillard, E. and Savage, J. *op cit.* para 1701.

prevailing view adopted by courts and authors is that enforcement of an award should be refused on the basis of a procedural violation only if that violation worked substantial prejudice to the complaining party or if it was serious.¹¹⁵² Courts therefore require that the losing party must establish such facts before enforcement will be refused. It should be added that a procedural defect is serious if it affects the procedure so that the arbitral tribunal would have decided differently had it not been for the procedural violation.¹¹⁵³

In the light of above view, mere procedural errors on the part of the arbitral tribunal will not usually be sufficient to justify a refusal to enforce an award. For example, most courts hold that exceeding the time limit set in an arbitration agreement to render an award is not a sufficient basis to deny enforcement.¹¹⁵⁴ In addition, the rendering of an award without an oral hearing or making an unreasoned award is not a procedural violation under of Article V (1) (d) where the applicable law did not require such steps.¹¹⁵⁵

Even where a clear and serious violation of procedure exists a court may yet enforce on the basis of estoppel. A number of courts have rejected of this defence, since the party did not object to the breach of procedure when it occurred. This is particularly likely when timeous objection is required by relevant procedural rules.¹¹⁵⁶

¹¹⁵² See, e.g., Born, G., op cit. p.2776; Gaillard, E. and Di Pietro, D. (eds), op cit. pp.741-41; Garentt, R., op cit. pp.106-07; Tweeddale, A. and K, op cit. pp.417-18; Kroll, S., op cit. p.171. See also, *K v F AG* (2008) XXXIII YBCA 354 (Austria Supreme Court 23 October 2007) 359; *Licensor (Finland) v Licensee (Germany)* (2008) XXXIII YBCA 524 (Germany Court of Appeal 31 May 2007) 531-32; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2002) XXVII YBCA 841 (US District Court 2001) 823; *P.T. Reasuransi Umum Indonesia v Evanston Ins. Co.* (1994) XIX YBCA 788 (US District Court 1992) 789-70; *Compagnie des Bauxites de Guinee v Hammermills Inc* 1992 WL 122712 (US District Court D.C 1992); *Eratelli Damiano s.n.c. v August Tropfer* (1984) IX YBCA 418 (Italy Supreme Court 1982) 420.

¹¹⁵³ See Gaillard, E. and Di Pietro, D. op cit. p.742; Poudret, J. and Besson, S., op cit. pp. 840-41. See also *Compagnie des Bauxites de Guinée v Hammermills Inc* 1992 WL 122712 (US District Court D.C 1992); *PT Reasuransi Umum Indonesia v Evanston Insurance Company et al.* (1994) XIX YBCA 788 (US District Court 21 December 1992) p.790.

¹¹⁵⁴ See, e.g., *SpA Ghezzi v Jacob Boss Sohne* (1990) XV YBCA 450 (Germany Federal Supreme Court 14 April 1988) 454; *Int'l Ass'n of Machinists v Mooney Aircraft, Inc.*, 410 F.2d 681, 683 (5 th Cir. 1969); *Laminoirs Trefileries-Cableries de Lens, SA v Southwire Co.*, - 484 F. Supp. 1063, 1066-67 (N.D. Ga. 1980); *La Société Nationale Pour La Recherche, etc. v Shaheen Natural Resources Co.*, 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd*, 733 F. 2d 260 (2d Cir. 1984).

¹¹⁵⁵ See, e.g., *German Buyer v English Seller* (Germany Court of Appeal 27 Jul 1978) 267; *Shipowner v Time Charterer* (2002) XXV YBCA 714 (Germany Court of Appeal 30 Jul 1998) 716.

¹¹⁵⁶ See, e.g., *K Trading Company v Bayerischen Motoren* (2005) XXX YBCA 568 (Germany Higher Court of Appeal, 23 September 2004) (waiver of challenge that arbitrators exceeded the maximum

The defence of procedural irregularity has rarely been successfully invoked before courts. Once of the few exceptions is where an arbitration was conducted in of two stages, the first regarding the quality of goods and the second regarding damages, while the applicable arbitration rules did not provide for this. A Swiss court of Appeal refused to enforce the award.¹¹⁵⁷ Another example is that of an award made in Switzerland under Swiss procedural law. A Turkish court of Appeal refused to enforce the award, as the arbitral tribunal should have applied the procedural law of Turkey, as per the parties' agreement.¹¹⁵⁸ A third example is where the chairman of an arbitration panel in Moscow had engaged in improper contact with a party, including giving advice on filing a counterclaim. A Dutch court refused to enforce the award.¹¹⁵⁹

In the GCC there is no case-law dealing with this issue, except in Kuwait and Saudi Arabia. A Kuwaiti decision of 1986 presents an interesting example of the application of Article V (1) (d). The parties agreed that disputes under the contract would be referred to a three-member tribunal in London, one co-arbitrator being appointed by each party and the third arbitrator to be appointed by the other two co-arbitrators. The award was rendered by the two co-arbitrators only. The Kuwait Court of Appeal found that the recitals of the award indicated that the third arbitrator had decided to act as an umpire, authorising the two arbitrators to determine the dispute, although he attended and participating in the oral hearing. Since the award was thus rendered by two arbitrators without the participation of the third, this was considered to be a violation of

duration of the arbitration) 572; *Food Services of America Inc v Pan pacific Specialties Ltd* (2004) XXIX YBCA 581 (Canada Supreme Court 1997)584-89 (waiver of right to oppose enforcement of the award under sect. 36 of the International Commercial Arbitration Act); *Mondial Grain Distributors Com Inc v Atlantica Canarias SA* (1991) XVI YBCA 599 (Spain Supreme Court 1984) 601; *China Agribusiness Development Corp v Balli Trading* [1998] 2 Lloyd's Rep 76 (UK QBD Com Ct 1997)80; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 1281-82; *X v X* (2004) XXIX YBCA 673, (Germany Court of Appeal 20 Oct 1998) 676 (waiver of right to discovery); *Chrome resource S.A. v Leopold Lazarus Ltd* (1986) XI YBCA 538 (Swiss Supreme Court 8 February 1978) 541-42.

¹¹⁵⁷ *Firm in Hamburg (buyer) v Corporation A. G in Basel (seller)* (1976) I YBCA 200 (Switzerland Court of Appeal 1968).

¹¹⁵⁸ *Osuuskunta METEX Andelslag V.S v Turkiye Elektrik Kurumu Genel Mudurlugu General Directorate* (1997) XXII YBCA 807 (Turkish Court of Appeal, 1 February 1996) pp 811-12.

¹¹⁵⁹ *Goldtron Limited v Media Most B.V* (2003) XXVIII YBCA 814 (Netherlands Court of First Instance 27 August 2002) pp818-19.

the agreed procedure, sufficient to justify a refusal of enforcement under Article V (1) (d).¹¹⁶⁰

In a Saudi case a party opposed enforcement of a foreign award on the basis that first, the tribunal had contravened Saudi procedural law, and, second, that the arbitration had not been conducted in the agreed arbitration seat. The Board of Grievances found that the parties had agreed that the dispute be settled by ICC arbitration in Paris. This meant that the arbitration was not subject to Saudi procedure. Moreover, the court emphasised that although the arbitration took place in Jordan, it had been decided by ICC itself, which made the issue of the seat less relevant. Therefore, the court rejected the objection and enforced the award.¹¹⁶¹

These cases may suggest that both Kuwait and Saudi courts adopt the view that only serious violations will lead to a refusal of enforcement. However, in the opinion of the writer, there are a number of factors that should be considered by the GCC Courts which may affect the success or failure of the application based on procedural irregularity. First, procedural irregularities should presumably affect the award in order for enforcement to be refused. This would comply with the general procedural principle that nullity of procedure will not ensue if the failure did not result in injury to the other party.¹¹⁶² Accordingly, a procedural defect should only lead to enforcement of a foreign award being refused when the arbitral tribunal would have decided differently had it not been for the procedural violation. Secondly, the court might take into account whether the party had challenged the procedural violation in the arbitral seat. If he had done so unsuccessfully, he should be precluded from resisting enforcement on the basis that he should not be allowed to re-litigate of this issue. Further, it is important to ensure that the party resisting enforcement had not waived his right to raise an objection at the time when the irregularities of procedure occurred, especially where such an issue is determined by applicable procedural rules.

¹¹⁶⁰ Kuwait Court of Appeal decision No. 1091/1986 dated 9/12/1986 available at <<http://ccda.kuniv.edu.kw>> (16/7/2009).

¹¹⁶¹ The Board of Grievances, the 25th Subsidiary Panel, decision No. 11/D/F/9 dated 1417 H (1996), and the 2nd Review Committee, decision No. 208/T/18 dated 1418 H (1997) quoting Al-Tuwaigeri, W, Grounds For Refusal of Enforcement of Foreign Arbitral Awards Under The New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia.

¹¹⁶² See Kuwait: Article 19 (2) of the Code of Civil and Commercial Procedure; Qatar: Article 16 of the Code of Civil and Commercial Procedure; Oman: Article 21 of the Code of Civil and Commercial Procedure; the UAE: Article 13 of the Code of Civil Procedure.

6.7 Award is not binding, or has been suspended or set aside

The sixth ground that can be used by the defendant to resist an application for enforcement of a foreign arbitral award in the GCC States is where he can prove that the award has not yet become binding or that the award has been set aside or suspended.

This defence is available under several regimes in the GCC States which deal with the enforcement of foreign awards. However they contain different approaches. According to the New York Convention, a court may refuse enforcement of the award if the defendant proves 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.”¹¹⁶³ The Arab League¹¹⁶⁴ and Riyadh Conventions¹¹⁶⁵ state that an application for enforcement may be refused “if the arbitrators’ decision is not final in the state in which it is given.” Under the Convention on the Enforcement of Judgments Delegation and Judicial Notices in the GCC, enforcement shall be refused if the dispute was the subject of a previous judgment rendered and acquiring *res judicata*,¹¹⁶⁶ or is the subject of a suit pending before any court of the enforcement state.¹¹⁶⁷

In addition, Kuwait and the UAE provide that an order of execution may not be issued unless that award “has become a *res judicata* according to the law of the court which rendered it.”¹¹⁶⁸ It is also required that the award “must be enforceable in the country wherein it was rendered.”¹¹⁶⁹ Omani law is similar and also stipulates that the award should be not enforced if fraud is involved.¹¹⁷⁰ In Qatar and under the Bahraini Code of Civil and Commercial Procedure it is provided that “leave to enforce will only be granted after ... award has become *res judicata* according to the law of the court which

¹¹⁶³ New York Convention, Article V (1) (e).

¹¹⁶⁴ Arab League Convention, Article 3 (f).

¹¹⁶⁵ Riyadh Convention, Article 37 (b).

¹¹⁶⁶ The Convention on Enforcement of Judgment Delegation and Judicial Notices in the GCC, Article 2 (c).

¹¹⁶⁷ The Convention on Enforcement of Judgment Delegation and Judicial Notices in the GCC, Article 2 (d).

¹¹⁶⁸ See Kuwait: Article 199 (1) (c) of the Code of Civil and Commercial Procedure; in the UAE: Article 235 (2) (d) of the Code of Civil Procedure.

¹¹⁶⁹ See Kuwait: Article 200 of the Code of Civil and Commercial Procedure; in the UAE: Article 236 of the Code of Civil Procedure.

¹¹⁷⁰ Oman: Article 352 (a) and 353 of the Code of Civil and Commercial Procedure.

made it.”¹¹⁷¹ The Bahraini International Commercial Arbitration Law follows the New York Convention,¹¹⁷² while Saudi Arabian law contains no provisions dealing with such an issue.

Thus the differences among the above regimes concern the burden of proof, the scope of the ground, and the law governing the issue. Under the conventions the party resisting enforcement must prove this ground, while under national provisions the burden of proof is on the party seeking enforcement. With regard to the scope of this ground, it is clear that Article V (1) (e) of the New York Convention is wider, as it contains three sub-grounds for refusal of enforcement - the award is not yet binding; it has been set aside at the place of arbitration; it has been suspended at the place of arbitration. Bahrain’s International Commercial Arbitration Law copies the New York Convention, while the remaining regimes (except Oman) only refer to the award not being binding character as a reason for refusing enforcement. The Omani Civil and Commercial Procedure Code speaks of the award having not become *res judicata*, and it requires that that award has not been rendered due to fraud.

With regard to the applicable law, all the regimes except the Convention on the Enforcement of Judgment Delegation and Judicial Notices determine the effect of the award by making reference to the law of the state of origin. Conversely, that Convention indicates that the law of the place of enforcement also applies to determine whether an award should be enforced.¹¹⁷³

This section will therefore (i) examine the natural binding force of the award and its effects on enforcement; (ii) discuss to what extent the annulment of an award at the place where it was made can affect its enforcement under the New York Convention; (iii) discuss the effects of a suspension under the New York Convention; and (iv) outline the court’s discretionary authority under the New York Convention to suspend enforcement proceedings pending resolution of an annulment application.

¹¹⁷¹ Bahrain: Article 252 (3) of the Code of Civil and Commercial Procedure; Qatar: Article 380 (3) of the Code of Civil and Commercial Procedure.

¹¹⁷² See Article 36 (1) (a) (5) of the Bahraini International Law.

¹¹⁷³ Article 2 of the Convention on the Enforcement of Judgment Delegation and Judicial Notices in the GCC provides that “enforcement ... shall be refused in the following cases ... (d) if the dispute in which the [award] is to be enforced, is the subject of a suit pending before any court in the state which has the same litigants and pertains to the same rights and the grounds and such suit was instituted on a date prior to the submission of the dispute to the [panel] of the state which has already passed the judgment”.

6.7.1 Not binding or final

In general, a foreign award must have reached some degree of finality or must be sufficiently binding in order to be enforced, and such a requirement varies depending on the regime that applies.

6.7.1.1 Awards that are Not Binding: New York Convention Article V (1) (e)

Article V (1) (e) of the New York Convention provides that enforcement of a foreign award can be denied if the party opposing enforcement proves that the award has not become binding on the parties. Two main questions have arisen regarding this article, the meaning of the term “binding,” and the law that determines the binding effect of the award.

The adjective ‘binding’ under the New York convention is mainly aimed at replacing the term “final” in the 1927 Geneva Convention.¹¹⁷⁴ A number of courts interpreted the term “final” to mean that the winning party was obliged to seek some sort of leave for enforcement (e.g., exequatur) in the country where the award was made as a requirement of enforcement in the country where enforcement was sought.¹¹⁷⁵ This system leads to what is known as the “double exequatur.” To avoid such problems, the New York Convention sought to abolish this practice by merely referring to a binding, rather than a final award.¹¹⁷⁶ To accomplish this, the Convention shifted the burden of proof from the party seeking enforcement to the party resisting enforcement.¹¹⁷⁷ There is consensus among commentators and courts that the term ‘binding’ does not require the winning party first to obtain leave for enforcement in the country where the award

¹¹⁷⁴ See UN DOC E/CONF.26/SR.3, p 4; UN DOC E/CONF.26/SR.17, p 3. Article 4 (2) of the Geneva Convention reads that “The party relying upon an award or claiming its enforcement must supply, in particular:- (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made”.

¹¹⁷⁵ See Born, G., op cit. p.2815; Di Pietro, D. and Platte, M., op cit. p.165; Gaillard, E. and Savage, J. op cit. para 1677; Tweeddale, A. and K., *Arbitration of Commercial Disputes*, 420; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.333.

¹¹⁷⁶ See UN Doc. E/CONF. 26/SR. 17 p3.

¹¹⁷⁷ See Gaillard, E. and Savage, J. op cit. para 1677; Gharavi, HG, Freyer, DH, ‘Finality and Enforceability of Foreign Arbitral Awards: From “Double Exequatur” to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity’, (1998) 13 (1), *ICSID-FILJ*, p. 102.

was made.¹¹⁷⁸ Indeed, the abandonment of the “double exequatur” is deemed one of the principal achievements of the Convention.

The Convention, however, does not define the term ‘binding’, which has led to lengthy discussion. The argument is mainly whether the term ‘binding’ is an autonomous concept under the Convention or if it is determined by the law of the country of origin.¹¹⁷⁹

The first view essentially investigates whether the binding character of the award should be determined by law of the state of the seat.¹¹⁸⁰ Fouchard, Gaillard and Goldman¹¹⁸¹ offer three arguments in support of this idea. First, this view is supported by the structure of Article of V (1) (e), which provides that the enforcement can be refused where the award “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”. This means that determination of this question is specifically dependent on the procedural law of the country of origin. Therefore, if the same concept was not also applicable to determining the issue of whether an award has become binding, this would lead to inconsistency, where an award became binding under one law, but its enforcement was refused because it was set aside under another law.¹¹⁸² Secondly, binding character cannot exist in any domain separate from a particular legal system, not even the New York

¹¹⁷⁸ See e.g., Born, G., op cit. p.2815; Gharavi, HG, op cit. para 55-56; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.338; Gaja, G., op cit. p.4; Redfern, A., and Hunter, M., op cit. pp 454, 467, 468; Gaillard, E. and Savage, J. op cit. para 1677. For court decisions see, e.g., *Animalfeeds Intl Corp v SAA Becker & Cie* (1977) II YBCA 244 (France Court 1970); *Bobbie Brooks Ins v Lanificio Walter Banci SAS* 291; *Lanificio Walter Banci SAS v Bobbie Brooks Ins* pp 235-36; the English High Court in *Rosseel N. V v Oriental Commercail & Shipping Co Ltd* [1991] 2 Lloyd’s Rep 625 (UK QBD Com Ct 1990) 628; *Gaetano Butera v Pietro & Romano Pagnan* 299; *Italian Party v Swiss Company* pp 827-28; *A SA v B Co Ltd & C SA* (2004) XXIX YBCA 834 (Switzerland Supreme Court 2003) pp 838-39.

¹¹⁷⁹ See Gaillard, E. and Savage, J. op cit. paras 1678 to 1681.

¹¹⁸⁰ Many national courts adopted this idea; see e.g., *Seller v Buyer* (2007) XXXII YBCA 322 (Germany Court of Appeal, 6 Oct 2005) 325; *Antilles Cement Corporation v Transficem* (2006) XXXI YBCA 846 (Spain Supreme Court, 20 July 2004) pp 850-51; *Carters Ltd v Francesco 277*; *Animalfeeds Intl Corp v SAA Becker & Cie* (France Court 1970); *Seller (Denmark) v Buyer (Germany)* (Germany Court of Appeal 16 Dec 1992) 541; *Oil & National Gas Commission v the West Comp of North American* (1988) XIII YBCA 473 (India Supreme Court 1987) pp 485-87. Some authors also support this view, e.g., Gaja, G., op cit. p.4 and citations in fn 74; Gaillard, E. and Savage, J. op cit. paras 1678 to 1681. See also, in general, Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.341; Nazzini, R., ‘The Law Applicable to the Arbitral Award’ (2002) 5 (6) *Intl Arb L R* 179 at 185; Merkin, R. *Arbitration law*, (Lloyd’s of London press, London 2004), para 19-56; Sarcevic, P., *Essays on International Commercial Arbitration* 212.

¹¹⁸¹ Gaillard, E. and Savage, J., op cit. paras 1678 to 1682.

¹¹⁸² Gaillard, E. and Savage, J., op cit paras 1678 to 1682. Gaja, G., “Introduction” in Gaja, G., (ed), *International Commercial Arbitration: New York Convention Vol. I*, para I.C.4.

Convention itself. Thirdly, when the Convention was drafted the role of the seat was more substantial. So it is difficult to imagine that the Convention contemplated that the award could be binding in a delocalised way, quite independent of the law of the seat.

The second view, which is affirmed by many courts¹¹⁸³ and the majority of authors,¹¹⁸⁴ suggest the term ‘binding’ has an autonomous meaning under Article V (1) (e), quite independent of the law of the country where the award was made. In support of this idea, it is submitted that the phrase “the country in which, or under the law of which, that award was made,” refers only to the setting aside of the award. If the term ‘binding’ was interpreted as suggested in the previous paragraph, it would amount to bringing back double exequatur, a condition the drafters sought expressly to avoid by using the term ‘binding’ instead of ‘final’.¹¹⁸⁵ Moreover, the idea of autonomous interpretation will lead to dispensing with the requirements of national laws, such as that an award needs formal confirmation by a court or must be deposited with a court, which are usually unnecessary and cumbersome for enforcement abroad.¹¹⁸⁶

Consequently, the correct methodological approach is to obtain the meaning of ‘binding’ from within the Convention itself. Since its drafters wanted to depart from the binding force of the award being a matter for the law of the country of origin as under the Geneva Convention, an autonomous interpretation of ‘binding’ is favoured.

However, there is another argument regarding the question of the moment at which the award can be considered binding. There are three main approaches proposed in this regard. First, it is suggested that a foreign award should be considered as binding as soon as it delivered, irrespective of possible or pending judicial, institutional, or other

¹¹⁸³ See e.g., *Carters Ltd v Francesco* (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; *Film Distributor v Film Producer* (2004) XXIX YBCA 754 (Germany High Court of Appeal 2002) 758; *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.

¹¹⁸⁴ See e.g., Sanders, P., op cit. 275; Van den Berg, A.J., ‘Consolidated Commentary’ (2003)’ 660; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, pp 341-45; Gaillard, E. and Savage, J. op cit. paras 1678 to 1679; David, R., op cit. p.400; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-101; Di Pietro, D. and Platte, M., op cit. p.166; Davidson, F., *Arbitration*, p.395; Redfern, A., and Hunter, M., op cit. p.468; Nazzini, R., ‘The Law Applicable to the Arbitral Award’ p.186; Born, G., op cit. p.2818.

¹¹⁸⁵ Gaillard, E. and Savage, J. op cit. para 1680; Sanders, P., op cit. pp.275-76;

¹¹⁸⁶ Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 342.

review.¹¹⁸⁷ Secondly, a few courts and authors have suggested that a foreign award could be considered as binding if no further arbitral tribunal appeals are available. On this view, a pending court appeal does not alter the binding effect of an award.¹¹⁸⁸ Thirdly, the view most supported by courts and authors is that a foreign award is binding for the purposes of Article V (1) (e) as long as it can no longer be appealed on the merits in further proceedings before another arbitral tribunal *or* in a court.¹¹⁸⁹ On this view, extraordinary means of recourse, which do not involve the merits of the award, would not preclude an award from becoming binding.¹¹⁹⁰ In support of this approach, it can be noted that the distinction between ordinary and extraordinary means of recourse was proposed by the drafters of the Convention, but rejected after lengthy debate because it was not common to all legal systems, or carried a different meaning in different systems.¹¹⁹¹ In addition, this is supported by Article VI, which provides that an enforcing court may adjourn enforcement proceedings because an application for setting aside or suspension of the award has been made to a competent court. It is thus clear that an application for setting aside is open to extraordinary means of recourse, but may only lead to the adjournment of the enforcement, while an award which is not yet binding may lead to the refusal of enforcement.

¹¹⁸⁷ See *Fertilizer Corp of India v IDI Management Inc* 957-958; *Rosseel N.V v Oriental Commercial & Shipping Co Ltd* 628; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* pp 610-11; WM Tupman, 'Staying Enforcement of Arbitral Awards under the New York Convention' (1987) 3 (3) *Arb Intl* 209 at 211-212. See in general, Born, op cit. p.2818.

¹¹⁸⁸ See *Seller v Buyer* (2007) XXXII YBCA 303 (Germany Court of Appeal, 2 Oct 2001) 308; *Jorf Lasfar Energy Company v AMCI Export Corporation* (2007) XXXII YBCA 713 (US District Court, 5 May 2006) 717; *Fertilize Corp of India v IDI Management Inc* (US District Court) pp 957-58; David, R., op cit. p.441; Morris and Collins, *Conflict of Laws* Para 16-117; Bishop, R. and Martin, E., 'Enforcement of Foreign Arbitral Awards' p.25; Soo, 'International Enforcement of Arbitral Awards' at 256. See in general, Born, G., op cit. p.2818; Gaillard, E. and Savage, J. op cit. para 1679; Martinez, R., op cit. pp 505-06.

¹¹⁸⁹ See, e.g., *French Seller v German (F.R) Buyer* (1977) II YBCA 234 (Germany Court 8 Jun 1967); *AB Gotaverken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden Supreme Court 1979) 240; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements* 611; *SPP Ltd v Egypt* pp 489-90; *Film Distributor v Film Producer* 758; *SNOC v Keen Lloyd Resources Ltd*, pp 777-83; *A SA v B Co Ltd & C SA* (the Swiss Supreme Court) pp838-39; *Compagnie X SA v Fédération Y* (2009) XXXIV YBCA 810 (Switzerland Federal Supreme Court, 9 December 2008). See also Matteuci, the Italian delegate, UN Doc. E/CONF.26/SR.17 p 13; Sanders, P., op cit. p.275; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 354; Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-102; Di Pietro, D. and Platte, M., op cit. p.166; Davidson, F., *Arbitration*, p. 395.

¹¹⁹⁰ See e.g., *Buyer v Seller* (2007) XXXII YBCA 619 (Switzerland Tribunal Federal Supreme Court, 21 January 2006) 627; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 342; Sanders, P., op cit. p.275.

¹¹⁹¹ Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.342.

Despite the absence of a definition of the term ‘binding’, there has been just one decision so far in which a court denied enforcement because the award had not become binding under Article V (1) (e).¹¹⁹² After the parties had agreed to refer the dispute to ICSID arbitration, dispute arose as to the validity of the agreement, leading the claimant to refer the dispute to AAA arbitration. He obtained an arbitration award by default under AAA, but a US Court of Appeal concluded that a district court lacked jurisdiction to confirm the award because of the agreement to go to ICSID arbitration. Later the claimant filed an application to ICSID while seeking enforcement of the AAA award in Switzerland. The Swiss Federal Court concluded that “following the conduct of [the claimant], which has initiated a new arbitration proceeding, the dispute between the parties may not be considered definitively settled. Whether an award is binding is first of all a question of the law governing the arbitral proceedings. In their autonomy, the parties freely designate the law of the proceedings.” The court felt that the claimant’s actions acknowledged that the AAA award had no binding effect and refused enforcement.¹¹⁹³

The GCC courts have not so far dealt with the interpretation of the term ‘binding’ under Article V (1) (e) except in Kuwait and Saudi Arabia. There is only one case which relates to the issue in Kuwait. The appellant challenged the enforcement of an ICC award made in France on the basis that award had not binding in France, since under Article 1477 of the French Code of Civil Procedure an award cannot become enforceable until confirmed by the relevant court.¹¹⁹⁴ In addition, Article V (1) (e) provides for refusing to enforce an award if it does not become binding on the parties. If the award has violated this principle then it becomes defective and must be subject to cassation. However, the Cassation Court held that the question of whether an award was

¹¹⁹² Van den Berg, A.J., ‘New York Convention of 1958: Refusals of Enforcement’ (2007) 18 (2) ICC International Court of Arbitration Bulletin 15; Van den Berg, A.J., ‘Consolidated Commentary’ Cases Reported in Volume XXXIV (2009) YBCA 371-1207.

¹¹⁹³ *Maritime International Nominees Establishment (MINE) v The Republic of Guinea* (1987) XII YBCA 541 (Switzerland, Court of First Instance, 13 march 1986) pp 520-22.

¹¹⁹⁴ Article 1477 of the French Civil Code of Procedure reads: “The arbitral award may be forcibly executed only by virtue of an order of *exequatur* by the *Tribunal de Grande Instance* having jurisdiction at the place where the award was rendered. *Exequatur* shall be ordered by the enforcement judge of the Tribunal.

To this effect, the text of the award and a copy of the arbitration agreement shall be filed by one of the arbitrators or by the most diligent of the parties, at the Secretariat of the court.”

binding was subject to the provisions of the Convention alone, so the objection was dismissed.¹¹⁹⁵

Although the challenge in above case is somewhat related to the issue of the binding character of the award, the court did not deal directly with the question of when the foreign award could be considered as binding for the purposes of Article V (1) (e), i.e. whether the term ‘binding’ should be defined autonomously interpretation or in the light of the law of the country of origin. However, the court noted that the appellant “has not presented any evidence refuting the validity thereof in accordance with the provisions of Article V (1) (e) of the Convention to effect that *the award did not become binding . . . in the country in which it was made which made it unenforceable*”, and this might indicate that the Cassation Court mainly assesses the binding nature of a foreign award by reference to the law of the country of origin.

In support of this view, it has been noted there is difference in formulation between the Arabic and English versions of Article V (1) (e). As noted earlier, the English text contains two grounds for refusal: (1) the award has not yet become binding; or (2) the award has been set aside or suspended. As regard the law governing these issues, the Convention refers expressly to “the country in which, or under the law of which that award was made” only in connection with second ground relating to setting aside. Conversely, the Arabic text makes reference to the arbitration law of the seat for both grounds, where it provides for refusing to enforce an award if “the award has not become binding on the parties or if it was set aside or suspended by the competent authority in the country in which the award was made or in accordance with whose law the award was made”. Accordingly, it seems that the Kuwaiti courts would favour examining the binding nature a foreign award in the light of the law of the country where it was made or the law under which it was given.

Similarly, in Saudi Arabia an enforcing court seems to interpret the binding character of a foreign award according to the law of the state in which it was made or the under which it was given. For example, in one decision a party argued that since the case was under appeal in an Egyptian court, the award could not be considered binding in the

¹¹⁹⁵ See Kuwait Cassation Court decision No. 78/88 dated 21/11/1988 available at < www.mohamoon-ju.com> (27/7/2009).

Saudi Arabia. The Subsidiary Panel of the Board of Grievances rejected this argument, holding that, according to Egyptian law, a pending court appeal did not alter the binding effect of the award, and did not block enforcement in Saudi Arabia.¹¹⁹⁶ This decision was also affirmed by the Appeal Court.¹¹⁹⁷

The remaining GCC Courts may also adopt the above view, especially if the enforcing court interprets the binding character in accordance with the Arabic version of the New York Convention, as mentioned earlier.

There have been no other cases in the GCC courts dealing with this question. However, given national provisions regarding the effect of awards, it can be said that an award becomes binding once it is rendered by the tribunal and continues to bind the parties as long as it stands. This derives from two principles. The first is the “binding force of a decision”, which is applied to any decision on a dispute, even if that decision is rendered by a court of first instance or in the absence of parties.¹¹⁹⁸ The second principle is *res judicata*, where there has been a final decision which is no longer subject to appeal.¹¹⁹⁹ The binding force of decisions also applies in relation to arbitration tribunals.¹²⁰⁰ Accordingly, the fact that recourse might be available to a court of law does not prevent the award from being binding.

It must be also pointed out that an award’s binding force is independent of any procedural obstacles that may arise at the stage of enforcement. This is clear where national laws used the terms ‘binding’ and “enforceable.” In particular, even if an award is not enforceable, this does not affect its binding character. Unlike a court judgment, an arbitral award is not enforceable of itself, but requires to be enforced by a court. As the New York Convention does not require that an award must be final and enforceable in

¹¹⁹⁶ The Board of Grievances, the 18th Subsidiary Panel, decision No. 8/D/F/18 dated 1424 H (2003) quoting Al-Tuwaigeri, W., Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia, p.242.

¹¹⁹⁷ The Board of Grievances, the 4th Review Committee, decision No. 36/T/4 dated 1425 H (2004) quoting Al-Tuwaigeri, W., Grounds For Refusal of Enforcement of Foreign Arbitral Awards Under The New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia, p.242.

¹¹⁹⁸ See in Kuwait: Article 53 of the Law of Evidence in Civil and Commercial Matters;

¹¹⁹⁹ See in Kuwait, Explanatory Memorandum of the Law of Evidence in Civil and Commercial Matters, Article 53. See also, in Bahrain, Article 99 of the Law of Evidence in Civil and Commercial Matters, in UAE Article 49 of the Law on Evidence in Civil and Commercial Transactions,

¹²⁰⁰ This is clear where the GCC arbitration laws used the above principles under the arbitral tribunal effect. For example, Article 55 of the Law of Arbitration in Civil and Commercial Disputes provides that “Arbitrators’ awards rendered in accordance with this law shall have the force of *res judicata*, and shall be enforced in conformity with the provisions appearing in this law.”

the country where it was made, and the winning party is under no obligation to prove this, the GCC courts might consider a foreign award to be binding once submitted to them, unless the losing party proves that it has still not become binding, or has been set aside or suspended in the country of origin.

6.7.1.2 Other regimes in the GCC States: “Final” Awards

Unlike the New York Convention, under the other regimes in the GCC States there is generally a requirement that an award should be “final” in order to be enforced. However, except in Qatar, the requirement of finality is not the only thing which is imposed under this ground. Under the Arab League and Riyadh Conventions, an arbitral award should fulfil the “double exequatur” requirement in order for enforcement to be granted. This is due to a requirement that an arbitral award should be final in the state in which it was given, and the winning party is obliged to supply a certificate from the judicial authority prove that the award is final and enforceable in the country where it was made.¹²⁰¹ The Arab League Convention goes on to require that a certified true copy of the award must include the “execution form.”¹²⁰² As a result, the winning party seeking to enforce a foreign award under one of these conventions is effectively required to obtain a leave for enforcement of the award from the court of origin in order to confirm its finality and enforceability, and thereafter seek judicial enforcement abroad.¹²⁰³

The requirement of “double exequatur” is also applied under the national laws of Kuwait, Oman, and the UAE. This is because these national laws stipulate that an order of execution of a foreign award may not be issued unless that award has become *res judicata* according to the law of the arbitration seat,¹²⁰⁴ and require that an award “must

¹²⁰¹See Arab League Convention: Articles 3 (f) and 5 (3); Riyadh Convention: Articles 37 (b).

¹²⁰² Arab League Convention, Article 5 (1).

¹²⁰³ As with the Geneva Convention of 1927. See the UAE High Federal Court decision no. 29, year 19, dated 28/6/1997; decision no 135 year 24, dated 7/4/2004; <www.mohamoon-ju.net>

¹²⁰⁴ See Kuwait: Article 199 (1) (c) of the Code of Civil and Commercial Procedure; Oman: Article 352 (a) of the Code of Civil and Commercial Procedure (it is noted the law is direct to used term “final”, rather than term “res Judicata”); in the UAE: Article 235 (2) (d) of the Code of Civil Procedure.

be enforceable in the country wherein it was rendered.”¹²⁰⁵ The use of the term *res judicata* means that an award has to be final.¹²⁰⁶

What exactly does it mean for an award to be “final”? An award is final for the purposes of the previous regime if there is no longer open an appeal on the merits in further proceedings before another arbitral tribunal or in a court. Accordingly, extraordinary means of recourse would not affect the possibility of enforcing foreign awards under the above regimes as long as the award was enforceable in the state of origin.¹²⁰⁷

The term “enforceable” means that an order of execution of an award at the country of origin has been rendered, including all forms of procedure required before the competent authority.

The aforementioned regimes show that the party seeking enforcement needs to start proceedings in the country where an award was made in order to guarantee enforcement. This means that these regimes impose more requirements in this regard than the New York Convention, where the winning party need not start any proceedings in the country where the award was made.

On the other hand, Qatar national law only stipulates that a foreign award must become final in order to be enforced, in accordance with the law in which it was given.¹²⁰⁸ Since the winning party, under national provisions, is required to prove such a condition, the ‘finality’ of an award can be made by supplying a certificate from the judicial authority where the award was made to prove that the award is final, or when the time limit for bringing an appeal has expired.

¹²⁰⁵ See Kuwait: Article 200 of the Code of Civil and Commercial Procedure; Oman: Article 353 of the Code of Civil and Commercial Procedure; in the UAE: Article 236 of the Code of Civil Procedure.

¹²⁰⁶ It should be pointed out that, according to GCC laws, arbitral awards are equal to judicial decisions for *res judicata* purposes. This is clear where in the Statutes of the GCC states it is stated that awards passed by the arbitrators in accordance with the law shall have the force of a *res judicata* (see, e.g., Article 55 of the Omani Law of Arbitration in Civil and Commercial Disputes, and Article 9 of the Kuwaiti Law of Judicial Arbitration in Civil and Commercial Matters). The doctrine of *res judicata*, in general, means that an award is definitive and obligatory. In order for an award to qualify as a *res judicata*, it must be rendered by a competent jurisdiction and the award must be final on the merits in respect of a dispute that had arisen between the same parties, the same subject matter and the same legal grounds (see, e.g., Article 53 of the Kuwaiti Law of Evidence in Civil and Commercial Matters).

¹²⁰⁷ This is to comply with the effect of domestic of arbitral awards, under Article 185 of Kuwaiti Code of Civil and Commercial Procedure and Article 57 of Omani Law of Arbitration in Civil and Commercial Disputes, which provides that “the bringing of an action for annulment shall not cause enforcement of the arbitral award to be stayed.”

¹²⁰⁸ Article 380 (3) of the Qatari Civil and Commercial Procedure Code.

6.7.2 Award Set Aside

Article V (1) (e) of the New York Convention also provides that a court may refuse enforcement if the defendant proves that the award “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.” The GCC regimes do not include this as a ground for refusing enforcement, save that the Bahrain International Commercial Arbitration Law, Article 36 (1) (a) (5) mirrors Article V (1) (e) of the Convention.

Article V (1) (e) establishes a connection between the review of the award by a court of the country of origin and its enforcement abroad. The Convention, however, provides no criteria to be followed by the enforcing court, and in no way restricts the grounds on which an award may be set aside at the place where it is made.¹²⁰⁹ Therefore, these grounds are entirely governed by the law of that country.¹²¹⁰ This means that, indirectly, the grounds for refusing enforcement may be extended to include all kinds of peculiarities of the arbitration law of the seat besides the grounds mentioned in the convention.¹²¹¹

This creates a problem in the application of the convention relating to what extent an annulment of an award at the place where it was made can affect refusal of enforcement at the place of enforcement. The question which arises is whether the foreign annulment decision has a binding effect on enforcement application? In this respect, two main approaches have been advanced. The traditional view is that a foreign award set aside in the place of origin is, as a general rule, not enforceable elsewhere. This approach has been adopted by many courts and authors.¹²¹² It is based on the view that an annulment

¹²⁰⁹ See Di Pietro, D. and Platte, M., op cit. p.169; Redfern, A., and Hunter, M., op cit. para 10-46.

¹²¹⁰ Compare this approach with, for example, the 1961 European Convention, which limits grounds of annulment, and provides that an award must have been set aside on one of the grounds mentioned by Article IX (a)-(d), which reflect exactly the grounds in Article V(1)(a)-(d) of the New York Convention. Accordingly, Article IX provides criteria to be followed by the enforcing court in the exercise of its discretion to enforce a foreign award, in order to avoid the unpredicted peculiarities of national laws and the courts in this regard.

¹²¹¹ See Gaillard, E. and Di Pietro, D. op cit. p.765; Van den Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, p.355; Sanders, P., op cit. p.276; Redfern, A., and Hunter, M., op cit. para 10-46.

¹²¹² See e.g., *Supplier v State enterprise* (2008) XXXIII YBCA 510 (Germany Court of Appeal, 31 Jan 2007) pp 610-16; *Claude Clair v Louis Beradi* (1982) VII YBCA 319 (France Court of Appeal 1980); *Baker Marine 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-A40/4363-03 (Russia Appeal Court 29 July 2003); *X v X* (2002) XXV YBCA 717 (Germany Court of Appeal 28 Oct 1999) 719; The Chinese Supreme People's Court Notice on the

decision makes the award non-existent and thus incapable of enforcement in any other jurisdiction. Van den Berg states that: “the fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of the origin. How then is it possible that in other 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 status to an award notwithstanding its annulment in the country of origin.”¹²¹³ In addition, enforcing a non-existent award would be against the principles of the judicial community and the public policy of the country of enforcement.¹²¹⁴ UNCITRAL agrees, opining that “the setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of Article V (1) (e) of the New York Convention and Article 36 (1) (a) (v) of the Model Law”.¹²¹⁵ Moreover, disregarding decisions of the courts of the seat may encourage parties to seek out jurisdictions where the likelihood of enforcement is known, engaging in endless forum shopping.¹²¹⁶

On the other hand, the modern view upholds the enforcement of a foreign award notwithstanding its annulment at the place of arbitration. The justification for this view is based on the language of Article V (1) being permissive, not mandatory. It has been said that the word *may* in the English text of Article V (1) implies some discretion on

implementation of the NYC, cited in Chang, ‘Enforcement of Foreign Arbitral Awards in the People’s Republic of China’ pp 468-69. See also in support of this view, Rogers, A., ‘The Enforcement of Awards Nullified in the Court of Origin’ (ICCA Congress Series no 9 Paris 1998) 548; Schwartz, E., ‘A Comment on Chromalloy-Hihmarton, à l’américaine’ (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, A., Morris, J. and Collins, L., op cit. para 16-118; Bajons, E-M, ‘Enforcement Annulled Arbitral Awards- A Comparative View’ (2002) 7 *Croat Arbit Yearb* 55, 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, both cited in Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-110 fn 167; see also in General, Mayer, P., ‘revisiting Hilmarton and Chromalloy’ (ICC Congress Series no 10, New Delhi 2000) p.165; Smit, R., ‘International Arbitration of Infrastructure Project Dispute and the Enforcement Regime Under the New York Convention’ (2003) <<http://www.stblaw.com/content/Publications/pub224.pdf>> (26/8/2009).

¹²¹³ Van den Berg, A.J., ‘Annulment of Awards in International Arbitration’ (International arbitration in the 21st century: towards “Judicialization” and Uniformity? 1992) 161, cited in Gharavi, HG., *The international effectiveness of the annulment of an arbitral award* 84.

¹²¹⁴ Rogers, A., ‘The enforcement of Awards Nullified in the Country of Origin’ in Van den Berg, A.J., (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series no 9 Paris 1999) p.548; Sanders, P., ‘New York Convention on the recognition and Enforcement of Foreign Arbitral Awards’, (1955) 6 *Netherlands Int’l L.R.* 43, 55; Tweeddale, A. and K., *Arbitration of Commercial Disputes*, p.443.

¹²¹⁵ Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, U.N Doc.A/40/17 (United nations ed., 1994), at 7 (b) (24)

¹²¹⁶ See Gaillard, E. and Di Pietro, D. op cit. p.766.

the part of the competent authority to refuse enforcement.¹²¹⁷ It also based on Article VII (1) of the New York Convention, which allows the enforcement of a foreign award, notwithstanding Article V (1) (e) if national law features provisions more favourable to enforcement.¹²¹⁸ This view developed after two famous decisions - the *Hilmarton* case in France, and the *Chromalloy* case in the US. In *Hilmarton* a French Court held an award annulled in Switzerland to be enforceable in France under Article VII (1) of the Convention.¹²¹⁹ Likewise, in *Chromalloy* a US Court relied on Article VII (1) to enforce an award which was made in Egypt and set aside there.¹²²⁰ A number of other jurisdictions followed the *Hilmarton* and *Chromalloy* jurisprudence with regard to the enforcement of annulled awards.¹²²¹

However, it is still not settled as to what the circumstances in which a court can disregard the annulment of an award by a relevant court, and enforce it nonetheless. Three different approaches have been advanced, in this regard.

The first is to ignore Article V (1) (e) totally, on the basis that Article VII allows each country to adopt a more liberal regime in favour of enforcement. According to this approach, if a foreign award meets domestic standards of enforcement, the award should be enforced without giving any weight to what a foreign court may have done to an award.¹²²² However, this argument has been considered to be too radical, as the Convention does not expressly state that Article VII should prevail over Article V in the

¹²¹⁷ See Redfern, A., and Hunter, M., op cit. para 10-47; Gaillard, E. and Savage, J. op cit. para 1687; Di Pietro and Platte, op cit. pp.170-76.

¹²¹⁸ Article VII (1) of the New York Convention reads: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

¹²¹⁹ *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* (1994) XIX YBCA 655 (France Supreme Court 1994).

¹²²⁰ *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F Supp 907, (US District Court Colu 1996).

¹²²¹ See *SONATRACH v Ford Bacon & Davis Inc* (1997) XV YBCA 370 (Belgium Court of First Instance 1988); *Kajo-Erzeugnisse Essenze Gmbh v Do Zdravilisce Radenska* (1999) XXIV YBCA 919 (Austria Supreme Court 20 Feb 1998); *Radenska v Kajo* (1999) XXVI YBCA 919 (Austria Supreme Court 20 Oct 1993); *X v X* (2005) XXX YBCA 421 (Austrian Supreme Court 26 January 2005); *Yukos Capital S.a.r.l. v Rosneft OAO* (The Amsterdam Court of Appeal on 28 April 2009, unreported) cited at <<http://www.kluwerarbitration.com/arbitration/newsletter.aspx?month=june2009>> (2/9/2009).

¹²²² See e.g., *SA Lesbats et Fils v Dr Volker Grub* (2007) XXXII YBCA 297 (French Court of Appeal, 18 Jan 2007) 298; *Pabalk Ticaret Ltd Sirketi v Norsolor SA* (1986) XI YBCA 484 (the French Court 1984) pp 489-90; *Polish Ocean Line v Jolasry* (1994) XIX YBCA 662 (French Supreme Court 1993); *Hilmarton Ltd v Omnium de Traitement et de Valorisation*; *Chromalloy Aeroservices Inc v Arab republic of Egypt*.

event of conflict. Moreover, if states are encouraged to adopt individualized criteria for the enforcement of foreign awards, this will create a real obstacle to international arbitration and demonstrate the limits of any harmonization through model laws.¹²²³

The second approach is based on distinguishing between “international standards” and “local standards.” It has been suggested that only decisions to set aside based on an international standards would create grounds for refusing enforcement of foreign awards. Thus if an award was set aside on the basis of national standards, the court should enforce such an award, even if it has been set aside at the country of origin.¹²²⁴ International standards would comprise grounds consistent with those in Article V (1) (a)-(d) of the New York Convention and Article 34 (2) (a) of the UNCITRAL Model Law.¹²²⁵ This argument, however, has been criticized, in that under this view ground (e) is made redundant, while the intention of the Convention is that ground (e) must provide a separate ground for the defendant to refuse a request to enforce an award that has already been set aside.¹²²⁶

The third approach goes back to Article V, on the basis that enforcing court ought to exercise its discretion to enforce award, even if it has been set aside at the country of origin,¹²²⁷ as evidenced by use of the permissive phrase “enforcement ... *may* be refused”- not that it *must* be. The question is when the court should exercise such discretion, despite the award having been set aside. Although a number of courts had exercised their discretion in this respect, it is difficult to deduce general guidelines from these decisions.¹²²⁸ Courts in exercising their discretion to enforce awards set aside, should not lead to disregarding the meaning of the rule that Article V (1) (e) is designed to protect. Therefore, courts need to balance between, on the one hand, the pro-enforcement bias of the Convention against the requirement of respecting the decision of the court of the seat. It has been suggested that enforcing a nullified award should be

¹²²³ See Gharavi, HG., *The International Effectiveness of the Annulment of an Arbitral Award*, p.87.

¹²²⁴ See Paulsson, J., ‘The Case for Disregarding LSAs (Local Standard Annulment) Under the New York Convention’ (1996) 7 *Am J Intl Arb* 99, 114.

¹²²⁵ See, U.N Doc.A/CN.9/460 para 143.

¹²²⁶ See, U.N Doc.A/CN.9/460 para 143.

¹²²⁷ See e.g., *Steel Corporation of the Philippines v International Steel Services, Inc* (2008) XXXIII YBCA 1125 (US District Court, 6 Feb 2008) 1131. See also Di Pietro, D. and Platte, M., pp 170-76.

¹²²⁸ See Di Pietro, D. and Platte, M., op cit. p.175.

restricted to exceptional cases as a safeguard against,¹²²⁹ for example, fraud,¹²³⁰ corruption, bias, lack of due process, and if it is contrary to the public policy of the country of enforcement.

This is the approach it may be best to follow, as it allows a court to exercise a significant degree of discretion in facilitating enforcement without introducing a damaging degree of disuniformity to the convention.¹²³¹ However, Poudret and Besson note that in none of the decisions rendered on the basis of Article V (1) (e) have the courts granted enforcement when the award was set aside in the state of origin, other than under Article VII (more favourable provisions of domestic law).¹²³²

In the GCC, to the researcher's knowledge there is no case-law dealing with this issue yet. However, his view is that it is arguable that the *Hilmarton* and *Chromalloy* jurisprudence, would not be followed in GCC countries. This is based on two reasons. The first is that GCC States apply the Arab text of the Convention. As was seen earlier, while the English text of Article V (1) is permissive, as it uses the word *may*, of the Arabic text of indicates that enforcement *must* be refused if the conditions listed in V (1) are proved. Thus Article V (1) is mandatory, rather than permissive. As a result, courts cannot exercise discretion to enforce awards that have been set aside in the country of origin. The second reason is that the national laws of the GCC do not seem to be more

¹²²⁹ Se, Chan, R., 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy*' (1999) 17 (1) *Boston Univ Intl L J* 141, 146 and 213; Petrochilos, G., *Procedural Law in International Arbitration*, Para 7.57; Park, W., 'Duty and Discretion in International Arbitration' (1999) 93 *Am I Intl L* 805, 813 and 823; Sampliner, G., 'Enforcement of Nullified foreign Arbitral Awards-*Chromalloy* Revisited' (1997) 14 (3) *J Intl Arab* 141; Redfern, A., and Hunter, M., op cit. para 10-47. Recently, it has been suggested that this view would be taken even in countries that grant enforcement in spite of the fact that an award had been annulled in the country of origin. In the US, the view adopted in *Chromalloy* has recently changed, and it has been held that, in the absence of "extraordinary circumstances", a court should deny enforcement of an award that has been set aside in the country of origin. In *e TermoRio S.A E.S.P. v Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007, Court of Appeals for the District of Columbia), it was stated that pursuant to Article V (1) (e) of the New York Convention, "a secondary contracting state normally may not enforce an arbitration award that has been lawfully set aside by a competent authority in the primary contracting state. The court, therefore, stated that "when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances..." Because there was nothing in the record indicating that the proceedings before the Consejo de Estado were tainted or suggesting that the judgement was not authentic, the court concluded that no such "extraordinary circumstances" existed and denied TermoRio's enforcement petition.

¹²³⁰ A foreign award rendered by fraud establishes an exception from enforcement. This is clearly provided under Omani law, where Article 352 (a) of the Code of Civil and Commercial Procedure requires that an award must be not rendered by fraud.

¹²³¹ See Ostorowski, S. and Shany, Y., 'Chromalloy: United States Law International Arbitration at the Crossroads' (1998) 73 *N.Y.L.J.* 1682.

¹²³² See Poudret, J. and Besson, S., op. cit. para 942.

favourable to enforcement than the Convention. They require that a foreign award should be enforceable in the country where it was made in order to be enforced. If the losing party has filed an application for setting aside of the award, or if such an application is accepted by competent authority, the award is usually not enforceable.

6.7.3 Suspension

The second part of Article V (1) (e) provides that recognition and enforcement may be refused if the party opposing enforcement proves that the award has been suspended by a competent court of the country in which, or under the law of which, that award was made. It is not entirely clear what situations the drafters of the convention envisaged in “suspension” of the award. However, it has been 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 makes a decision over an application to set the award aside.¹²³³ It seems that a provisional order rendered by the court of the seat of the arbitration for suspension also meets the requirement of Article V (1) (e).¹²³⁴ Consequently, suspension of the award leading to refusal of enforcement under Article V (1) (e) should not be based on initiating an application for suspension of the award in the seat of arbitration.¹²³⁵ In addition, the automatic suspension of the award by operation of law in the country of origin does not provide a ground for refusing enforcement.¹²³⁶ If the opposite interpretation were adopted, it make the Convention to be subject to a procedural rule of the country of origin.¹²³⁷

Conversely, in two rare cases an automatic suspension of enforcement of the award under the law of the seat was held to be a ground for refusing enforcement under Article V (1) (e). The Swiss Court of Appeal confirmed a court of First Instance’s refusal to enforce an award rendered in France because the losing party had filed an application

¹²³³ See Van den Berg, A.J., ‘New York Convention of 1958: Refusals of Enforcement’ (2007) 18 (2) ICC International Court of Arbitration Bulletin, p.17; Gaillard, E. and Savage, J. op. cit. para 1690; Tweeddale, A. and K., op. cit. p.420.

¹²³⁴ Gaillard, E. and Savage, J., op. cit. para 1690.

¹²³⁵ See *AB Gotaverken v General National Maritime Transport Co* 241

¹²³⁶ See e.g., *ABGotaverken v General National Maritime Transport Co* pp 241-42; *SPP Ltd v Egypt* pp 489-90; *White Knight ISA v Nu-Swift* (English HC 14 Jul 1995, unreported), cited in Davidson, F., *Arbitration*, p.397; *Gabon v Swiss Oil Cor* (1989) XIV YBCA 621, (Cayman Grand Court 1988). Also see, Davison, F., *Arbitration*, p.397. See also, Gaillard, E. and Savage, J. op. cit. para 1690; Bishop, R. and Martin, E., op. cit. p.28; Dicey, A., Morris, J. and Collins, L., op. cit. para 16-120; Sajok, K., ‘The New York Arbitration Convention of 1958 from the Yugoslavia Point of View: Selected Issues’ in Sarcevic, P., (ed) *Essays on International Commercial Arbitration* (Graham & Trotman, London 1989) 212 fn 46.

¹²³⁷ Gaillard, E. and Savage, J. op. cit. para 1690.

for setting aside the award before a French court, which application automatically suspends the enforcement of an award under French law.¹²³⁸ Likewise, in *Creighton v The Government of Qatar*¹²³⁹, a US Court in similar circumstances relied on French law to refuse enforcement.¹²⁴⁰ As Van den Berg suggests that both decisions must be considered the result of a judicial error,¹²⁴¹ because the Convention requires that the award must be suspended “by a competent authority” and not by the laws of the seat.

6.7.4 Adjournment of Enforcement Proceedings

If the losing party has made an application to annul the award in the place of origin, the enforcing court may ask what the effect of these proceedings on enforcement proceedings should be. Both the New York Convention and Bahraini law empower the court to adjourn its decision on enforcement pending resolution of the annulment application, while in the other GCC regimes the provisions governing enforcement of foreign awards are silent in this respect.

Under the New York Convention, since Article V (1) (e) allows the court to refuse to enforce an annulled award, Article VI gives it discretion to adjourn the enforcement decision when an application to set aside or suspend the award has been made to a competent authority in the seat. In addition, the court may, on the application of the party claiming enforcement, order the resisting party to put up suitable security.¹²⁴² The same provisions also apply under Bahrain International Commercial

¹²³⁸ See *Continaf BV v Polycoton SA* (1987) XII YBCA 505 (Switzerland Court of Appeals 25 April 1985) 508-09.

¹²³⁹ See *Creighton Ltd v The Government of Qatar* (1996) XXI YBCA 751 (US District Court, District of Columbia, 22 March 1995) 751-58.

¹²⁴⁰ Compare this with *AB Gotaverken v General National Maritime Transport Co. (GMTC), Libya* (1981) VI YBCA 237 (Swedish Supreme Court 13 Aug 1979), which complied with above prevailing view. In this case it was argued, that an action to set award aside under French law automatically suspends the enforcement of the award in France. The court, however, held that such suspension was not sufficient to meet the meaning of ground of Article V (1) (e) of the New York Convention.

¹²⁴¹ See Van den Berg, A.J., ‘New York Convention of 1958: Refusals of Enforcement’ (2007) 18 (2) *ICC International Court of Arbitration Bulletin* 18.

¹²⁴² Article VI of the New York Convention reads: “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”.

Arbitration Law.¹²⁴³ Thus, the court has discretion whether or not to adjourn the decision on enforcement, or to grant it on condition that security is given.¹²⁴⁴

The Convention, however, provides no clear standards which may be followed in the exercise of this discretion. There are no internationally accepted standards employed by the courts in deciding whether to stay enforcement proceedings before them when an action to set aside or stay an award is pending before the courts of the seat.¹²⁴⁵ The courts have generally considered that the decision to grant or deny an adjournment should be determined by the probable success of the setting aside proceedings.¹²⁴⁶ Other decisions place substantial weight on whether the period of time within which the decision on annulment is to be made is likely to be short.¹²⁴⁷ An English court explained that “it would be wrong to read a fetter into this understandably wide discretion ... Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success...; (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalize; all must depend on the circumstances of the individual case.”¹²⁴⁸

In the light of above, the court should not adjourn enforcement when an application for setting aside is not effective in the country of origin for this purpose, or the suspension request does not meet with Article VI’s requirement. This can happen in various circumstances; for example, where a party seek annulment of an award, which is not subject to annulment.¹²⁴⁹ It can also happen in where a party files an application for reconsideration of award,¹²⁵⁰ or where there appear to be no serious ground for

¹²⁴³ The Bahraini International Law, Article 36 (2).

¹²⁴⁴ Gaillard, E. and Savage, J. op. cit. para 1691.

¹²⁴⁵ Gaillard, E. and Di Pietro, D. op. cit. p.766.

¹²⁴⁶ See Van den Berg, A.J., ‘Consolidated Commentary’ (2003) p.670;

¹²⁴⁷ *Ibid.*

¹²⁴⁸ *IPCO (Nigeria) Ltd v Nigerian Nat’l Petroleum Corp.* [2005] EWHC 726 15 (QB).

¹²⁴⁹ Several national laws require that an award should be final in order for an annulment application to be exactable. For example, US FAA, 9 U.S.C. section 10; Swiss Law on Private International law, Article 190 (1); Bahrain law on civil and commercial procedure code, Article 242.

¹²⁵⁰ It is noted that in some countries arbitration law provides that reconsideration is one recourse which is available besides the annulment of the award but in different provisions, as Article VI requires the suspension by “an application for setting aside.” Thus if the resisting party applied for reconsideration rather than annulment in the country of origin, this application would not be sufficient for suspension of

annulment,¹²⁵¹ or where the party was not a party to the action in the country of origin.¹²⁵²

Another important point that should be considered relates to the granting of security under Article VI, where the court should determine the period in which security has to be posted by the respondent and clearly define the type of security in its decision.¹²⁵³ Otherwise, proceeding with the enforcement of the award would become more burdensome to the winning party.

The GCC Courts have not so far dealt with these matters. However, the factors relevant to the suspension of recognition proceedings should be considered by a court in deciding whether to suspend enforcement proceedings.

6.8 Summary

This chapter has described the grounds on which a party may resist enforcement of a foreign arbitral award in the GCC States. These grounds are: (1) incapacity; (2) invalidity of the arbitration agreement; (3) a party was not given proper notice or was unable to present its case; (4) the tribunal exceeded its jurisdiction; (5) improper tribunal composition or procedural irregularity; and (6) the award is not binding, or has been suspended or set aside.

The list of grounds is considered to be exhaustive, excluding the possibility of review of the merits by the enforcing court, while that the party who resists enforcement has the burden of proving the existence of one of these grounds. However, under national provisions governing the enforcement of foreign arbitral awards in Kuwait, Bahrain, Qatar, Oman, and the UAE, the burden of proof is on the party seeking enforcement.

recognition proceedings pending under Article VI. For example, Qatar law of the Civil and Commercial Procedure Code, Article 206.

¹²⁵¹ See e.g., *Company A v Company B & C* 2008) XXXII YBCA 517 (Germany Court of Appeal, 23 Feb 2007) 520; *Film distributor v Film producer* (2004) XXIX YBCA 754 (Germany Higher Court of Appeal, 22 Nov 2002) 760.

¹²⁵² *Yugraneft Corporation v Rexx Management Corporation* (2008) XXXIII YBCA 433 (Canada Court of Queen's Bench, 27 June 2007) 445.

¹²⁵³ See e.g., in *Gesco Ltd v Han Yang Corp* (1986) XV YBCA 575 (US Court for the District, 21 Nov 1986) (the court adjourned the decision on enforcement for six days to allow the respondent to post security); *Spier v Calzaturificio Tecnica SpA*, No. 86 Civ. 3777, (CSH), 12 September 1988 (1988 WL 96839 (S.D.N.Y.)). (The Party seeking to enforce the award is entitled to security giving him a direct claim either property or a guarantor resident in the country of enforcement).

In addition, the grounds for refusing enforcement the New York Convention have to be construed narrowly, although However, certain of the grounds have been interpreted differently, whether by the courts or by commentators.

With regard to incapacity, it found that the English text of the Convention uses the expression “under some incapacity” while the Arabic text of the Convention indicates that a person must be only under incapacity in order to refuse the enforcement. Therefore, the chance of enforcement being refused is smaller under the Arabic text. The law applicable to the question is to be determined by reference to the conflict rules of the law of the state in which enforcement is sought.

With regard to the invalidity of the arbitration agreement, other than under the New York Convention, the governing law will be determined by the conflict of laws rules provided of each enforcing state. However, Article V (1) (a) of the Convention itself contains conflict of laws rules dealing with this issue. In the absence of a choice of law by the parties, it is generally presumed that the law which governs the contract as a whole will also govern the arbitration agreement. However, with respect to the law governing the formal validity of the arbitration agreement, there is a strong argument for applying the conflict of laws rules under Article V (1) (a), i.e. the law chosen by the parties or, failing any indication, the law of the place of arbitration. Yet the prevailing view is that the formal requirements and thus grounds for invalidity of an arbitration agreement should be determined by Article II (2). These grounds are: (i) invalidity of the parties’ consent; (ii) a defined legal relationship between parties; (iii) inarbitrability of the dispute.

With regard lack of due process in arbitration proceedings, it was been seen that the concept of due process is not uniform in the relevant regimes. The most developed concept of due process is found under Article V (1) (b) of the New York Convention, which covers the party’s right to be given proper notice, and stipulates that each party must be able to present his case. However, in the other conventions and national laws, the concept of due process only concerns the party’s right to be duly summoned and/or properly represented. It is commonly recognised that the lack of due process mentioned in Article V (1) (b) overlaps with the public policy defence of Article V (2) (b). According to the prevailing view, the law of the place where enforcement is sought

should determine whether there is a lack of due process. The alternative view is that the matter is governed by the procedural law chosen by parties or, in the absence of such, under the law of the arbitration seat. The latter view appears to be followed by GCC Courts.

Although the lack of proper notice defence is often invoked, it is rarely successful in practice. It is generally accepted that the notice need not be in a particular form as long as the party is notified of the appointment of the arbitrator of the procedure. A short time limit is generally not deemed a violation of due process.

Being “unable to present his case” generally covers any serious procedural irregularity that may lead deprive a party of an opportunity to present his case. Unless a serious irregularity exists, the court may well reject a party’s defence. This is particularly so, if an irregularity results from that party’s own conduct, or he has failed to raise the objection during the arbitration, or if the award could not have been different even had the opportunity to be heard been granted.

The defence that the tribunal has exceeded its jurisdiction may generally rule only be determined by the law chosen by the parties or, in the absence of such a choice, by the law of the place of arbitration. According to the New York Convention, this defence covers the situation where the tribunal has either ruled outside its jurisdiction or had no jurisdiction since the parties did not want to arbitrate (*extra petita*), or the situation where it renders an award on matters beyond the scope of the submission to arbitration (*ultra petita*). However, an incomplete award is not sufficient grounds for refusing enforcement under the New York Convention (*infra petita*).

It has been suggested that the expression “submission to arbitration” used in Article V (1) (c) of the Convention was intended to include not only the scope of an arbitration agreement, but also the scope of a submission to arbitration. Nonetheless, this defence has been unsuccessfully invoked in most cases.

In addition, under Article V (1) (c), a court has discretion to grant partial enforcement of an award if the decision on the matters submitted to arbitration can be separated from those not so submitted.

According to the most common interpretation of the ground concerning irregularity in the composition of the arbitral tribunal or arbitral procedure, this defence has to be determined under the rules agreed by the parties, even if that agreement is contrary to the mandatory rules of the place of arbitration. Only in the absence of such an agreement will the law of the country where the arbitration took place govern these issues. It has been noted that invoking questions of irregularity in the composition of the arbitral tribunal or arbitral procedure is unpopular before courts. Yet it has been noted that even if a party proves an irregularity under Article V (1) (d), the court may yet enforce. The might be for one of the following reasons: (i) the violation is minor; (ii) under application of the doctrine of estoppel; (iii) where the court ignores the arbitration agreement and allows enforcement of an award that complies with the laws of the arbitral forum; (iv) where the court considers that the parties have tacitly consented to the modification of the composition of the arbitral tribunal.

There are different approaches in the various regimes in the GCC states regarding the issue of whether the award is yet binding or has been set aside or suspended. According to Article V (1) (e) of the New York Convention, the award must be ‘binding’, while other regimes insist that an award should be “final” in order to be enforced. However, there is consensus among commentators and courts that the term ‘binding’ does not require the winning party first to obtain leave for enforcement in the country where the award was made, the so-called “double exequatur.”

There is a view supporting the idea that the term ‘binding’ under Article V (1) (e) should be determined by the law of the seat. However, the prevailing view is that ‘binding’ is defined according to the autonomous meaning of Article V (1) (e), and independent of the law of the country where the award was made. Regarding the latter view, there are three main approaches regarding the question of the moment at which the award can be considered binding. First, it is suggested that a foreign award should be considered as binding as soon as it is delivered, irrespective of possible or pending judicial, institutional, or other review under any municipal law. Secondly, a few courts and several authors have suggested that a foreign award could be considered binding if no further arbitral tribunal appeals are available. Thirdly, the view most supported by courts and authors is that a foreign award is binding for the purposes of Article V (1) (e)

as long as it can no longer be appealed on the merits in further proceedings before another arbitral tribunal or in a court.

Most of the discussion, however, has concerned the question as to whether a foreign annulment decision binds the enforcing court. The traditional view is that a foreign award set aside in its place of origin is generally not enforceable elsewhere under Article V (1) (e). On the other hand, the modern view upholds the enforcement of a foreign award notwithstanding its annulment at the place of arbitration. The justification for this view is based on the language of Article V (1) being permissive, not mandatory. It is also based on Article VII (1) of the Convention, which allows the courts to apply provisions of national law which are more favourable to enforcement than the Convention, thus allowing enforcement of a foreign award, notwithstanding Article V (1) (e). However, it is suggested that the latter view would not be followed in GCC countries. This is firstly because GCC States apply the Arab text of the Convention, which provides that recognition and enforcement *must* be refused if the conditions listed in V (1) are proved, rather than the English text which uses the word *may*. Secondly, GCC national laws are not more favourable to enforcement than the Convention in any case. Thus courts have no discretion to grant enforcement of awards that have been set aside in the country of origin.

Finally, in order for a suspension to be grounds for refusing enforcement under Article V (1) (e), it must have been ordered by a court in the country of origin. Therefore, the automatic suspension of the award by operation of law in that country is not a ground for refusing enforcement.

Chapter Seven

The Grounds on which a Foreign Arbitral Award Must be Refused (Grounds which can be raised by the courts on their own motion)

7.1 Introduction

The previous chapter listed the grounds for refusal of enforcement of an award which have to be proven by the party resisting enforcement. This chapter will deal with the grounds on which an enforcing court may refuse enforcement on its own motion in the absence of pleadings by a defendant.

There are two such grounds on which a foreign arbitral award can be refused enforcement. The first is the ‘non-arbitrability’ of the dispute under the law of the enforcing state, and the second is the ‘public policy’ of that state. These grounds will be examined separately.

7.2 Non-Arbitrability

This ground appears in all regimes in the GCC governing enforcement of foreign arbitral awards.

The New York Convention provides that recognition and enforcement of an arbitral award may be refused “if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country”.¹²⁵⁴ The Arab League Convention and Riyadh Convention provide that a request of execution may be refused “if the laws of the requested state do not admit the solution of the issue by means of arbitration.”¹²⁵⁵ The national laws of Kuwait, Bahrain, Qatar, Oman and the UAE all provide that “the award must be made in matters which, under the laws of the state of

¹²⁵⁴ New York Convention, Article V (2) (a).

¹²⁵⁵ Arab League Convention, Article 3 (a); Riyadh Convention, 37 (a).

[enforcement], are arbitrable” in order that an order of execution may be granted.¹²⁵⁶ The Bahrain International Commercial Arbitration Law copies the provisions of the New York Convention,¹²⁵⁷ while in Saudi Arabian law contains no provisions dealing with the issue.

We shall now discuss (1) the notion of non-arbitrability; (2) the law applicable to the issue; and (3) when a dispute is non-arbitrable.

7.2.1 The notion of non-arbitrability

According to the prevailing international understanding, the notion of non-arbitrability relates to the restrictions or limitations imposed by a particular national law on what matters cannot be resolved by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters. The New York Convention provides for disputes “capable of settlement by arbitration.”¹²⁵⁸ This is known in jurisprudence as “objective arbitrability” (arbitrability *rationae materiae*).¹²⁵⁹ In some jurisdictions, for example the US, the term “arbitrability” is often used more broadly to include the whole issue of the tribunal’s jurisdiction.¹²⁶⁰ However, it is argued that meaning is liable to generate confusion, and is not generally used in international practice. It suggested, therefore, that the term non-arbitrability will only used in its narrower meaning to cover disputes that may be not resolved by arbitration.¹²⁶¹

The non-arbitrability doctrine rests on the notion that some matters may involve very sensitive public policy issues, or the interests of third parties, and as such should only be dealt with by state authority.¹²⁶² This may have led many authors to the conclusion that

¹²⁵⁶ See Kuwait: Article 199 (1) (c) of the Code of Civil and Commercial Procedure; Bahrain: Article 253 of the Code of Civil and Commercial Procedure; Qatar: Article 381 of the Code of Civil and Commercial Procedure; Oman: Article 353 of Code of Civil and Commercial Procedure; in the UAE: Article 235 (2) (d) of the Code of Civil Procedure.

¹²⁵⁷ See Article 36 (1) (a) (5) of the Bahraini International Law.

¹²⁵⁸ New York Convention, Article V (2) (a).

¹²⁵⁹ For the distinction between subjective and objective arbitrability see e.g., Bernardini, P, ‘the problem of arbitrability in general’, Gaillard and Di Pietro op. cit. pp.503-22; Gaillard and Savage op. cit. para 533; Lew, Mistelis and Kroll, op. cit. para 9-35.

¹²⁶⁰ See Lew, Mistelis and Kroll, op. cit., para 9-4; Mistelis and Brekoulakis, *Arbitrability: International & Comparative Perspective* p.3; Gaillard and Savage op. cit. para 532.

¹²⁶¹ See Gaillard and Savage op. cit. para 532.

¹²⁶² See Born, G, op. cit. p.768; Lew, Mistelis and Kroll, op. cit. para 9-2.

the issue of arbitrability is part of public policy.¹²⁶³ However, other authors support the view that non-arbitrability is not a dimension of public policy, but a separate ground for refusing enforcement.¹²⁶⁴ Thus Brekoulakis argues that “the relevance of public policy to the discussion of arbitrability is essentially very limited, and therefore, the scope of inarbitrability should not be determined by reference to public policy.”¹²⁶⁵ It is noted that if a dispute involves matters of public policy, this does not necessarily mean that the dispute is non-arbitrable, and thus must only be determined by the courts.¹²⁶⁶ In addition, the final report of the International Law Association Committee on the topic of public policy as a ground for refusing enforcement of international awards does not include arbitrability within its study of public policy, because the New York Convention and the UNCITRAL Model Law include separate provisions concerning arbitrability.¹²⁶⁷

In order to limit court control of the scope of the arbitrability of a dispute, there is support for distinguishing between the arbitrability of domestic and international disputes. Fouchard, Gaillard and Goldman,¹²⁶⁸ have affirmed that such a distinction enables “a dispute to be found non-arbitrable under a country’s domestic law, without necessarily preventing the recognition in that country of a foreign award dealing with the same subject-matter.”¹²⁶⁹

7.2.2 Law applicable to the issue of non-arbitrability

All the regimes which apply in the GCC states require the enforcing court to deal with issue of non-arbitrability according to the law of that state. The New York Convention

¹²⁶³ See e.g., Sanders, P, op. cit. p.270; Gaja, G, op. cit. Para I.C.5; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, pp.360, 368; Gaillard and Savage op. cit. para 1704; Garnett, op. cit. p.108; Redfern and Hunter, op. cit. pp. 149, 471; Lew, Mistelis and Kroll, op. cit. para 26-111; Di Pietro, D., ‘General Remarks on Arbitrability under the New York Convention’, in Mistelis and Brekoulakis (eds), *Arbitrability: International & Comparative Perspective* para 5-38.

¹²⁶⁴ See e.g., Born, G, op. cit. pp.770-72; Mistelis and Brekoulakis, op. cit. paras 1-19, 1-24, 2-5, 2-39; Kirry, A, ‘Arbitrability: Current Trends in Europe’, 12 *Arb Int’l* (1996) 373 at 374-379; Arfazadeh, H, ‘Arbitrability under the New York Convention: the *Lex Fori* Revisited’ (2001) 17 (1) *Arb Intl* 86.

¹²⁶⁵ Mistelis and Brekoulakis, op. cit. para 2-39.

¹²⁶⁶ For more discussion concerning the distinction between non-arbitrability and public policy, see e.g., Born, G, op. cit. pp.770-72; Mistelis and Brekoulakis, op. cit. paras 1-19 to 1-24, and 2-5 to 2-39; Kirry, op. cit. pp.374-379; Arfazadeh, H, op. cit. p.86.

¹²⁶⁶ Mistelis and Brekoulakis, op. cit. para 2-39.

¹²⁶⁷ ILA Final Report 255.

¹²⁶⁸ Gaillard and Savage (eds), op. cit. para 1701.

¹²⁶⁹ Some national court adopted the same view, see, e.g., the *Scherk v Alberto-Culver Co.* (US Supreme Court 1974)

refers to the fact that “the subject matter of the difference is not capable of settlement by arbitration under the law the country where enforcement is sought.”¹²⁷⁰ Both the Arab league and Riyadh conventions also require that the issue be examined “under the law of the state where enforcement or recognition of award is sought.”¹²⁷¹ Moreover, except for Saudi law, the GCC national laws provide the same rule.¹²⁷² Therefore, the view that the law of the country where enforcement of the award is sought must be applied to govern the question of non-arbitrability seems indisputable.¹²⁷³

However, some authors argue that it is questionable whether that law will always be relevant for determining non-arbitrability.¹²⁷⁴ Rather they suggest that the enforcing court should ask is whether the award did actually violate its exclusive jurisdiction.¹²⁷⁵ That exclusive jurisdiction will depend on whether the dispute had a territorial link with the enforcement state.¹²⁷⁶ Accordingly, the law of the place where enforcement is sought will be relevant to the determination of enforceability only if its courts originally had jurisdiction over the dispute determined by the arbitral tribunal. Otherwise there is no reason for the court to apply its own law and refuse the enforcement of the award.¹²⁷⁷ Pursuant to this view, let us assume, for example, that an arbitral tribunal in state A decided on a dispute relating to an administrative contract concluded in Kuwait. Kuwaiti law provides that such disputes cannot be resolved by arbitration because the Kuwaiti courts have exclusive jurisdiction over them. If the winning party sought to enforce the award in Kuwait, the court would most likely deny enforcement on the basis

¹²⁷⁰ New York Convention, Article V (2) (a).

¹²⁷¹ Arab League Convention, Article 3 (a); Riyadh Convention, 37 (a).

¹²⁷² Kuwait: Article 199 (1) (c) of the Code of Civil and Commercial Procedure; Bahrain: Article 253 of the Code of Civil and Commercial Procedure, and Article 36 (1) (b) (5) of the Bahraini International Law; Qatar: Article 381 of the Code of Civil and Commercial Procedure; Oman: Article 353 of Code of Civil and Commercial Procedure; in the UAE: Article 235 (2) (d) of the Code of Civil Procedure.

¹²⁷³ Many national courts affirmed this view, see, e.g., *Aloe Vera of America Inc v Asianic Food Pte Ltd* (2007) XXXII YBCA 489 (Singapore Supreme Court 2006) 504; *Scandlines AB v Scandlines Denmark* (2007) XXXII YBCA 555 (Spain Supreme Court 2002) 558; *Italian Party v Swiss Company* (2004) XXIX YBCA 819 (Switzerland Court of First Instance 2003) 828; *Thyssen Haniel Logistic Intl GmbH v Barna Consignataria SL* (2001) XXIV YBCA 851 (Spain Supreme Court 1998) 852; *Consmaremma-Consortio v Hermanos Escot Madrid SA* (2001) XXVI YBCA 858 (Spain Supreme Court 2001) 859; *Audi-NSU Auto Union A.G. v S. A. Adelin Petit & Cie* (1980) V YBCA 257 (Belgium Supreme Court 1979); *Nitron Intl Corp v Golden Panagia Maritime Inc* (2000) XXV YBCA 987 (US District Court SD NY 1999) 989. See also Arfazadeh, op. cit. pp 74-85; van den Berg, ‘Consolidated Commentary’ (2003)’ at 630; Di Pietro and Platte, op. cit. p.175; Lew, Mistelis and Kroll, op. cit. para 26-113; Tweeddale, A & K, op. cit. p424; Born, G, op. cit. p.517; Gaja, G, op. cit. para IC.5 and fn 82.

¹²⁷⁴ See, Mistelis and Brekoulakis, op. cit. para 6-31.

¹²⁷⁵ See, Mistelis and Brekoulakis, op. cit. para 6-31; Arfazadeh, H, op. cit. pp.86-89

¹²⁷⁶ Mistelis and Brekoulakis, op. cit. para 6-33 at 6-34.

¹²⁷⁷ Mistelis and Brekoulakis, op. cit. para 6-34.

that the award breached Kuwaiti law. On the other hand, if an award dealt with an administrative contract concluded elsewhere, there would be no reason for a Kuwaiti court to deny enforcement on the ground that this type of dispute cannot be resolved by arbitration under Kuwait law. This would be far from of the intent of national law which is concerned with the determination of the domain of national arbitration, rather than intending to preserve the exclusive jurisdiction of national courts on specific disputes. Whilst this view seems to be logical, it may lead to unwanted practical consequences in cases where the law of the country of enforcement contains a wider concept of non-arbitrability. In this case, an enforcing court, having verified that it has exclusive jurisdiction over a dispute that cannot be settled by its own notion, would then deny enforcement, irrespective of any other aspects, such as an international element, thus narrowing the concept of non-arbitrability.

However, if it is agreed that an attempt should be made to restrict the unacceptable consequences of arbitrability being reviewed solely by the enforcing, it is safe to make a distinction between the arbitrability of domestic and international disputes.¹²⁷⁸ Thus if a dispute is international, the enforcing court is not likely to exercise discretion to refuse enforcement of an award on the grounds of non-arbitrability, despite the fact that the dispute cannot be settled under domestic law. This view has been articulated particularly in the US, where the Supreme Court held that “it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration,”¹²⁷⁹ noting elsewhere that “the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and our courts ... we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our

¹²⁷⁸For authors supporting this view see e.g., Di Pietro and Platte, op. cit. p.178; Gaillard and Savage op. cit. para 1707; Born, G. op. cit. pp.774-6.

¹²⁷⁹ See *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, In.*, (1986) XI YBCA 555 (US Supreme Court, 2 July 1985) 565. See also, *Sonatrach (Algeria) v DISTRIGAS Corp.*, (1995) XX YBCA 195 (US District Court 17 March 1987) 801-4; *Parsons & Whittemore Overseas Co v RAKTA* 508 F2d 969, (US Court of Appeals 2nd Cir 1974).

courts.”¹²⁸⁰ It thought that such a view is more in keeping with the letter of the Convention and the intentions of its authors.¹²⁸¹

Thus it is clear that the law governing non-arbitrability is that of the place of enforcement, while there is still room for debate as to whether a different concept of arbitrability applies to domestic and international.

7.2.3 When is a dispute non-arbitrable?

Generally, each state decides which matters can and cannot be settled by arbitration in accordance with its own political, social and economic policy, as well as its general attitude towards arbitration.¹²⁸² As we have seen earlier, the issue of non-arbitrability is governed solely by the views of the place of enforcement; therefore, we will examine below only the view of the GCC laws relating to non-arbitrability.

The relevant GCC laws cover a wide area in the field of arbitrability. The general rule is that any matter which can be the subject of a compromise between parties can be referred to arbitration.¹²⁸³ In general, this covers all claims that have a financial value. Consequently, in general, civil, commercial, and economic disputes may be referred to arbitration. Therefore, it can be considered that arbitrability is the rule and matters that are not capable of settlement by arbitration are exceptions. There are, however, some exceptions to the aforementioned general rule. The rule must be construed in the light of another rule that “compromise may not be concluded in regard to matters related to public order but may be concluded in respect of financial matters resulting thereto.”¹²⁸⁴ Obvious examples are cases related to personal matters and crimes, which are generally the domain of the national courts. However, this does not mean that every case which in

¹²⁸⁰ *Bremen v Zapata Offshore Co*, 407 U.S. 1; 92 S.Ct. 1907; 32 L.ED.2d 513 (1972).

¹²⁸¹ Gaillard and Savage op. cit. para 1707.

¹²⁸² See Redfern and Hunter, op. cit. para 3-13; Mistelis and Brekoulakis, op. cit. p.10; Mistelis and Kroll, op. cit. para 9-35; Born, G. op. cit. p.768,

¹²⁸³ See Kuwait: Article 173 of the Code of Civil and Commercial Procedure; Bahrain: Article 233 of the Code of Civil and Commercial Procedure; Qatar: Article 190 of the Code of Civil and Commercial Procedure; Saudi Arabia: Article 2 of the Arbitration Law and Article 1 of the Implementation rules; Oman: Article 11 of the law of Arbitration in Civil and Commercial Disputes; in the UAE: Article 203 (4) of the Code of Civil Procedure. While the Bahrain International Arbitration Law does not contain any provisions prescribing any particular category of dispute to be non-arbitrable, Article 1(6) provides that “this law shall not affect any other law of Bahrain by virtue of which certain disputes may not be submitted to arbitration...”

¹²⁸⁴ See in Kuwait: Article 554 of the Civil Code; in Bahrain: Article 498 of the Civil Code; in Qatar: Article 575 of the Civil Code.

some respect relates to such matters cannot be subject to compromise, and is not capable of resolution by arbitration. Kuwaiti law, for example, allows a compromise in relation to a crime that violates any provision of the Free Zone Act.¹²⁸⁵

With regard to the second criterion, in some cases national laws indicate that national courts have exclusive jurisdiction over certain disputes. This means that arbitration is not permissible in relation to such matters. In sensitive matters legislators may doubt whether arbitrators will reach decisions that are socially acceptable. Thus they explicitly provide that any disputes arising under certain statutes should be resolved by the courts. The following categories emerge:

Bankruptcy: GCC laws give the courts exclusive jurisdiction to deal with questions relating to bankruptcy, whether personal or corporate.¹²⁸⁶ The courts alone can order the opening and closing of bankruptcy proceedings, create bankruptcy officials who are empowered to intervene in the management of the bankruptcy proceedings, and distribute the debtor's property. Some authors have argued that it is accepted that one may compromise, and consequently arbitrate, on the monetary aspects of a bankruptcy.¹²⁸⁷ However, in the researcher's opinion, although the law provides that compromise may be reached in regard to such matters, it should be noted that such compromise is in the exclusive jurisdiction of national courts, which means that a bankrupt may enter into composition with his creditors only through a competent court. Accordingly, the disputes relating to bankruptcy functions are considered non-arbitrable under the GCC national laws.

Intellectual Property Disputes (Trademarks, patents etc.): According to GCC laws, disputes regarding the protection of patents, trademarks, and intellectual property rights may only be resolved by courts or government committees, since a ruling regarding

¹²⁸⁵ See Article 15 of the Kuwaiti Free Zone Law no. 26 of 1995.

¹²⁸⁶ See Kuwait: Articles 555 at 800 of the Commercial Code, and Article 17 of the law in respect of Legal Reactions Containing a Foreign Element; Bahrain: the Bankruptcy and Composition Law promulgated by Decree No (11) of 1987; Saudi Arabia: the Code of the Settlement Preventing Bankruptcy issued by Royal Decree No (M/16) of 4/9/1416 (H); Qatar: Articles 606 at 846 of the Commercial Code; Oman: Articles 579 at 788 of the Commercial Code; the UAE: Articles 645 at 900 of the UAE Federal Commercial Transactions Law No (18) of 1993.

¹²⁸⁷ See El Ahdab, *op. cit.* p.297

invalidity will have an effect beyond the parties.¹²⁸⁸ These rights are primarily derived from the legal protection granted by the national sovereign power,¹²⁸⁹ and must be publicly registered. As seen above, disputes arising from illegal acts are not arbitrable. Therefore, any disputes concerning whether such rights have been granted or are valid are not capable of being resolved through arbitration. However, disputes regarding the financial consequences of infringing such rights may be capable of resolution by arbitration.

Commercial agency: Kuwaiti law provides that national courts have exclusive jurisdiction over all claims arising between the parties out of the performance of commercial agency contracts.¹²⁹⁰ The UAE provides that the committee on trade agencies is the sole competent body to consider to any dispute that may arise out of trade agencies.¹²⁹¹ This attitude may arise due to such contracts not being freely negotiated between the parties, as an agent is often faced with the option of either accepting the contract as proposed or losing the business.¹²⁹² In Saudi Arabia, although the rules regulating commercial agency do not prohibit the referral of such disputes to arbitration, the competent authority has established a standard form of commercial agency contract which provides that “any dispute will be brought before the board for

¹²⁸⁸ See Kuwait: Articles 92 of the Commercial Code, Law No (4) of 1962 amended by Law No (3) of 2001 Relating to Patents, Design and Industrial Models, and Law No (64) of 1999 Relating to Intellectual Property Rights; Bahrain: Law No (1) of 2004 in respect of Patents and Utility Models, as amended by Law No (14) of 2006, Law No (11) of 2006 on Trademarks, Law No (6) of 2006 on Industrial Designs, and Law No (22) of June 2006 on Copyright and Neighbouring Rights; Qatar: Decree Law No (30) of 2006 to issue Patent’ Law, Law No (7) of 2002 on the Protection of Copyright and Related Rights, and Law No (9) of 2002 on Trademarks, Geographical Indications and Industrial Designs; Oman: Royal Decree No (82) of 2000 Promulgating the Patent Law, Royal Decree No (38) of 2000 Promulgating the Law on Trade Marks, Descriptions and Secrets and Protection against Unfair Competition, Royal Decree No (39) of 2000 Promulgating the Law on the Protection of Industrial Designs, and Royal Decree No (37) 2000 Promulgating the law on the Protection of Copyrights and Neighbouring Rights; Saudi Arabia: Royal Decree No (M/27) of 2004 Implementing Regulation of the Law of Patents, layout-Designs of Integrated Circuits, Plant Varieties, and Industrial designs, Royal Decree No (M/21) of 2002 Implementing Regulation of the Law of Trademarks, Royal Decree No (M/15) of 1999 Implementing Regulation of the Law of Trade Names, Ministerial Decision No (1277) dated 3 July 2004 for issuance the regulation of Bordered Procedures for Protection of Intellectual Property Rights of Trademarks and Copyrights; in the UAE: Federal Law No (17) for the year 2002 Pertaining to the Industrial Regulation and protection of Patents, industrial Drawings, and Designs, Federal Law No (37) of the year 1992, amended by the Federal Law No (8) of the year 2002 in respect of Trademarks, and Federal Law No (7) of the year 2002 Concerning Copyrights and Neighbouring Rights.

¹²⁸⁹ See Lew, Mistelis and Kroll, op. cit. para 9-64;

¹²⁹⁰ See Kuwait: Articles 282 and 285 of the Commercial Code.

¹²⁹¹ See Article 28 of the Federal Act No (14) of 1988 modifying some provisions of the federal Act No (18) of 1981 of 1981 organizing Trade Agencies. See also, the decision of the Federal Court of Cassation of the UAE of June 28, 1994. available at < www.mohamoon-ju.com > (9/10/2009)

¹²⁹² See Kroll, S., ‘The “Arbitrability” of Disputes Arising from Commercial Representation’, Mistelis and Brekoulakis, (eds), *Arbitrability: International & Comparative Perspective* Para 16-9.

settlement of commercial dispute.”¹²⁹³ Therefore, these disputes are incapable of resolution by arbitration since the national courts have sole jurisdiction under applicable rules. Conversely, Oman, Bahrain, and Qatar are more liberal, as the Commercial Agencies Law explicitly provides that in a commercial agency dispute the parties are free to resort to arbitration.¹²⁹⁴ Such disputes should be referred to the dispute resolution authority in Oman,¹²⁹⁵ or to the competent court in Bahrain and Qatar.

Administrative Contracts: Except in Kuwait, there is no specific provision in the GCC states dealing with the arbitrability of disputes relating to administrative contracts, and therefore it would appear that such disputes, generally, are capable of being resolved through arbitration. In Kuwait, administrative contracts invite questions of non-arbitrability, because of the establishment of a specialised administrative court, which has exclusive jurisdiction over all disputes concerning administrative contracts.¹²⁹⁶ This view has also been emphasised by Kuwaiti courts, who reject arbitration in disputes arising from administrative contracts, concluding that any dispute arising from such contracts should only be decided by this court.¹²⁹⁷ But what does the term ‘administrative contracts’ mean precisely? The Kuwaiti courts have defined the term by stating: “The administration would not be considered a party to administrative contracts unless the latter relate to public services; and where the administration shows its intention to enjoy the powers that the public law grants for it in execution of its decisions through its own means, and where exceptional conditions are stated in such a contract”.¹²⁹⁸ However, in recent years there have been exceptions to this rule. The first is that of administrative contracts relating to the category of BOT (build-operate-transfer) or BOOT (build-own-operate-transfer).¹²⁹⁹ The second is where the other party

¹²⁹³ See El-Ahdab, op. cit. pp 574-75.

¹²⁹⁴ In Oman: Article 18 of the Commercial Agency Law (Royal Decree No 26/77 as amended by Royal Decree 37/96); Bahrain: Article 30 of the Decree No (10) of 1992 with respect to the Commercial Agency as amended in certain respects by Decree No (8) of 1998 and Decree No (49) 2002; Qatar: Article 23 of the Law no (8) of 2002 on Organization of Business of Commercial Agents.

¹²⁹⁵ Article 18 of the Commercial Agency Law (Royal Decree No 26/77 as amended by Royal Decree 37/96).

¹²⁹⁶ See Article 169 of Kuwait constitution, and Article 2 of the law No. 20 of 1980, amended by law No. 61 of 1982, regarding establishing the administrative court.

¹²⁹⁷ See Kuwait Cassation Court decision No. 155/96, dated 7/4/1997; Cassation Court decision No. 51/1997, dated 15/3/1998; Cassation Court decision No. 444/98, dated 14/3/1999 available at < www.mohamoon-ju.com > (26/10/2009).

¹²⁹⁸ See, Kuwait Cassation Court decision No. 43/97, dated 8/12/1997 available at < www.mohamoon-ju.com > (26/10/2009).

¹²⁹⁹ See, Article 15 of the Law No. 7 of 2008 governing the building operation and transfer.

to an administrative contract is foreign party.¹³⁰⁰ Therefore, if a dispute falls into either of these categories, it can be referred to arbitration pursuant to an explicit provision which regulates these kinds of administrative contracts.

Antitrust and Competition Claims: Except in Saudi Arabia and Kuwait, the legal systems of the GCC States do not including specific laws governing competition, which means that disputes relating to questions of competition law seem to be, generally, capable of being resolved through arbitration. Saudi Arabian competition law gives the national courts and government body exclusive jurisdiction over questions relating to protecting and encouraging fair competition and combating monopolistic practices that affect lawful competition.¹³⁰¹ This will be the case, in particular, of approval or disapproval of cases of merger, acquisition, or combining two managements or more into one joint management resulting in a dominant position in the market, conducting an investigation, the initiation of criminal case procedures against violators of the law, and disposal of assets, shares or proprietary rights, or undertaking any other action which removes the effects of the violation.¹³⁰² As mentioned above, arbitration is generally not permitted in cases where compromise is not allowed. As these disputes arise from illegal acts, which invite criminal sanctions, these matters cannot be the subject of compromise between parties, so that the public authorities have sole jurisdiction. Therefore, any disputes concerning such questions are not capable of being resolved through arbitration. However, it appears that claims resulting from infringements may be referred to arbitration. This is based on the language used by the provision, which states that “any natural or corporate person subjected to harm resulting from practice prohibited under provisions of this law may apply for compensation before the competent judiciary.”¹³⁰³ The article uses the term “may” to refer to the jurisdiction of the competent court. This means that it is not a mandatory rule, which means that jurisdiction of the court in this regard is not exclusive. This view can also be justified in that such claims can be subject to compromise. In Kuwait, although competition law includes the same aims, it adopts a different view regarding the arbitrability of such

¹³⁰⁰ See, Article 16 of the law No. 8 of 2001 Regulating Foreign Capital Direct Investment Law in State of Kuwait.

¹³⁰¹ See, Articles 9, 11, 15, 16, and 17 of the Competition Law, and Articles 17, 19, 20, 21, and 22 of the execution regulation of competitions law.

¹³⁰² See, Articles 4, 5, 6, and 7 of the Competition Law, and Articles 4, 5, 6, and 7 of the execution regulation of competitions law.

¹³⁰³ Article 18 of the Competition law.

disputes, an explicit provision of competition law indicating that arbitration may be resorted to resolve any disputes arising in connection with the execution of the provisions of the law.¹³⁰⁴

Anti-dumping: The GCC States adopted a common law on anti-dumping, countervailing measures and safeguards designed to prevent the GCC economies from injurious practices in international trade that cause or threaten material injury to established GCC industries or are related to the establishment of such industries, which can be achieved by taking appropriate GCC measures against such practices.¹³⁰⁵ These practices include: (1) Dumping; (2) Subsidy; (3) Unjustifiable increase in imports.¹³⁰⁶ Under this law, two bodies have been established - the permanent committee, and the ministerial committee - which alone may order the measures and procedures the law provides, including price undertakings, imposing fees for anti-dumping and countervailing duties to prevent subsidies, and conducting an investigation.¹³⁰⁷ Moreover, the law established a competent juridical board, which has exclusive jurisdiction over objections against decisions made under it.¹³⁰⁸ Therefore, any disputes concerning the issues of anti-dumping are not arbitrable, but should be referred to the body established by the law. However, it should be noted that forbidding arbitrability may only concern anti-dumping disputes arising within the law. Its scope of application only covers questions which threaten material injury to an established GCC industry or hinder the establishment of such industry.¹³⁰⁹ Otherwise, any dispute relating to anti-dumping, whose object does not fall within the scope of the law, may be referred to arbitration.

Miscellaneous other claims: GCC laws also provide for a range of other claims to be capable of settlement only by the courts, and thus non-arbitrable. If a dispute falls into

¹³⁰⁴ See, Article 24 of the law No (15) of 2007 regarding the protection of competition.

¹³⁰⁵ This law has been issued in Kuwait by the law no. 25 of 2007; in Bahrain by Law No (4) of 2006; in Saudi Arabia by the Royal Decree No (M/30) of 17/5/1427 (H); in Oman by Royal Decree No (39) of 2006; in the UAE by Decree No (7) of 2005.

¹³⁰⁶ See, Article 1 of the GCC Common Law on Anti-dumping and Countervailing Measures and Safeguards.

¹³⁰⁷ See, Articles 8, 9, and 10 of the GCC Common Law on Anti-dumping and Countervailing Measures and Safeguards.

¹³⁰⁸ See, Article 12 of the GCC Common Law on Anti-dumping and Countervailing Measures and Safeguards.

¹³⁰⁹ See Article 1 of the GCC Common Law on Anti-dumping and Countervailing Measures and Safeguards.

the category of eminent domain, property, land, or labour in Kuwait it cannot be referred to arbitration.¹³¹⁰

To the researcher's knowledge there is as yet no case-law in the GCC States dealing with the ground of non-arbitrability. However, since the above regimes refer the question to national law, the question arises as to whether the GCC courts will apply their own law to refuse enforcement of foreign awards on the ground of non-arbitrability, in accordance with the specific matters mentioned above that are not capable of settlement by arbitration. It is submitted that denying enforcement of an award where a dispute is considered non-arbitrable under GCC laws would not always be proper, and that the issue of non-arbitrability should be narrowly construed.¹³¹¹ Most recently, the prevailing view has been to support a distinction between national and international non-arbitrability in order to limit the scope of the latter concept. Under this view, the fact that a specific matter is considered to be non-arbitrable in relation to domestic arbitration does not necessarily mean it is so in relation to international arbitration.¹³¹² Adoption of this interpretation by GCC Courts would, on one hand, leave considerable scope for GCC states to give effect to national policies, and on the other hand, require that this be done in a manner that is consistent with the basic structure and premises of the above regimes. It also complies with the purpose of the New York Convention to encourage the enforcement of foreign awards. However, the question whether the GCC courts would exercise their discretion not to refuse enforcement of foreign awards in cases of the specific matters mentioned above still requires to be tested by the practice of enforcing courts.

¹³¹⁰ See Kuwaiti Cassation Court decision No. 86/86 dated 16/3/1987 available at < www.mohamoon-ju.com > (26/10/2009). See also, in Kuwait: Article 13 of the Law no 5/1961 in respect of Legal Reactions Containing a Foreign Element, Article 24 (b) of the Code of Civil and Commercial Procedure; Bahrain: Article 15 (1) of the Code of Civil and Commercial Procedure; Qatar: Article 25 of the Civil Code; Oman: Article 30 (b) of the Code of Civil and Commercial Procedure; the UAE: Article 21 (2) of the Code of Civil Procedure.

¹³¹¹ See Hanotiau, B. 'The Law Applicable to Arbitrability', van den Berg (ed), *ICCA Congress series no 9*, 146, 167; Born, G. *International Commercial Arbitration*, (2009) 774-76;

¹³¹² In favour of this approach see, e.g. *Fritz Scherk v Alberto-Culver Co* 417 US 506 (US Supreme Court 1974); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (US Supreme Court 1985). See also, e.g., Born, G, op. cit. pp.774-76; Di Pietro and Platte, op. cit. p.176; Gaja, G, op. cit. Para I.C.5; van den Berg, 'Consolidated Commentary' (2003) 667; van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, pp 360, 368; Lew, Mistelis and Kroll, op. cit. para 26-113; Gaillard and Savage op. cit. para 1707; Redfern and Hunter, op. cit. p.148; Bishop and Martina, 'Enforcement of Foreign Arbitral Awards' 26.

7.3 Public policy

The fact that an award offends against public policy is a ground for refusing enforcement under all regimes in the GCC governing the enforcement of foreign arbitral awards.

Thus the New York Convention provides that recognition and enforcement of an award may be refused “if the competent authority in the country where recognition and enforcement is sought finds that ... the recognition or enforcement of the award would be contrary to the public policy of that country.”¹³¹³ The Arab League Convention provides that a request for execution may be refused “if the arbitrators’ decision includes anything considered to be against general order or public morals in the state requested to carry out execution,”¹³¹⁴ while the Riyadh Convention provides that such a request may be refused “if the award is contrary to the Moslem Shari’a, public policy or good morals of the signatory state where enforcement is sought”.¹³¹⁵

The national laws of Kuwait, Bahrain, Qatar, Oman and the UAE all provide that “the [award must] not breach the rules of public policy and good morals” in order for an order of execution be issued,¹³¹⁶ while the Bahrain International Commercial Arbitration Law copies the New York Convention.¹³¹⁷ Saudi Arabian law contains no provisions dealing with the issue, but the Grievances Board has issued a Circular stating that the enforcement of foreign judgments and arbitral awards requires conformity with public policy, and affirming that “The Arab League Convention . . . empowers the court to refuse to enforce a foreign award if it contradicts the public policy or public morals of the enforcement country, and the court has discretion in this matter. Accordingly, *it is not possible in any case to grant execution of any foreign award that violates any*

¹³¹³ New York Convention, Article V (2) (b).

¹³¹⁴ Arab League Convention, Article 3 (e).

¹³¹⁵ Riyadh Convention, 37 (e).

¹³¹⁶ See, Kuwait: Article 199 (1) (d) of the Code of Civil and Commercial Procedure; Bahrain: Article 252 (4) of the Code of Civil and Commercial Procedure; Qatar: Article 380 (4) of the Code of Civil and Commercial Procedure; Oman: Article 352 (d) of the Code of Civil and Commercial Procedure; in the UAE: Article 234 (2) (f) of the Code of Civil Procedure.

¹³¹⁷ The Bahraini International Law, Article 36 (1) (b) (2).

general principles of Shari'a (such as interest), since the Islamic Shari'a is the constitution and highest authority for judiciary and the governance in Saudi Arabia."¹³¹⁸

It should be noted here that although the above regimes use various terminology (public policy, public order, good morals, and Shari'a law), these terms have same meaning, since their emphasis is on the protection of the same supreme values deemed fundamental in the GCC States.

In the light of the relevant principles and judicial practice, this section will attempt to examine several issues in respect of the public policy ground: (i) definition of public policy; (ii) what law would govern the public policy; (iii) the standard for a violation of public policy; and (iv) common examples of public policy exception.

7.3.1 Definition of Public policy

To provide an accurate definition of the concept of public policy may be difficult, if not impossible.¹³¹⁹ This difficulty also arises in the context of the enforcement of foreign awards,¹³²⁰ since the international conventions offer no definition of the concept, nor do they provide guidance as to how it should be applied as a ground for refusing enforcement. This is because public policy touches almost every area of law in various ways,¹³²¹ and its content differs from country to country and from time to time.¹³²² Principles which are considered essential to one country's legal or social order may be considered less important in other countries, thus national laws may differ significantly in this respect. For example, in many countries awards concerning gambling are

¹³¹⁸ The Circular of the Grievance Board regarding Enforcement of Foreign Judgements and Arbitral Awards, no 7 dated 15/8/1405 H (1985), Articles 3, 5.

¹³¹⁹ See, Lew, Mistelis and Kroll, op. cit. para 26-115; Hanotiau and Caprasse, 'Public Policy in International Commercial Arbitration', Gaillard and Di Pietro op. cit. p.788; ILC Committee on International Commercial Arbitration, Public Policy as a Bar to the Enforcement of International Arbitral Awards, London Conference Report (2000) 4.

¹³²⁰ See, *Deutsch Schachtbau-und Tiefbohrgesellschaft MBH v Ras Al Hkaimah National Oil Co* [1987] 2 Lloyd's Rep. 246 (UK Court of Appeal) 254; *Renusagar Renusagar Power Co. Ltd v General Electric Co* (1995) XX YBCA 681 (India Supreme Court 1993) 696. See also, ILC Committee on International Commercial Arbitration, 'Interim report on Public Policy as A Bar to Enforcement of International Arbitral Awards' p 4;

¹³²¹ See, Lalive, P., 'Transnational (or Truly International) Public Policy and International Arbitration' (ICCA Congress Series no 3 New York 1986) 309; Di Pietro and Platte, op. cit. p.179; Buchanan, M., 'Public policy and International Commercial Arbitration' (1988) 26 (3) *Am Bus L J* 511 at 513.

¹³²² See, Lew, Mistelis and Kroll, op. cit. para 26-117; Redfern, A, 'Commercial Arbitration and Transnational Public Policy' (ICCA Congress Series no 18 Montreal 2006) 2; Sheppard, 'Public Policy and the Enforcement Arbitral awards: Should there be a Global Standard?' (2004) 1 (1) *Transnational Dispute management*, para I.

enforceable, but they are unenforceable under GCC laws as contrary to public policy.¹³²³ The concept of public policy even differs between GCC states. For instance, an award including interest will be contrary to public policy in Saudi Arabia, but would be acceptable under the commercial codes of the other GCC States. Furthermore, the international Commercial Arbitration Committee of the International Law Association published a well-received report and resolution on public policy as a bar to the enforcement of foreign awards, which identified various categories of international public policy and gave examples, but did not seek to define the concept.¹³²⁴ Therefore, the doctrine of public policy is easier to exemplify rather than to identify, and it may indeed be desirable that it not be defined.

Likewise, there is no precise definition of public policy in Shari'a. Saudi Arabian, public policy is determined by reference to Shari'a,¹³²⁵ and Shari'a is considered a component of public policy in the UAE. Although the UAE's legal system is based on civil law, the Civil Code after setting out provisions governing the proper law in the context of the conflict of laws, provides that "it shall not be lawful to apply principles of law designated by the foregoing provisions if such principles are contrary to the Islamic Shari'a or public policy or morals in the UAE."¹³²⁶ Nevertheless, according to El-Ahdab, "in Moslem law the concept of public policy is based on the respect of the general spirit of the *Shari'a* and its sources (the Koran and the *Sunna*, etc.) and on the principle that "individuals must respect their agreements, unless they forbid what is authorized and authorize what is forbidden."¹³²⁷

¹³²³ For example, under Kuwaiti law the Civil Code contains a general principle, which provides that "if the subject matter of an obligation is contrary to the law, public policy or good morals, the contract is deemed void".

¹³²⁴ ILA Committee on International Commercial Arbitration, *Public Policy as a Bar to the Enforcement of International Arbitral Awards*, London Conference report (2000). The Final Report of the ILA Committee was presented at the 2002 New Delhi conference and published in the 2002 Proceedings and at <www.ila-hq.org>

¹³²⁵ See, Mahassani, H, 'Moslem Law is a main part of Saudi public policy' Conference in Jeddah, 20 January 1977, quoted in El-Ahdab, op. cit. p.608;

¹³²⁶ See, Article 27 of the Civil Transaction Code.

¹³²⁷ El-Ahdab, 'General Introduction on Arbitration in Arab Countries' in Sanders, P and van den Berg, AJ (ed) *International Handbook on Commercial Arbitration* (Kluwer, 1998), Suppl. 27, Annex 1, p. 12; Aboul-Enein, M, 'Liberal Trends in Islamic Law (Shari'a) on Peaceful Settlement of Disputes', (2000) 2 *Journal of Arab Arbitration*, p 1-6.

Nonetheless, in theory and practice it is generally agreed that public policy may be defined as reflecting “the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community”.¹³²⁸

Nor do GCC laws and courts define the term. However, the UAE’s Code of Civil Transactions provides lists of public policy matters, including matters of personal status such as marriage and inheritance, etc., matters relating to the regulation of judgments, freedom of trade and the circulation of wealth, principles of individual ownership and the other basic principles upon which society rests.¹³²⁹ According to the Cassation Court, the concept of public policy is restricted to a limited number of basic principles reflecting the supreme values deemed fundamental for the national community. For example, in Kuwait, the Cassation Court in a case where foreign law seemed to apply in a domestic context stated that foreign law would only be excluded if its provisions were contrary to public policy or morality in Kuwait, which touches the very existence of the state or relates to the supreme interests of the community.¹³³⁰

7.3.2 Choice of law governing the question of public policy

The rationale for this ground is to protect the basic moral precepts and social order of the enforcing state.¹³³¹ Thus, public policy is a ground for each GCC state to refuse to give effect in its territory to foreign awards that it finds contrary to the fundamental principles of its own legal system.

There is no doubt that the question of violation of public policy should be governed by the law of the enforcing state.¹³³² This is explicit in the text of Conventions and national

¹³²⁸ See, Lew, J, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Ocean Publications, Dobbs Ferry, N.Y. 1978) 532; Born, G, op. cit. p.2829; see also, ILC Committee on International Commercial Arbitration, ‘Public Policy as A Bar to Enforcement of International Arbitral Awards’, London Conference Report (2000) pp 15, 14-30; Delvolvae, Rouche and Pointon, *French arbitration law and practice* 153.

¹³²⁹ See, Article 3 of the Civil Transaction Code.

¹³³⁰ Cassation Court decision no 221 dated 15/12/1991, available at < www.mohamoon-ju.com > (13/11/2009).

¹³³¹ See, van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 360.

¹³³² Many authors affirm this view. See, e.g., Born, G, op. cit. pp.2831-33; Redfern and Hunter, op. cit. p.472; Gaillard and Savage op. cit. para 1710; Di Pietro and Platte, op. cit. p.180; Merkin, R., op. cit. para 19.58; ILC Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as A Bar to Enforcement of International Arbitration Awards’ 30.

laws in GCC States, which refer to public policy “of that country.”¹³³³ So in the context of the New York Convention, most national courts, both in common law and civil law jurisdictions, apply their own laws when dealing with this issue.¹³³⁴

7.3.3 The Standards of Application of Public Policy Exception

As we have seen above, the relevant regimes provide for the application of the public policy of the enforcing state without suggesting whether courts should apply the same public policy standards they apply to domestic awards. However, despite the focus seen above on national public policy, the common tendency is for the New York and other international conventions to be construed narrowly for the purposes denying enforcement. Therefore, what standard of violation of public policy is applied under the New York Convention and other regimes in the GCC? Since domestic and international relations are different,¹³³⁵ it is often suggested that a distinction should be made between national and international public policy in the context of the enforcement of foreign awards. This distinction will now be examined.

7.3.3.1 Distinction between National and International Public Policy

In defining the standard for a violation of public policy, many courts and authors¹³³⁶ make a distinction between domestic and international public policy in the context of the enforcement of foreign awards, as indeed do a number of national statutes.¹³³⁷

¹³³³ New York Convention, Article V (2) (b); Arab League Convention, Article 3 (e); Riyadh Convention, 37 (e); Article 199 (1) (d) of the Kuwaiti Code of Civil and Commercial Procedure; Article 252 (4) of the Bahraini Code of Civil and Commercial Procedure; Article 380 (4) of the Qatari Code of Civil and Commercial Procedure; Article 352 (d) of the Omani Code of Civil and Commercial Procedure; Article 234 (2) (f) of the UAE Code of Civil Procedure.

¹³³⁴ See, e.g., *Renusagar Power Co. Ltd v General Electric Co* (India Supreme Court 1993) pp 701-2; *See Dragon, Inc. v Gebr. Van Weelde Scheepvaartkantoor BV*, 574 F. Supp. 367, 372 (SDNY 1983); *Construction Company (UK) v Painting Contractors (Germany)* (2006) XXXI YBCA 722 (Germany Court of Appeal 2004) pp 726-27; *X v X* (1989) XIV YBCA 637 (Athens Court of Appeal 1984) 637; *Kotraco, Inc. v V/O Rosvneshtorg* (1998) XXIII YBCA 735 (Moscow District Court 1995) pp 636-37.

¹³³⁵ van den Berg, ‘Consolidated Commentary’ (2003) XXVIII YBCA 655;

¹³³⁶ Many national courts affirm this view, see, e.g., *Firm P (US) v Firm F (Germany)* (Germany Court of Appeal 3 Apr 1975); *Renusagar Power Co. Ltd v General Electric Co* (India Supreme Court; 1993) pp 696-702; *Kersa Holding Co v Infancourtage* at 626; *Manufacturer (Slovenia) v Exclusive Distributor (Germany)* (German Court of Appeal 1999) 696; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* pp 674, 691; *MGM Prod. Group, Inc. v Aeroflot Russian Airlines*, 2003 WL 21108367, at 4 (SDNY 2003); *A (Netherlands) v B & Cia. Ltda* (2007) XXXII YBCA 474 (Portuguese Supreme Court of Justice 2003) p 477; *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Invesment and Isny* (1996) XXI YBCA 617 (Luxembourg Court of Appeal 1993) 625. See also Born, G, op. cit. pp.2837-2838; Davidson, *Arbitration* 374; Gaillard and Savage op. cit. para 1712; van den Berg, ‘Consolidated

What does international public policy mean? According to Jan van den Berg, “what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as falling under public policy in international cases is smaller than that in domestic ones. The distinction is justified by the differing purpose of domestic and international relations.”¹³³⁸ Similarly, Fouchard, Gaillard and Goldman conclude that, “not every breach of a mandatory rule of a host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.”¹³³⁹ In terms of judicial support of this distinction, for example, the Luxemburg Court of Appeal states that “According to the [New York] Convention, the public policy of the state where the arbitral award is invoked is ... not the internal public policy of that country, but *its international public policy*, which is defined as being “all that affects the essential principles of the administration of justice or the performance of contractual obligations,” that is, all that is considered ‘as essential to the moral, political or economic order’”¹³⁴⁰

Conversely, some authors argue that it is not clear what the formula “international public policy” means.¹³⁴¹ Some suggest that the concept is not international public policy as conceived by domestic law, but rather transnational public policy. One author notes that this “establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of individual nations.”¹³⁴²

Commentary’ (2003)’ at 665; Di Pietro and Platte, op. cit. p.181; Redfern and Hunter, op. cit. p.473; Lew, Mistelis and Kroll, op. cit. paras 26-114, 26-126.

¹³³⁷ See, France New Code of Civil Procedure of 1981, Article 1502 (5); Portuguese Code of Civil Procedure of 1986, Article 1096 (f); Lebanese New Code of Civil Procedure of 1983, Article 814, 817 (5); Algerian Decree no. 83.9 of 1993, Article 458 bis 23 (h); Tunisia Arbitration Code 1993 Articles 78 (2) (II) and 81 (II); Romania Law on Settlement of Private International Law Disputes Article 168 (2) and 174; US EAA Sections 201 (incorporation of New York Convention) and 301 (incorporation of the Panama Convention).

¹³³⁸ van den Berg, ‘Consolidated Commentary’ (2003) XXVIII YBCA 655.

¹³³⁹ Gaillard and Savage op. cit. para 1711.

¹³⁴⁰ *Kersa Holding Co v Infancourtage* (1996) YBCA XXI 617 (Luxembourg Court of Appeal 1993) 625.

¹³⁴¹ See, e.g., Lalive, P., ‘Transnational (or Truly International) and International Arbitration’ (ICC Congress Series No 3 New York 1986)1; Buchanan, ‘Public Policy and International Commercial Arbitration, (1988) 26 Am Bus L J 514 and fn 15; in general, Born, G, op. cit. p.2837.

¹³⁴² Dolinger, J, ‘World Public Policy: Real International Public Policy in the Conflict of Laws’, (1982) 17 *Texas Int. L. J.* 167.

However, since Article V (2) (b) of New York Convention refers to the public policy “of that country,” i.e. the country where enforcement is sought, this means that “international public policy” must be that of a state. Foucherd, Gaillard and Goldman opine that public policy under Article V (2) (b) clearly “refers to the host country’s conception of international public policy, and not to a “genuinely international public policy” rooted in the law of the community of nations. The latter concept is only of relevance to international arbitrators ...”¹³⁴³ In addition, transnational public policy has not yet been adopted by any court, and many authors have criticised the concept.¹³⁴⁴ Therefore, any resort to international public policy must be that recognised by the law of the enforcing state.¹³⁴⁵

Do the GCC courts apply a concept of international public policy? As we have seen above, GCC laws provide for the application of public policy without suggesting whether it should be international or domestic. Moreover, to the researcher’s knowledge, no case-law in the GCC states has adopted this distinction in the context of the enforcement of foreign arbitral awards. It is also beyond the scope of this study to examine the various circumstances that might be found to be contrary to public policy in the GCC. Rather the question is whether public policy is interpreted broadly or narrowly.

In the researcher’s opinion, the GCC courts would most likely adopt a narrow concept of public policy where recognition and enforcement are requested. As a general rule, the concept does not encompass all mandatory rules in the GCC. As we will see later, infringement of GCC mandatory rules, whether procedural or substantive, is not sufficient to constitute a violation of public policy unless a foreign award is in conflict with social, political, economic or moral issues which relate to the supreme interests of the community. In addition, it is suggested that enforcement should not be denied from supposed general considerations of public policy, but must be based on explicit

¹³⁴³ Gaillard and Savage (eds), *op. cit.* para 1712.

¹³⁴⁴ For criticism of this view, see, e.g., Reisman, ‘Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration’ (ICCA Congress Series no 18 Montreal 2006) pp 12-17; Redfern, ‘Commercial Arbitration and Transnational Public Policy’ pp 1-2; Gaillard and Savage *op. cit.* paras 1648, 1712; Born, G, *op. cit.* pp.2837-2838.

¹³⁴⁵ Born, G, *op. cit.* p.2838.

provisions.¹³⁴⁶ Further, a survey of judgments has shown that the defence of public policy is rarely successful before GCC courts.¹³⁴⁷ Moreover, even infringements of basic procedural guarantees in foreign arbitral proceedings will only justify the invocation of the public policy exception if they have affected the result of the award.¹³⁴⁸

This can also be supported by the prevailing view of Arab jurisprudence. In this respect, one author stated that “a national judge must not misuse public policy in private international law to disregard the applicable foreign law, particularly when he uses that to justify his confusion and unfamiliarity with the foreign law, otherwise this will hinder private international relations.”¹³⁴⁹ Besides, the same approach is followed by the Egyptian Cassation Courts. For example, although Egyptian law does not use the distinction between domestic and international public policy, in one case the court stated that “According to article 28 of the civil law, it is not allowed to exclude the application of a foreign law unless it is contrary to Egyptian public policy and morality or it contradicts the state constitution or an essential public interest of the community. However, a court must consider the application of international public policy in that if the difference between the foreign law and the Egyptian public policy rules is not substantial, then the court should not consider that difference as leading to a violation of national public policy.”¹³⁵⁰

¹³⁴⁶ This is clear where the GCC States legal systems are based on civil law and the courts must establish their decisions by using reasons and arguments derived from the texts.

¹³⁴⁷ This is based on the survey of the national GCC courts decisions that have been published by the Encyclopaedia of Arabic judicial decisions <www.mohamoon-ju.com>, which contains the most of the GCC courts' decisions that were publishing by Ministries Justice of these states.

¹³⁴⁸ See, chapter six section five which dealt with ground irregularity of procedure or due process.

¹³⁴⁹ Fathi, N., *Supervisiong Foreign Awards by the Nathional Courts* (Dar Al Nhdah al Arabiah, 1996 'in Arabic') 467. Also see, Ibrahim, Ahmmad Ibrahim, *Private International Law*, 3 ed., (Dar al Nahdah Al Arabiah, 2000 'in Arabic') 333; Abed Al Majeed, Moneer, *Arbitration in International Commercial Disputes* (Dar Al Mabo'at al Gam'iah, 1995 'in Arabic') 280.

¹³⁵⁰ The Court of Cassation decision dated 5/4/1967, the collection of cassation decisions (civil departments) s 18 1967, p 79; also see, Decision no 714/47 k, dated 26/4/1982, collection of cassation's decisions vol. 32, p 422; Decision no 1259/49, dated 13/6/1983, collection of cassation's decisions vol. 34, p 1416.

Finally, enforcing courts in GCC States should be consistent with the tendency to interpret the New York Convention as in favour of enforcing awards, and thus limit their application of national public policy.¹³⁵¹

With regard to Shari'a law, since in Saudi Arabia public policy is taken to conforming to Shari'a tenets, it is opportune at this point to examine briefly the Shari'a concept of the distinction between domestic and international public policy.

There is no explicit reference to the “principles of international public policy” in Shari'a or Saudi law. However, judicial precedent in Saudi indicates that Shari'a law can support a narrow interpretation of the concept of public policy in the context of enforcing foreign awards. This can be seen by reading Saudi arbitration law, which stipulates that “an arbitral award shall be enforceable ... after ascertaining that *there is nothing that prevents its enforcement in Shari'a.*”¹³⁵² The legislature thus refers to Shari'a in a broad sense, as the use of the phrase “*there is nothing*” without qualification can be interpreted literally to comprise every mandatory rule of Shari'a Law. How should it be interpreted? In different contexts the Saudi courts have shown that Shari'a Law can recognise some limitation on public policy in the context of enforcement foreign awards. Thus while Saudi arbitration law says arbitrators must be Muslim,¹³⁵³ in various decisions the courts have held that foreign awards made by non-Muslims are not considered to be contrary to public policy as long as the parties agreed.¹³⁵⁴ Secondly, it is provided that arbitrators issuing their awards “shall follow the provisions of Islamic Sharia and applicable regulations,”¹³⁵⁵ which invites the construction that foreign awards governed by non-Islamic Law are contrary to Saudi law and thus unenforceable.¹³⁵⁶ Yet Saudi and other GCC courts affirm that applying a foreign law to

¹³⁵¹ Born, G, op. cit. p.2838 states that “the convention’s structure and objectives argue strongly against the notion that contracting states would be free to effectively repudiate their obligations under Articles III and V by means of reliance on parochial local public policies, without international limitation.”

¹³⁵² Saudi Arbitration Law, Article 20.

¹³⁵³ The Implementation Rules of the Saudi Arbitration Law, Article 3.

¹³⁵⁴ See, e.g., 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); 4th Review Committee, decision No. 156/T/4 dated 1413 H (1992); the 3th Review Committee, decision No. 15/T/3 dated 1423 H (2002). Cited Al-Tuwaigeri, W, Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia 299.

¹³⁵⁵ The Implementation Rules of the Saudi Arbitration Law, Article 39.

¹³⁵⁶ See, Roy, ‘The New York Convention and Saudi Arabia: Can a Contrary Use the Public Policy Defence to Refuse enforcement of Non-Domestic Arbitral Awards?’ pp 950,259 fn 259.

an award will not be by itself sufficient to violate public policy unless the award conflicts with the general principles of Shari'a. Thus many foreign awards have been enforced, regardless their not having been issued by reference to Sharia.¹³⁵⁷ Thirdly, it has been argued that foreign awards granting compensation for lost profit or opportunity (which is not recognized by the *Hanbali* Moslem doctrine, which applies in Saudi Arabia) may be refused, as they would be contrary to Shari'a Law.¹³⁵⁸ However, Saudi have enforced foreign awards which compensate for both actual loss and lost future profits. Thus an appeal court voided a lower court's decision to refuse to enforce a foreign award mainly because it compensated a party for lost future profits and damages for reputation, which is considered contrary to the Shari'a.¹³⁵⁹ The appeal court explained that the court should have established the non-compliance of the foreign award with Shari'a by using evidence and arguments derived from the unanimity of Islamic scholars or from Islamic *Fiqh* confirming that compensation for lost profit would violate Shari'a. Thus the case was sent back to the lower court to be reconsidered in view of the appeal court's remarks.¹³⁶⁰ This approach was later accepted by other courts deeming that compensating for lost profit or opportunity was not contrary to Shari'a Law.¹³⁶¹

Accordingly, although GCC courts have not clearly made a distinction between national and international public policy, it could be said that they exercise a more substantial degree of restraint and moderation in the application of public policy in the context of enforcing foreign rather than domestic awards. This is consistent with the trend that

¹³⁵⁷ See, e.g., the 4th Review Committee, decision No. 155/T/4 dated 1415 H (1994); the 3rd Review Committee, decision No. 15/T/3 dated 1423 H (2002); 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).

¹³⁵⁸ See, El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 87 (1994) 11 (3) *J Intl Arab* 91; ILA Committee on International Commercial Arbitration, 'Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards' 235.

¹³⁵⁹ See, the 10th Subsidiary Panel, decision No. 20/D/F10 dated 1416 H (1995), and the 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994). Cited Al-Tuwaigeri, W, Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia 301-2.

¹³⁶⁰ The 2nd Review Committee, decision No. 235/T/2 dated 1415 H (1994). Cited Al-Tuwaigeri, W, Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia 302.

¹³⁶¹ See, e.g., the 1st Review Committee, decision No. 30/T/1 dated 1419 H (1998); The 2nd Commercial panel, decision No. 65/D/TJ/2 dated 1420 H (1999); The 3rd Review Committee, decision No. 202/T/3 dated 1420 H (1994). Cited Al-Tuwaigeri, W, Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 With Special Reference to the Kingdom of Saudi Arabia 302.

public policy should be construed narrowly for the purposes of recognition or enforcement of foreign awards.

7.3.4 Common Examples of Public Policy Exception

Although invocation of this ground is rarely successful in practice,¹³⁶² as noted previously, countless examples of it might be imagined. It is beyond the limited scope of this study to attempt to consider all potential examples of public policy which might arise in the GCC. However, we will attempt to examine the examples that are most commonly invoked in practice under the following headings: (i) lack of reasons for the award; (ii) lack of impartiality of arbitrators; (iii) interest or *riba*; (iv) corruption and; (v) mandatory rules.

7.3.4.1 Lack of reasons for the award

Generally, it is seen that a lack of reasons for a foreign award is not by itself a ground for refusing recognition and enforcement.¹³⁶³ The requirement to provide reasons is not even found in every GCC country. Thus the arbitration laws of Bahrain and Oman do not demand reasons,¹³⁶⁴ although reasons are mandatory under the laws of Kuwait, Qatar, Saudi Arabia, and the UAE.¹³⁶⁵ Yet the real question here is whether a court can refuse to enforce a foreign award which does not contain reasons.

The courts of Kuwait, Qatar, Saudi Arabia and the UAE have not yet dealt with this issue. However, in the context of the enforcement of domestic awards, the courts do not seem to regard the requirement to provide a reasoned award as of great importance. In several cases they have insisted that reasons in an arbitral award should not be treated in

¹³⁶² See, e.g., Lew, Mistelis and Kroll, op. cit., para 26-115; Hanotiau and Caprasse, 'Public Policy in International Commercial Arbitration', in Gaillard and Di Pietro op. cit. p.787.

¹³⁶³ See, van den Berg, 'Consolidated Commentary' (2003) at 668; see, e.g., *Buyer (P.R. China) v Seller (Germany)* (2008) XXXIII YBCA 495 (Germany Court of Appeal 2004) p 499; *Inter-Arab Inv. Guarantee Corp. v Banque Arabe et International d'Investissements SA* (1998) XXIII YBCA 644 (France Court of Appeal 1997) pp 652-53; *Tradax Export v Spa Carapelli* (1978) III YBCA 279 (Florence Court of Appeal 1976) pp 280-81; *X v X* (1989) XIV YBCA 637 (Athens Court of Appeal 1948) 637; *Euro'n Geain & Shipping Ltd v Seth Oil Mills Ltd* (1984) IX YBCA 411 (High Court of Bombay 1983) 414.

¹³⁶⁴ Bahrain: Article 31(2) of the International Commercial Arbitration Law; Oman: Article 43 (2) of the Law of Arbitration in Civil and Commercial Disputes.

¹³⁶⁵ Kuwait: Article 183 of the Code of Civil and Commercial Procedure provides that "The arbitrators' award ..., shall include in particular ... the reasons for the award..." the same rule lay down under the Qatar Code of Civil and Commercial Procedure, Article 202; the Saudi Arbitration Law, Article 17 and Article 41 of the Implementation Rules of Arbitration Law; the UAE Code of Civil Procedure, Article 212 (5).

the same fashion as reasons in judgments. It is sufficient for the validity of an arbitral award that brief reasons be given. Thus, while a domestic award would be at odds with public policy if it contained no reasons at all, the same would not be true if it did not contain adequate reasons.¹³⁶⁶ It is suggested a lack of reasons in a foreign award which a party is seeking to enforce would not infringe public policy in these states as long as this reflected by the agreement of the parties was contemplated by the applicable procedural law. Otherwise, GCC courts might deem that a lack of reasons to be a good ground for refusing enforcement of a foreign award on the basis that it violated fundamental principles of public policy.¹³⁶⁷

7.3.4.2 Lack of impartiality of the arbitrator

Public policy is also violated if the arbitral tribunal lacked impartiality and that influenced the result of the proceedings. Such impartiality is a fundamental principles of fair proceedings.¹³⁶⁸ Does every violation of the impartiality of the arbitrator then lead to a refusal to enforce the award? Van den Berg notes that where a lack of impartiality is alleged under the New York Convention,¹³⁶⁹ “the courts generally distinguish between the case where there are circumstances which might have created the lack of impartiality on the part of the arbitrator (“imputed bias” or “appearance of bias”), and a case where the arbitrator has effectively not acted in an impartial manner (“actual

¹³⁶⁶ See, e.g., Kuwait Cassation Court decision no 531 Commercial dated 8/2/2003; decision no 332 and 338 civil dated 25/3/2002 available at <<http://ccda.kuniw.edu.kw/default.asp>> (14/11/09)

¹³⁶⁷ This view has been adopted by other jurisdictions. In *Smart Systems Technologies Inc. v Domotique Secant Inc.* (2008) XXXIII YBCA 464 the Canadian Court of Appeal refused to enforce an award on the grounds that the arbitral tribunal’s failure to provide any reasons for its decision was contrary to public policy in Quebec. In this case, though the Appeal Court agreed with defendant that the term ‘public policy’ in this context meant international public policy, it could not, however, accept the defendant’s argument that enforcement of the award would not violate public policy as understood in international relations, even taking into account the favourable attitude of the Quebec courts toward the enforcement of foreign awards. The court reasoned that the lack of reasons for an award was not *per se* a violation of public policy. However, it is a violation when the parties agreed that the award should contain reasons, as they did here. Thus, enforcement in Quebec would be against public policy. See also, *Excelsior Film TV srl v UGC-PH* (1999) XXIVa YBCA 643 (France Supreme Court 1998) 644; *X v X* (1998) XXIII YBCA 754 (Switzerland Court of first Instance 26 May 1994) pp 758-62.

¹³⁶⁸ See, e.g., Article 10 of the Universal Declaration of Human Rights, which provides that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

¹³⁶⁹ van den Berg, ‘Consolidated Commentary’ (2003) XXVIII YBCA 667.

bias”).” As a rule, courts will only refuse to enforce a foreign award where it is proved that actual bias has influenced the outcome of proceedings.¹³⁷⁰

There is no case-law in the GCC dealing with this matter. However, GCC arbitration laws only allow this issue to be raised prior to the issuance of the award.¹³⁷¹ This means that a party cannot raise such an objection in enforcement proceedings unless it has done so in a arbitral proceedings, since the court will rule that the party has waived its right to contest the enforcement of the award.

7.3.4.3 Interest (*Riba*)

While the award of interest or *riba* may seem a clear example of violation of public policy in GCC legal systems, GCC laws actually feature a variety of rules that govern this issue. While interest (*riba*) is forbidden under Shari’a, it nevertheless is paid and collected under more modern GCC laws. As general rule interest is totally forbidden as being contrary to public policy if it arises from debt under civil obligations.¹³⁷² For example, the Kuwaiti Civil Code provides that “any agreement for interest in consideration of utilising a sum of money or against delay in settlement thereof shall be void.”¹³⁷³ The Civil Codes of Bahrain, Qatar, and the UAE contain the same rule.¹³⁷⁴ On the other hand, the commercial codes of Kuwait, Bahrain, Qatar, Oman and the UAE recognise interest in commercial contracts, although this matter is approached in a variety of ways. In some states the laws impose strict restrictions, infringement of which would cause a breach of public policy, while in other states the laws contain no rules which could be considered as part of public policy. Pursuant to principles of commercial law in Kuwait and Bahrain, interest is forbidden if it is taken as frozen

¹³⁷⁰ See, Tweeddale, A. and K, op. cit. p.429; van den Berg, ‘Consolidated Commentary’ (2003)’ 667; *Tianjin Stationery & Sporting Goods Import and Export Corp v Verisport BV* (1997) XXII YBCA 766 (Netherlands Court of First Instance 1996) pp766-7.

¹³⁷¹ Kuwait: Article 178 of the Code of Civil and Commercial Procedure; Qatar: Article 194 of the Code of Civil and Commercial Procedure; Oman: Articles 18 and 19 the Law of Arbitration in Civil and Commercial Arbitration Disputes; the UAE: Article 207 (4) of the Code of Civil Procedure. See also, the Kuwait Cassation Court decision in domestic case no 37 dated 3/6/1981 and decision no 182/86 dated 11/3/1987, no 210/88 dated 15/5/1989

¹³⁷² Kuwait Cassation Court decision no 166 commercial/ 2, dated 2/3/2005, available at <<http://ccda.kuniy.edu.kw/default.asp>> (14/11/09)

¹³⁷³ Kuwaiti Civil Code, Article 305 (1).

¹³⁷⁴ See in Bahrain: Article 228 (1) (a) of the Civil Code; Qatar: Article 568 of the Civil Code; the UAE: Article 714 of the Civil Transactions Law.

interest, or the total interest exceeds the capital fund, or exceeds the legal rate.¹³⁷⁵ The legal rate must not exceed 7% in Kuwait,¹³⁷⁶ and 12% in the UAE in the absence of agreement,¹³⁷⁷ while in Bahrain the legal rate is stipulated by the Bahrain Monetary Agency.¹³⁷⁸ Consequently, interest is considered as contrary to the public policy if it breaches the above principles.

To sum up, where an award features an unusually high interest rate, or an excessive profit margin, or frozen interest, or arises from a civil contract, then there may be breach of public policy, and it could be that a court would grant enforcement of the principal amount of award, but refuse on public policy grounds to enforce that part of the award related to interest.¹³⁷⁹ Yet, in the view of researcher, the issue as to whether or not an enforcing court would confer leave to execute interest on the basis of public policy would also depend on two issues. The first is that mandatory national rules of these states are applicable to the subject matter of a foreign award, and the second is whether enforcing courts in these states should recognise the existence of an international public policy more limited than the national law concept.

In Qatar and Oman, although commercial law permits the payment and receipt taking of interest, it does not provide any further rules on this matter.¹³⁸⁰ The only possibly relevant rule under Omani commercial law is a provision setting out that every loan concluded by a merchant in matters relating to his commercial activities shall be considered as a commercial loan.¹³⁸¹ Therefore, there are no rules relating to the issue of interest that would infringe public policy under Qatari and Omani law and thus leading a court to refuse enforcement.

¹³⁷⁵ See, Kuwait: Articles 102 (1), 110, and 115 of the Commercial Code; Bahrain: Articles 76 and 81 of the Commercial Code; the UAE: Articles 76, 77, and 88 of the Federal law no 18 of 1993 issuing the Commercial Transactions Law;

¹³⁷⁶ Kuwaiti Commercial Code, Articles 102 (1) and 110.

¹³⁷⁷ The UAE Commercial Transactions Code, Article 76. See also, the Abu Dhabi Federal Court of Cassation no 245/2000 dated 7 may 2000 quoting Price, R. and Al Tamimi, E., 'United Arab Emirates Court of Cassation Judgments 1998-2003', (Brill 2004) pp 179-182.

¹³⁷⁸ Bahraini Commercial Code, Article 76.

¹³⁷⁹ This view has also been adopted by some developed countries. For example, in *Buyer (Austria) v Seller (Serbia and Montenegro)* (2005) XXX YBCA 421 (Austrian Supreme Court 26 January 2005) pp 435-6 the Court upheld the buyer's allegation that the rate of interest was excessive and violated Austrian public policy, and therefore concluded that it was possible to separate the award on the main sum, which was enforceable, from the award on the interest, which was not); *Laminoirs-Trefileries-Cableries de Lens, SA v Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980) 1069 (a US Court concluded that the imposition of 5% excess interest was in violation of applicable US public policy against contractual penalties)

¹³⁸⁰ Qatar: Article 77 of the Commercial Code; Oman: Article 80 of the Commercial Code.

¹³⁸¹ Qatar: Article 78 of the Commercial Code; Oman: Article 79 of the Commercial Code.

In Saudi Arabia the award of interest is the most common violation of public policy. The courts strictly apply the Shari'a law which forbids interest. The main sources of Shari'a (*Qur'an and Hadith*) clearly prohibit usury.¹³⁸² The Shari'a forbids interest, in on the belief that receiving something in exchange for nothing is inherently immoral and wrong.¹³⁸³ Moreover, the Grievance Board, the competent court for the enforcement of foreign awards, emphasises in a Circular regarding enforcement of foreign arbitral awards that "it is not possible in any case to grant execution of any foreign award that violates any general principles of Shari'a, and this has been consistently confirmed in the judicial precedents of the (competent courts) ... in which execution of interest contained in foreign awards was prevented."¹³⁸⁴ Therefore any foreign award based on a contract containing provisions as to interest or granting payment of interest as an indemnity for economic loss will not be enforced in Saudi Arabia. Courts in Saudi Arabia have applied these prohibitive principles in several cases they where they have granted enforcement of a foreign award apart from the award of interest, holding the latter to be contrary to the principles of Shari'a law.¹³⁸⁵

7.3.4.4 Corruption

Although, in practice, particularly in Europe, matters involving bribery and corruption can be determined by arbitral tribunals,¹³⁸⁶ the public policy defence can sometimes be invoked to refuse enforcement on the grounds that the underlying contract is illegal. A Report of the United Nations Commission on International Trade Law states that "it was understood that the term 'public policy', which was used in the 1958 New York

¹³⁸² In this regard, *The Qur'an, Al-Baqrah* [2: 275-276] says: "But Allah has permitted trading and forbidden *Riba* (usury). So whosoever has receives 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." In addition, Prophet Mohamed (PBUH) stated, regards *Riba* as one of the great destructive sins. Reported by Al-Bukhari, M., *Sahih al-Bukhari* (in Arabic) no. 2266; Muslim, *Sahih Muslim* no. 258.

¹³⁸³ See, Sloane, P, 'The Status of Islamic Law in the Modern Commercial World' (1998) 22 *Int'l Law* 743 at 751; Roy, K, 'The New York Convention and Saudi Arabia: Can A Country Use the Public Policy Defence to Refuse Enforcement of Non-domestic Arbitral Awards?' (1995) 18 *Fordham Intl J* 920 at 947.

¹³⁸⁴ The Circular of Grievance Board no 7 dated 15/8/1405 H (1997), Article 3.

¹³⁸⁵ See, e.g., the 25th Subsidiary Panel, decision No. 11/D/F/25 dated 1417 H (1996) 8; the 2nd Review Committee, decision No. 208/T/2 dated 1418 H (1997) 6; the 10th Subsidiary Panel, decision No. 20/D/F/10 dated 1416 H (1995) 2. quoting Al-Tuwaigari, W, Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 With Special reference to the Kingdom of Saudi Arabia 306.

¹³⁸⁶ See, Lew, Mistelis and Kroll, op. cit. para 9-80; also *Northrop Corp v Triad*, 593 F. Supp. 928 (1984), where tribunals have allowed a claim for commission (or bribery) in accordance with the agreement having been entered into prior to the enactment of prohibitory legislation.

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 ground for setting aside.”¹³⁸⁷

Under the GCC statutes, issues relating to illegal behaviour such as corruption, fraud, bribery, smuggling, and drugs are considered as contrary to their public policy. Such issues are a vitiating factor in all contracts pursuant to the general rule which provides that “a contract is void if its object is contrary to public policy or morality.”¹³⁸⁸ However, it is thought that if an award deals with an illegal issue such as those mentioned above, the enforcing court would not reject enforcement unless it that found evidence was available to prove illegality. The same would be true of Saudi Arabia where Islamic law applies, which demand that the object of a contract must be legal if it is to be valid.¹³⁸⁹

7.3.4.5 Mandatory rules and public policy

In GCC legal systems mandatory rules are usually mixed up with public policy. It is beyond the scope of this study to consider the concept of mandatory rules mandatory rules are surely broader than public policy. In addition, not every mandatory rule contains fundamental principles and is of essential value to the community.¹³⁹⁰ For example, several procedural rule are mandatory but certainly do not form part of public policy.¹³⁹¹ “Every public policy rule is mandatory, but not every mandatory rule forms part of public policy.”¹³⁹² The Kuwait Cassation Court also affirmed this meaning in enforcing a foreign judgement, holding that for mandatory rules to form part of public policy they must be intended to achieve social, political, economic or moral

¹³⁸⁷ UN Doc. A/40/17, Para 297.

¹³⁸⁸ Kuwait: Article 172 of the Civil Code; Bahrain: Article 109 of the Civil Code; Qatar: Article 151 of the Civil Code; Oman: Article 352 (d) of the Code of Civil and Commercial Procedure in the UAE: Article 205 of the Transactions Civil Code;

¹³⁸⁹ Kourides, N, ‘The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and binding Force of Contracts’ (1970) 9 *Colum. J. Transant’l L.* 387 pp 403-4.

¹³⁹⁰ Bockstiegel, K, ‘Public Policy and Arbitrability’ (ICCA Congress Series no 3 New York 1986) 183. He states that “mandatory rules are not necessarily identical with public policy rules. Public policy requires further additional qualification.”

¹³⁹¹ For example, the civil and commercial procedure code of Kuwait article 80 provides that “Nullity of service of the writs of the suits and the papers requiring attendance, which resulted from a defect in the summons or in the court declaration or in the date of the hearing is eliminated by the presence of the addressee at the hearing that has been fixed in said summons or by depositing a memorandum containing the defence.”

¹³⁹² See, ILA Report, London Conference (2000) 18.

fundamental principles which are in the supreme interests of the community.¹³⁹³ A similar view was adopted by Egyptian Cassation court in the context of the enforcement of a foreign award under the New York Convention. The court affirmed that “it is unacceptable to claim the exclusion of the applicable English law under the pretext that it violates [public policy], even if we assume that this is true. The possibility of excluding the rules of the foreign applicable law is conditioned according to Article 28 of the Civil Code upon the proof that these rules are contrary to public policy in Egypt, i.e., in conflict with social, political, economic or moral bases which relate to the supreme interests of the community. Thus, it is not sufficient that they (the foreign rules) contradict a mandatory legal text.”¹³⁹⁴ To determine whether mandatory rules meet this test is the role of the enforcing court under the control of the Cassation Court. Accordingly, the mere fact that the particular foreign rules applied in a foreign award infringe mandatory rules of GCC laws does not of itself constitute a valid reason to refuse enforcement.

7.4 Summary

This chapter has shown that two grounds can be raised by national courts on their own motion for refusing enforcement of foreign awards.

The first ground is non-arbitrability, which is available under all regimes applied in GCC states except Saudi national law. It was found that, according to the prevailing international understanding, the notion of non-arbitrability relates to the restrictions or limitations imposed by a particular national law on what matters cannot be resolved by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters. It is suggested that the term non-arbitrability will only be used in its narrower meaning to cover disputes that may be not resolved by arbitration. In order to limit court control of the scope of arbitrability of a dispute, there is support for a concept to distinguish between the arbitrability of domestic and international disputes.

As regards the applicable law, it was unanimously decided non-arbitrability is determined by the law of the enforcing state, while it is up to national courts and

¹³⁹³ Cassation Court decision no. 221 commercial, dated 15/12/1991, available at < www.mohamoon-ju.com> (13/11/2009).

¹³⁹⁴ The Cassation Court decision no. 714 judicial year 47, dated 26/4/1982, quoting El-Kosheri, A, ‘Public Policy under Egyptian Law’, ICCA Congress no 3 (New York 1986) p. 325

national laws who should distinguish between the arbitrability of domestic and international disputes in order to limit the scope of non-arbitrability.

To determine what types of matters cannot be referred to arbitration under GCC laws, it was observed that there are two criteria that can help to determine when a dispute is inarbitrable. The first criterion is related to matters of which parties cannot freely dispose, of which the subject matter is itself non-arbitrable, while the second is related to matters subject to the exclusive jurisdiction of national courts. It was also seen that GCC arbitration laws cover a wide area of arbitrability, comprising all claims that have a financial value in civil, commercial, and economic disputes. Therefore, it can be considered that arbitrability is the rule and matters that are not capable of settlement by arbitration are exceptions. On the other hand, some exceptions to the aforementioned general rule relating to the concept of the non-arbitrability under GCC laws were found. These include a range of matters, such as Personal matters, Crimes, Bankruptcy, Intellectual Property Disputes, Trademarks, patents, Commercial agency, Administrative Contracts, Antitrust and Competition Claims, Anti-dumping, and Labour disputes. However, it was found that any disputes concerning financial matters resulting from the aforementioned matters may yet be capable of resolution by arbitration. At the same time, it was suggested that some of these disputes, e.g., the matter of anti-dumping, whose object does not fall within the scope of this law may be referred to arbitration, and therefore, the ground of non-arbitrability to refuse enforcement of a foreign award will not exist in this case. Finally, it was recommended that GCC courts should interpret the non-arbitrability ground narrowly, as the fact that a specific matter is non-arbitrable in domestic arbitration does not necessarily mean it is so in international arbitration. The adoption of such an interpretation by GCC Courts would, on one hand, leave considerable scope for GCC states to give effect to national law policies, and on the other hand, require that this be done in a manner that is consistent with the basic structure and premises of the international conventions. However, the question of whether the GCC courts exercise their discretion not to refuse enforcement of foreign awards in cases of the specific matters mentioned above still requires to be tested by practices of the enforcing courts.

With regard to the second ground, it was found that courts can refuse enforcement on their own motion on public policy grounds. It was found that this ground is provided in

national GCC laws and international conventions that apply in the GCC. These regimes, however, do not define the term of public policy. In general, it was submitted that this term may be defined as reflecting the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community.

It was seen that the question of violation of public policy is governed by the law of the enforcing state. In the application of public policy exceptions, it was noted that public policy plays a larger role in the theory of arbitration than it does in practice. However, most national courts have adopted narrow definitions of public policy as grounds for rejecting enforcement of foreign awards. This is done by making a distinction between domestic and international public policy. In addition, a number of national statutes use the distinction between domestic and international public policy. This approach means that what is considered to relate to public policy in domestic relations does not necessarily apply to public policy in international relations. On the contrary, it was found that GCC courts do not adopt this standard, nor do national laws make any reference to a standard of public policy being international or domestic. Yet, despite the omission of such a reference in these national laws, it seems that GCC courts' mostly adopt a narrow concept of public policy where recognition and enforcement are requested. In several decisions courts have declared that the concept of public policy is restricted to a limited number of basic principles reflecting the supreme values deemed fundamental for the national community.

It is noted that public policy could include unlimited reasons. However, it should also be noted that courts practice has shown that invocation of this ground is rarely successful. The chapter inspected the most common issues which are invoked under this head - a lack of reasons for the award, lack of impartiality of arbitrators, interest or *riba*, corruption and mandatory rules. It was noted that interest is a clear issue on which the GCC courts are prepared to refuse to enforce a foreign award on the basis of public policy, if it arises from civil debt in Kuwait, Bahrain, Oman, Qatar, and the UAE, while the same follows under commercial contracts if the award exceeds certain restrictions, e.g. if it involves for frozen interest, or the total interest exceeds the capital fund, or exceeds the legal rate. However, in Saudi Arabia it is clear that interest always violates Saudi public policy, since such matters are regulated by Shari'a Law in Saudi Arabia, as opposed to modern legislation in the rest of the GCC. Briefly, it can be said that public

policy exception in GCC states is only violated if the enforcement of the award would be clearly injurious to the social, political, economic or moral fundamental principles which are in the supreme interests of the community.

Summary and Recommendations

Simplifying the process of enforcing arbitral awards is considered to be one of the main factors in the success of international commercial arbitration. If an arbitral award had no effective enforcement mechanism, the value of international commercial arbitration would be significantly diminished. “If arbitration awards could not be enforced, the whole system of arbitration would collapse,”¹³⁹⁵ and arbitral awards would become mere words written on paper.

This study is concerned with the recognition and enforcement of foreign arbitral awards under the relevant regimes in the GCC states, both local law and international conventions.

The key convention was seen to be the New York Convention, not merely because of the significant number of states acceding to it (144 as of August, 2010), but because of certain significant provisions - requiring minimal conditions to be fulfilled by the party seeking enforcement of a Convention award (Articles III and IV), removing the need for “double *exequatur*” the need for awards to be declared enforceable in their country of origin, creating a powerful presumption in favour of the validity of arbitral awards and placing the burden of proving invalidity on the party resisting enforcement (Article V), allowing under Article VII a winning party the option of relying on a local law or treaty provision which is more favourable towards the enforcement of a foreign award than the New York Convention itself. Thus it can be said that GCC ratification of the New York Convention would be evidence that their legal systems are well disposed to the recognition and enforcement of foreign awards.

As the most of the GCC States are parties to the New York Convention, the aim of this thesis was to comprehensively analyse provisions pertaining to the recognition and enforcement of foreign awards under relevant regimes in the GCC States. This allowed a comparative analysis for the purpose of assessing the impact the Convention has on the GCC States. The study dealt with five main subject areas pertaining to the process

¹³⁹⁵ Crowter, H. *Introduction to Arbitration*, (London: LLP Publishing, 1998), p 139.

of the enforcement foreign arbitral award in the GCC States. First, it discussed terminological problems. Secondly, it examined basic elements of jurisdiction, i.e. determining the competent authority dealing with the recognition and enforcement of arbitral awards; the role of that authority; how its decision might be challenged; and the time limits relating to recognition and enforcement. Thirdly, the procedural steps demanded by each state for the enforcement of awards were identified. Fourthly, the evidence that must be furnished and the conditions that must be met by a party requesting enforcement were examined. Fifthly, there was a discussion of the grounds on which an application for enforcement may be dismissed.

Chapter Two found that the terms ‘recognition’ and ‘enforcement’ have different meanings and achieve different purposes. In addition, it found while there is no firm definition of the term ‘award’, only final and partial awards are enforceable under the relevant regimes, with the exception of interim measures granted by the GGC Commercial Arbitration Centre. Moreover, it was seen that GCC national laws take different views as to when an arbitral award is considered “foreign.” In Kuwait and the UAE an award is deemed as being foreign if it is signed abroad, while Bahrain, Qatar and Saudi Arabia have adopted the criterion of the seat of arbitration, and Oman refers to geography and the applicable law.

Chapter Three revealed that all GCC States have clearly identified the competent court to deal with applications for recognition and enforcement. No court in the GCC has the power to re-examine the merits of an award. Their role is limited to granting or refusing enforcement. Where a ground for resisting enforcement is established courts have no discretion, but have to refuse enforcement. However, the GCC courts have adopted a narrow construction of the provisions in question in order to favour the enforcement of foreign awards. Moreover, judgments enforcing or refusing enforcement of a foreign award are subject to challenge by other concerned parties.

Chapter Four saw that enforcement procedures are governed by the *lex fori*. In Kuwait, Bahrain, Qatar, Oman, and the UAE, a request for the enforcement of an award is made by filing an action, and courts grant enforcement by rendering an order. However, a request for the enforcement of an ICSID arbitral award is made by a petition to the

Court of First Instance to issue an enforcement order (*exequatur*). In Saudi Arabia, the request should be filed in accordance with the procedures for filing administrative cases.

Chapter Five identified that the evidence that must be supplied by a party seeking enforcement of a foreign award varies from one regime to another. The New York and Riyadh Conventions requires evidence of the original arbitral award and arbitration agreement or copies thereof, with a translation if they are not written in Arabic. However, under the charter of the GCC Commercial Arbitration Centre and the ICSID the only evidence that must be supplied is the arbitral award. It can be seen from these minimal requirements that the Conventions are designed to provide internationally uniform and transparent standards of proof in order to facilitate and simplify the conditions of enforcement as far as possible. Consequently, it can be said that a winning party should be optimistic regarding enforcement for the following reasons. Firstly, the only condition required for the enforcement of an arbitral award is that the above evidence is to be submitted by the winning party. Secondly, these are the only provisions that govern the matter of evidence or conditions to be fulfilled by a party applying for the enforcement of a foreign award, which means that the provisions of the Convention supersede national law in this regard. Thirdly, when that party has produced *prima facie* evidence, this enables him to obtain enforcement, and the burden of proof shifts to the other party if he wishes to resist enforcement.

On the other hand, the Arab League Convention, the Convention on the Enforcement of Judgement Delegations and Judicial Notes in the GCC States and national provisions require more evidence to be supplied for the enforcement of awards. The applicant must supply: (1) a certified true copy of the judgment, duly authorised by a responsible body; (2) the original summons of the text of the judgment which is to be executed or an official certificate to the effect that the text of the judgment has been duly served; (3) a certificate from a responsible authority to the effect that judgment is final and executory; (4) a certificate that the parties were duly served with summons to appear before the proper authorities or before the arbitrators in a case where the judgment or award was by default. In addition, national provisions request the winning party to prove that the arbitral award is enforceable in place where it was made. This is clear less conducive to enforcement.

Chapters Six and Seven considered the main grounds for resisting enforcement: incapacity of a party, invalidity of the arbitration agreement, that a party was not given proper notice or was unable to present its case, that the tribunal exceeded its jurisdiction, improper tribunal composition or procedural irregularity, that the award is not binding, or has been suspended or set aside, non-arbitrability of the subject matter, and public policy. The main points arising are as follows. First, the grounds for refusing enforcement set out by the relevant regimes are generally considered to be exhaustive. Secondly, enforcing courts may not review the merits of foreign arbitral awards for possible mistakes in fact or law by the arbitral tribunal. Finally, a party who alleges that an award is unenforceable bears the burden of proof of establishing that one of the grounds exists.

It was also noted that the very few cases before the GCC national courts have dealt with the issue of recognition and enforcement of foreign awards. However, a survey of court applications showed illustrated that the grounds specifically set forth in the New York Convention, have in general been interpreted restrictively in accordance with the purpose of the New York Convention to facilitate enforcement. However, the award of interest or *riba* may still lead to a for refusal to enforce a foreign arbitral award, albeit that the rest of the award would still be enforceable.

Shortcomings

This study has explored the main controversies and complexities in the application of different regimes regarding the recognition and enforcement of foreign arbitral awards, which can undermine the relevant regime's goal of facilitating the enforcement of foreign arbitral awards in the GCC. It was seen that there are uncertainties concerning the general principles of the application in the current regimes. As shown in Chapter Two, it is unclear which an arbitral awards can qualify as awards for recognition and enforcement under the relevant regimes, especially that of the New York Convention. The Convention fails to define precisely which arbitral awards are within the scope of application. Moreover, GCC national laws contain different views relating to the question of determining when an arbitral award can be considered "foreign." In this regard, it was found the laws in Kuwait and the UAE take an overly simplistic position,

in that the criterion that they have adopted to determine whether an award is considered national or foreign is the place where the arbitral award was signed.

It was also thought regrettable that regimes other than the New York and Arab League Conventions oblige courts to refuse enforcement where a ground for resisting enforcement is established rather than giving them discretion to grant enforcement. It is also disappointing that all regimes are silent as to whether there is a time limit for requesting enforcement. This failure to establish a fixed short time limit for making such a request jeopardises economic stability.

It was further found that differences in formulation between the Arabic and English versions of the New York Convention invite different interpretations of the Convention, especially the use of the word “shall” rather than “may” in the Article V, as theoretically this leads to different conclusions as to whether a court has discretion to grant enforcement.

In Chapter Four saw that the rules of procedure for enforcement are governed by the national law of the place where the enforcement is sought. Certain aspects of the rules in the GCC States have given cause for concern, in that they could impair the objectives of the relevant regimes by preventing rapid enforcement of awards through their complexity or ineffectiveness. National provisions in GCC states are heterogeneous with regard to the determination of which enforcement mode is adopted for enforcing awards. While on the one hand, the laws indicate that the mode for enforcing awards is normally applied by *exequatur*, on the other hand, they require that the application must be filed by writ. The combination of these contradictory approaches do not comply with the Civil and Commercial Procedural Codes in these States, as *exequatur* and filing an action are very different methods of litigation and are governed by different procedures. In addition, it was seen there that the procedural rules applicable to foreign awards are more onerous than those applied to national awards, which represents to a breach of the obligations imposed under Article III of the New York Convention.

With regard to the grounds for refusing enforcement of arbitral awards, certain shortcomings may be noted, particularly for the grounds provided by the New York Convention.

Firstly, in connection with incapacity of a party, the expression used in the Arabic text of the New York Convention differs to that used in the English text. The latter uses the expression “under some incapacity,” which covers complete incapacity or defective capacity, while the Arabic text refers only to “incapacity.” According to the GCC laws, there are three categories regulating the level of a natural person’s capacity: (1) full capacity; (2) diminished capacity; (3) incapacity. The effect of this defence, therefore, differs depending on whether it is read according to the Arabic text or the English one. Thus, if the enforcing court applies the Arabic text there is less chance of enforcement being refused than under the English text.

The second shortcoming concerns the invalidity of the arbitration agreement under the New York Convention, as it is not clear if the applicable law should be determined by Article II or the conflict rules of Article V (1) (a). Thus an arbitration agreement contained in letters of confirmation would not be formally valid under Article II Convention but would be valid under many modern national laws. In addition, Article II requires the arbitration agreement to be in writing, although some national laws allow the agreement to arbitrate to be entered into in any form (including orally).

Thirdly, there is inconsistency between the provisions of Article V (1) (e) and Article VII of the New York Convention. In some jurisdictions, both provisions have been utilised in different ways to enforce a foreign award which was annulled in the state in which it was made, while many jurisdictions have adopted the stance that a foreign award set aside in the place of origin is not enforceable elsewhere. The potential complications arising from the enforcement of a foreign award independent of the law of the country where the award was made involves concern that Article VII should prevail over Article V, which is not expressly provided by the Convention. Moreover, if states are encouraged to adopt individualised criteria for the enforcement of foreign awards, this will create a real obstacle to international arbitration and demonstrate the limits of any harmonisation through model laws. Therefore, it is necessary to achieve “a balance between unconditional respect for all foreign annulments (an outcome that will hardly promote efficiency or respect for international arbitration, particularly where an award has been annulled in bad faith or to protect local interests) and the need to grant

aggrieved parties who feel they have been the victim of a tainted arbitration a way to challenge the award.”¹³⁹⁶

Finally, an additional weakness is that the New York Convention allows for local standards of enforcement to determine a number of important matters, such as violation of due process, non-arbitrability, and breach of public policy. However, in order to limit the scope of local standards of enforcement, there is support for distinguishing between the domestic and the international in such matters as the place of enforcement.

Recommendations

It is important for the GCC States to update their current legislation affecting the enforceability of foreign awards. The researcher recommends that GCC laws be reformed as follows:

(1) New separate provisions governing the enforcement of foreign awards in GCC States should be adopted to replace the current provisions designed to govern the enforcement of foreign judgments. It has been seen in cases where no treaty or convention is applicable that provisions dealing with the enforcement of a foreign arbitral award are the same as those governing enforcement of foreign judgments. The latter provisions, as has been seen from many aspects throughout this study, are by and large not suitable to govern the issue of the enforcement of foreign awards, or are silent with regard to procedural rules regulating this matter. In addition, it has been observed that these provisions contain a list of the grounds for refusal, meaning that these grounds are deemed as conditions, and therefore the national courts in these states are never entitled to grant enforcement of a foreign arbitral award unless these conditions are verified. This makes, in theory, the chance of the enforcement of foreign awards under national provisions less easy than under other regimes.

The new provisions should provide for simple, clear and rapid methods for the enforcement of foreign arbitral awards, as well as containing all the rules that regulate

¹³⁹⁶ Freyer, D, ‘The Enforcement of Awards Affected by Judicial Order of Annulment at the Place of Arbitration’ in Gaillard and Di Pietro op. cit. p.786.

the process of the enforcement of foreign awards. Suggestions for the new provisions dealing with such issues are noted below.

- i. The words used by new provisions should leave room for courts in the GCC states to exercise their residual discretion to grant enforcement when grounds for refusing enforcement are established. This can be achieved by using the word *may* rather than *shall* in the context of provisions dealing with the grounds for resisting enforcement of a foreign arbitral award.
- ii. It should be ensured there are no substantially more onerous conditions or higher fees or charges on the recognition or enforcement of foreign arbitral awards than are imposed on the recognition or enforcement of domestic arbitral awards. This can be achieved by removing any distinctions in procedural rules applicable to domestic and foreign arbitral awards in the GCC States. This will also ensure these states honour their obligations under international conventions, particularly Article III of the New York Convention.
- iii. A short time limit of a maximum of three years for application to enforce foreign awards in the GCC States should be observed in order to ensure that enforcement is not used improperly. As explained in chapter three, this idea can ensure economic stability, which is often vulnerable to fluctuations due to rumours.
- iv. It should be precisely defined which arbitral awards qualify to be the subject matter of recognition and enforcement procedures under the relevant regimes governing the enforcement and recognition of foreign arbitral awards. This is because arbitral tribunals, under national laws, are generally authorised to render various types of awards during the arbitration proceedings, but not every type of award can benefit from recognition and enforcement under the international Conventions.
- v. The *exequatur* form which applies to the enforcement of national awards should be adopted as a method of procedure for the enforcement of foreign arbitral awards. As discussed in chapter four, the GCC states should adopt an *exequatur*

form enforcement of foreign arbitral awards, the same mode of enforcement as national arbitral awards, rather than demanding that enforcement must be sought by writ. The adoption of the exequatur mode of enforcement of foreign arbitral awards will enrich the attitude of the GCC's legal systems towards supporting arbitration as a method of dispute settlement, thus encouraging international investments in the GCC States.

- vi. A requirement should be introduced that minimal evidence should have to be tendered by the party applying for enforcement of a foreign award. It has been noted that unlimited evidence may be required for the enforcement of a non-convention arbitral award, since the national provisions are the same as those which govern the enforcement foreign judgments. Such provisions are not suitable to govern the enforcement of arbitral awards. In this regard, it was found that the New York Convention contains reasonable provisions on the matter, which might usefully be adopted by the GCC Laws.
- vii. A provision should be created making a distinction between domestic and international public policy in the context of the enforcement of foreign awards, similar to that provided by French law. As it was noted that the term 'public policy' is potentially unlimited in scope, a distinction between domestic and international public policy can encourage enforcing courts in the GCC States, following international trends, to adopt a narrower definition of public policy as a ground for refusing enforcement of foreign awards. This is also justified by the differing purpose of domestic and international relations.

(2) The current arbitration laws in the state of Kuwait, Qatar, Saudi Arabia, and the UAE should be amended. It is necessary for the legislators in these States take into account that new provisions should stem from the philosophy of enriching the role of arbitration as a valued method of conflict resolution in international commerce in the GCC States. This can be done by applying modern standards in international commercial arbitration, such as those represented by the UNCITRAL Model Law 2006. The legislator can also benefit from laws provided by developed countries, such Western countries.

(3) The laws of issuance of the New York Convention in the GCC States should be amended in order that the Arabic version of the Convention complies with the English version. Indeed, the language used by the Arabic text of the New York Convention may at times be in a form which undermines the purpose of the Convention, which is aimed essentially at facilitating the recognition of foreign awards. For example, as noted in Chapter Three, in the English version, Article V provides that “recognition and enforcement *may* be refused if ...”, whereas the Arabic version provides that “recognition and enforcement of the award *shall not* be refused, at the request of the party against whom it is invoked, *unless* that party furnishes to the competent authority where the recognition and enforcement is sought, the proof that” It is clear that the Arabic version establishes what must happen if one of the grounds exists, whereas the English version does not do so. The words “*shall not ... unless ...*” mean that leave for enforcement of an arbitral award is under conditional stipulation if one of grounds does not exist. Thus the Arabic text is mandatory, not permissive.

(4) It is necessary to issue national conflict of law rules in the countries whose legal systems contain no such specific provisions, in order to determine the applicable law not established by international conventions or when enforcement is sought under national provisions.

It is clear that the adoption of the aforementioned recommendations would support the harmonisation of the international conventions and the GCC national laws and greatly assist in overcoming the obstacles to the achievement of flexibility in the recognition and enforcement of foreign arbitral awards. In addition, this would ensure that the GCC States honoured the obligations found in international conventions such as those provided by World Trade Organisation (WTO), whether these conventions related to arbitration or were more general. The GCC States’ membership of the World Trade Organisation (WTO) implies an obligation to develop their laws in order to be more developmental and flexible.

It is also recommended that enforcement courts in GCC States should exercise their discretion in order to grant enforcement. Although the language used by the Arabic text of the New York Convention and national provisions governing the enforcement of foreign arbitral awards clearly do not give the enforcing courts discretion to grant

enforcement, it is suggested that such authority can find support under the national laws for one of several reasons. The first is that of the discretion to recognise and enforce a foreign award by relying on the principles of estoppel and waiver. The second is that discretion can be exercised through the distinction between national and international concepts, such as under the grounds of non-arbitrability and breach of public policy. The third reason is that of discounting minor procedural violations, or indeed, even where a clear and serious violation of procedure exists, a court may still enforce on the basis that the arbitral tribunal would have decided differently had it not been for the procedural violation. The fourth reason is based on the principle of good faith; for example, if a violation of due process as a ground for refusal of the enforcement cannot result from the losing party's own conduct. In addition, GCC laws, in some cases, set out that the party cannot rely on his own incapacity if the third party deals with it in good faith. The fifth reason is where the discretion to recognise and enforce a foreign award can be exercised pursuant to Article VII (1) of the New York Convention. Article VII (1) provides for enforcement under the national law or another treaty in the state where enforcement is sought if that law is more favourable than the New York Convention, as the more favourable provision shall prevail over the rules of the Convention. This was applied in Saudi Arabia, where an enforcing court ignored the national provisions which impose certain restrictions upon government agencies who "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, and relying on the Shari'a Law. Shari'a law emphatically upholds the moral obligation to fulfil one's contracts, as expressed in the Qur'an: "O you who believe! Fulfil all obligations."¹³⁹⁷ The sixth reason involves acceptance of a liberal interpretation of Article II (2) by a recommendation which was recently adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the New York Convention.

It is recommended that competent authorities in the GCC States publish judicial decisions related to recognition and enforcement foreign arbitral awards in these States, in order to provide important materials to support the work of researchers and to unify the principles of the national courts.

¹³⁹⁷ *The Qur'an, Al-Ma'idah* [5:1].

Moreover, the GCC countries, unlike Western countries, are not characterised by many publications and reference books on the subject of the enforcement of foreign arbitral awards or of international commercial arbitration in general. Therefore, it is necessary that that institutes or organisations in the GCC States pay closer consideration in arbitration work to translating the principal material, such as books and articles on international arbitration, into Arabic.

As a general recommendation, as enforcement procedure is governed by the *lex fori*, and as was seen in this thesis, procedural conditions in the place of enforcement can undermine the international conventions' purpose of facilitating enforcement, this author supports the call to unify procedural requirements for the recognition and enforcement of foreign arbitral awards. In observing the 40th year anniversary of the convention, van den Berg indicated that there was a need to have a model law covering various procedural matters:

“Such a Model Law is desirable, not least because the existing implementing laws are widely diverging, and the procedure for enforcement of foreign awards under the convention needs to be harmonized. It is unacceptable that at present it depends on the country where enforcement of a convention award is sought whether there are one, two or even three courts that may adjudicate on a request for enforcement of a convention award. It is equally unacceptable that the limitation period for enforcement depends on the country where enforcement of a convention award is sought.”¹³⁹⁸

It is hoped that this thesis will inform and enrich the GCC states' systems with new ideas and legal perspectives, provide a useful guide for the process of enforcement of foreign arbitral awards in the GCC States through casting light on unexplored corners, and highlight unanticipated problems in the context of the enforcement of foreign arbitral awards.

¹³⁹⁸ Van den Berg, A.J., “Striving for Uniform Interpretation: Experience and Prospects,” in United Nations, “Enforcing Arbitration Awards under the New York Convention: Experience and Prospects,” (New York : United Nations 1999), 40 (papers presented at “New York Convention Day”), <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>> (23/08/2010)

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Appendix A: New York Convention

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this 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 recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral 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 matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

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 or, failing any indication thereon, under the law of the country where the award was made; or
- (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 or was otherwise unable to present his case; or
- (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 recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; 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 arbitral 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 the law of that country; or
- (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 arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 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 specialized 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.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General 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 day of 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 to 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 arbitral 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.

Appendix B: Arab League Convention

Article 1

Any final judgment involving civil or commercial rights or payments, any sentence imposed by the Courts having jurisdiction over penal matters, or matters concerning injuries, as well as all decisions relating to matters of personal status, made by the competent legal authorities in any of the member States of the Arab League, shall be executory in the other States of the League, in accordance with the provisions of this agreement.

Article 2

The appropriate judicial authorities of the State which is requested to execute the sentence, shall not be allowed to investigate or review the subject matter of the case, and shall not refuse execution of the judgment, except under the following circumstances:

- a. If the legal authority which rendered the judgment was not qualified to hear the case on account of lack of jurisdiction or because of applicable principles of international law.
- b. If the parties concerned were not properly and duly summoned.
- c. If the sentence passed is contrary to the general order, or to the public policy of the State which is requested to carry out its execution. The said State shall decide whether the case is to be so considered, as also whether the execution of the sentence would be contrary to a recognized principle of international law.
- d. If the Courts of the State which is requested to carry out the execution have already given judgment between the same parties on the same subject matter, or if a case is pending on the same subject and between the same parties, provided the said case had been begun in the Court of the requested State prior to the date of its being begun and in the Court of the requesting State which gave verdict and asked execution.

Article 3

With due consideration to Article 1 of this agreement, the authorities who are requested to enforce execution are not entitled to reconsider the verdict of arbitrators which have been given in any of the States of the League. Request of execution may be refused in the following instances:

- a. If the laws of the requested State do not admit the solution of litigation by means of Arbitrations.
- b. If the verdict passed was not in pursuance of a conditional Arbitration Agreement.
- c. If the Arbitrators were not qualified to act in pursuance of a conditional agreement of Arbitration or in accordance with the provisions of the law under which the sentence was passed.
- d. If the parties were not properly served with Summons to appear.
- e. If the Arbitrators' decision includes anything considered to be against general order or public morals in the State requested to carry out execution. The requested State shall decide whether the case is to be considered as such and may refuse execution.

f. If the Arbitrators' decision is not final in the State in which it is given.

Article 4

The provisions of this agreement shall not be applicable to any judgment issued against the Government of the requested State or any of its officers in his official capacity and on account of the performance of his duties, nor shall they be applicable to judgments which are contrary to international treaties and agreements, in force in the requested State.

Article 5

Requests for execution should be supported by the following documents:

1. A certified true copy of the judgment, duly authorized by responsible quarters.
2. The original summons of the text of judgment which is to be executed or an official certificate to the effect that the text of the judgment has been duly served.
3. A certificate from responsible authority to the effect that judgment is final and executory.
4. A certificate that the parties were duly served with summons to appear before the proper authorities or before the arbitrators in case the judgment or arbitrators' decision was by default.

Article 6

Judgments which are to be executed in any State of the League shall have the same legal validity as in the requesting State.

Article 7

In any of the States of the League, citizens of the requesting State shall not be asked to pay any fees, furnish any deposits or produce any securities, which they are not required to do in their country, nor is it permitted to deprive them of legal aid or exemptions from legal fees.

Article 8

Each State will appoint a legal authority to which will be submitted all demands of execution demands, procedure and appeals against decisions taken in this respect. Communication of such appointment shall be made to each of the other Contracting States.

Article 9

States which shall have accepted this agreement, shall confirm such acceptance in accordance with their own constitutional laws and procedure, at the earliest possible date. Documents of confirmation will be deposited with the general Secretariat of the League, which will prepare a memorandum of the deposit of each State's confirmatory documents and will inform the other signatories of this agreement.

Article 10

States of the League who have not signed this agreement may adhere to the same before sending a notice to that effect to the General Secretary of the League who will advise the other signatory of such adhesion.

Article 11

This agreement will come into force a month from the date of deposit of confirmatory documents by three of the signatory States. For other States, it will come into effect a month from the date of deposit of their confirmatory documents or their notice of adhesion.

Article 12

Any of the States bound by this agreement may withdraw therefrom, upon submitting a notice to that effect to the General Secretariat of the Arab States League. Withdrawal will be effective after the lapse of 6 months from the date of the notice. However the provisions of this agreement will remain valid and binding for execution of demands submitted before the date of its expiration.

Appendix C: Arab Convention on Judicial Cooperation (Riyadh)

Section V. Recognition and Enforcement of Judgments Made in Civil, Commercial and Administrative Matters as Well as in Matters of Personal Status

Article 25: RES JUDICATA

(a) For the implementation of the provisions of this Section, “judgment” shall mean any decision - whatever its name - made, following judicial proceedings, by a court or any other competent authority in one of the signatory States.

(b) Without prejudice to the provisions of Article 30 of this Convention, each signatory party recognizes the judgments made by the courts of any other signatory party in civil matters (including the judgments made on civil rights by the criminal courts) and in commercial and administrative matters as well as in matters of personal status when these decisions have become *res judicata*. This party must execute them in its country in compliance with the procedure on enforcement of judgments foreseen in this Section, provided that the Courts of the signatory State who made the decision are competent according to the rules of international court competence in the State where enforcement or recognition is sought, and provided that the law of this signatory State does not reserve to the court[s] of another party the exclusivity of the right to make such a decision

(c) This Article does not apply to:

- judgments made against the government of the signatory party where enforcement is sought, or against one of its officials for acts accomplished during, or arising out of, performance of their functions
- judgments the enforcement or recognition of which would be contrary to international agreements or conventions in force in the signatory State where recognition is sought
- provisional and interim measures of protection as well as judgments made in matters of bankruptcy or taxes.

Article 26: JURISDICTION IN MATTERS OF DISPUTES ON THE CAPACITY OR PERSONAL STATUS OF THE PERSONS SEEKING ENFORCEMENT

In matters of capacity or personal status the courts of the signatory State of which the concerned person is a national, have jurisdiction when the claim is made, if the dispute covers the capacity or personal status of such person.

Article 27: JURISDICTIONS IN MATTER OF REAL RIGHTS

The courts of the signatory State on which the immovable, subject matter of the real right, is located, have jurisdiction over disputes on real rights.

Article 28: JURISDICTION OF THE COURTS OF THE STATE WHERE THE JUDGMENT WAS MADE

Except for those questions mentioned in Articles 26 and 27 of this Convention, the courts of the signatory State where the judgment was made have jurisdiction in the following cases:

- (a) If the defendant was a national of this State or resided there when the case was considered (i.e., when the legal proceedings were started on the territory of this signatory State).
- (b) If, when the case was considered (i.e., when the proceedings were started), the defendant had headquarters or a commercial or industrial (or other) subsidiary on the territory of this signatory State or if the proceedings concerned a dispute relating to the activity of this headquarters or subsidiary.
- (c) If the contractual obligation which is the subject matter of the dispute was, or should have been, performed in the signatory State by virtue of an express or tacit agreement between the defendant and the claimant.
- (d) If, in case of non-contractual liability, the act, action or deed resulting in such liability was performed in this signatory State.
- (e) If the defendant expressly accepted to subject himself to the jurisdiction of the courts of this signatory State, either by electing domicile therein or by agreeing to their jurisdiction, if the law of this country does not prohibit such agreement.
- (f) If the defendant makes his defence on the substance of the dispute without raising a plea of lack of jurisdiction before the court to whom the dispute was referred.
- (g) If it is a claim made during other proceedings and if the courts have jurisdiction over the main claim by virtue of the provisions of this Article.

Article 29 SCOPE OF THE POWERS OF THE COURTS OF THE SIGNATORY STATE WHERE RECOGNITION OR ENFORCEMENT IS SOUGHT WHEN ANALYZING THE GROUNDS OF THE JURISDICTION OF THE COURTS OF ANOTHER SIGNATORY STATE

The courts of the signatory State where enforcement is sought, when they analyze the reasons for the jurisdiction of another signatory State must restrict themselves to the facts mentioned in the judgment which were the basis for such jurisdiction, unless this judgment was made by default.

Article 30 CASE OF REFUSAL OF RECOGNITION OF JUDGMENT

The recognition of a judgment may be refused in the following cases:

- (a) If it is contrary to the provisions of the Moslem Shari'a or the Constitution or the public policy or good morals of the signatory State where enforcement is sought.
- (b) If it was made by default and if the losing party was not duly summoned or duly notified of the judgment so that it could not defend itself.
- (c) If the rules of the law on legal representation of persons under a disability in the State where recognition is sought have not been respected.
- (d) If the dispute which was subject to the judgment (recognition of which is sought)

had already been judged in a judgment on the same case between the same parties and relating to the same rights as to their purpose and reasons and if such judgment is *res judicata* in the signatory State where recognition is sought or in a third signatory State and recognized in the signatory State where recognition is sought.

- (e) If the dispute, on which the judgment (which is to be recognized) was given, is subject to legal proceedings in one of the courts of the signatory State where recognition is sought and if these proceedings are between the same parties and relate to the same rights in their purpose and reasons.

Moreover, these proceedings must have been started before the courts of the latter signatory State before the dispute had been brought before the courts of the State where the judgment which is to be recognized was made.

The judicial authorities which examine requests for leave to enforce under this Article, must respect the legal rule proper to their own State.

Article 31: ENFORCEMENT OF JUDGMENTS

1. The judgments made by the courts of one of the signatory States, and which are recognized by the other signatory States under the provisions of this Convention, are enforceable in any of the signatory States if they are enforceable in the signatory State where the court which made the judgment is located.

2. The proceedings for recognition or enforcement of the judgment are governed by the law of the State where enforcement or recognition are sought, to the extent that they are not governed by this Convention.

Article 32: MISSION OF THE JUDICIAL AUTHORITY HAVING JURISDICTION IN THE SIGNATORY STATE WHERE RECOGNITION OR ENFORCEMENT OF THE JUDGMENT IS SOUGHT

The mission of the judicial authority which has jurisdiction in the signatory State where recognition or enforcement of the judgment is sought, is restricted to verifying whether the judgment contains all the conditions foreseen in this Convention. This authority does not consider the subject matter of the dispute. The authority proceeds to this on its own motion and mentions the result in minutes. If need be and at the same time it orders enforcement, the judicial authority having jurisdiction in the State where recognition of the judgment is sought orders necessary measures to be taken to give to such judgment the same executory force as to judgments which would have been made by a court of the State where enforcement is sought.

The request for enforcement may cover the entire judgment or only one of its parts provided it is possible to separate them.

Article 33: EFFECTS OF LEAVE TO ENFORCE

The effects of the leave to enforce cover all the parties to the proceedings residing in the signatory State where this leave has been granted.

Article 34: DOCUMENTS RELATING TO THE REQUEST FOR RECOGNITION OR ENFORCEMENT OF JUDGMENT

The party requesting the recognition of the judgment in one of the signatory States must produce the following:

- (a) A complete and official copy of the judgment, declared to be a true copy by the competent authorities.
- (b) A certificate showing that the judgment is final and has become *res judicata*, unless this is indicated in the judgment itself.
- (c) A copy of the notification of such judgment, certified to be a true copy to the original, or of any other document showing that the defendant was duly summoned if the judgment was made by default:
 - If enforcement of the judgment is requested, a certified true copy of the judgment ordering enforcement must be joined to the above documents.
 - The documents mentioned in this article must be officially signed and contain the stamp of the competent court, without need of legalization by any other authority except as concerns the documents indicated in paragraph (a) above.

Article 35: CONCILIATION BEFORE COMPETENT AUTHORITIES

Conciliation made under the provisions of this Convention before the competent judicial authorities in any of the signatory States shall be recognized and be enforceable in the other signatory States after verifying its executory force in the State where it was made and after having made sure that it does not contain any provisions contrary to the Moslem Shari'a, the Constitution, public policy or good morals of the State where recognition or enforcement of the conciliation is sought.

The party requesting recognition or enforcement of the conciliation must present a true copy of the deed of conciliation and an official certificate made by a judicial authority before which this conciliation was made and which establishes that it is enforceable. In this case, paragraph 3 of Article 34 of this Convention applies.

Article 36: ENFORCING DOCUMENTS

The enforcing documents of the signatory State, established on its territory, must in the other signatory States, be subject to a leave to enforce in compliance with the procedure foreseen for judicial decisions, should they be subject to such procedure. Their enforcement must not be contrary to the provisions of the Moslem Shari'a or the constitution, public policy or good morals of the signatory State where enforcement is sought.

A party which requires recognition and enforcement of a notarized deed in the territory of the signatory State, must present an official copy of this document with a stamp of the notary or the notarized office and legalized or a certificate thereof which shows the executory force of these documents.

In this case, paragraph 3 of Article 34 of this Convention applies.

Article 37: ARBITRAL AWARDS

Without prejudice to the provisions of Articles 28 and 30 of this Convention, arbitral awards are recognized and enforced in each of the signatory States according to the same manner as those foreseen in this Section, without prejudice to the legal rules in force in the State where enforcement is sought. The judicial authorities of this State can only refuse enforcement of the award in one of the following cases:

- (a) If, under the law of the State where enforcement or recognition of the award is sought, the dispute is not arbitrable.
- (b) If the award was made on the basis of a void agreement to arbitrate or one that has expired.
- (c) If the arbitrators were not competent under the agreement to arbitrate or the law under which the award was made.
- (d) If the parties had not been duly summoned to appear.
- (e) If the award is contrary to the Moslem Shari'a, public policy or good morals of the signatory State where enforcement is sought.

The party requesting recognition or enforcement of the arbitral award must present a certified copy of the award, accompanied by a certificate of the judicial authority witnessing its executory force.

If there exists a written agreement between the parties which foresees that a determined dispute, or any dispute which might arise between the parties out of a determined legal relationship shall be referred to arbitration, a certified true copy of this agreement must be produced.

Appendix D: The Charter of the GCC Commercial Arbitration Centre

Chapter One: Establishment of the Centre, Its Powers and Headquarters

Article 1

A commercial arbitration centre shall be established under the name of the “Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf” (the Centre) which shall be independent and shall be a separate juristic entity.

Article 2

Powers

The Centre shall have the power to examine commercial disputes between GCC nationals, or between them and others, whether they are natural or juristic persons, and commercial disputes arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions issued for implementation thereof if the two parties agree in a written contract or in a subsequent agreement on arbitration within the framework of this Centre.

Article 3

Centre’s Headquarters

The Centre’s headquarters shall be situated in the State of Bahrain.

Chapter Two: Centre’s Bodies

Article 4

The Centre shall consist of the following:

- (a) Board of Directors.
- (b) Secretary General.
- (c) Arbitral Tribunal.
- (d) Arbitral Tribunal Secretariat.

Board of Directors

Article 5

The Centre shall have a Board of Directors which shall consist of six members. The Chamber of Commerce and Industry in each of the GCC States shall nominate one member. The Board shall convene a meeting at least once every six months or whenever such meeting is deemed necessary. Chairmanship of the Board of Directors shall be in

rotation in keeping with the practice followed in the GCC meetings. The Board of Directors shall appoint from its members a Deputy Chairman.

Article 6

Membership of the Board of Directors shall be for a three-year term of office which is renewable once only. Meetings of the Board of Directors shall be held in the host country or in any of the GCC member states, if necessary, upon the summons of the Chairman or Deputy Chairman in the case of the foregoing's absence. A Board meeting shall not be validly convened except in the presence of at least four of its Members including the Chairman or his Deputy. Resolutions of the Board of Directors shall be adopted by a majority vote of the Members present. In case of an equality of votes, the Chairman shall have the deciding vote.

Article 7

Powers of the Centre's Board of Directors

The Board of Directors shall seek to realize the Centre's objectives and carry out its duties. In particular, the Board shall do the following:

- (a) Approve the Centre's financial and administrative regulations.
- (b) Appoint the Centre's Secretary General.
- (c) Approve the Centre's annual budget.
- (d) Approve the annual report on the Centre's activities.

Centre's Secretary General

Article 8

The Centre shall have a Secretary General who shall be a GCC national and shall be appointed by the Board of Directors. The Board of Directors shall determine his service conditions, duties and entitlements provided that he shall enjoy the required expertise and have specialized knowledge in this field. The Secretary General shall be the Centre's legal representative in all relations before the law courts, public agencies and private entities.

Article 9

The Secretary General shall be assisted by a sufficient number of employees who shall be appointed in accordance with the employment provisions stipulated in the organizational rules to be issued by the Board of Directors.

Arbitral Tribunal

Article 10

An Arbitral Tribunal shall be formed by appointing a single arbitrator or three arbitrators as may be mutually agreed upon by the parties under an Arbitration

Agreement or Contract. In case there is no Agreement, the *Rules of Procedure* issued by the Board of Directors shall be applicable.

Article 11

The Centre shall maintain a Panel of arbitrators to be prepared by Chambers of Commerce and Industry in the GCC member States and the concerned parties may have access to such Panel to select arbitrators therefrom or from elsewhere. An arbitrator shall be a legal practitioner, judge or a person enjoying a wide experience and knowledge in commerce, industry or finance. He must be reputed for his good conduct, high integrity and independent views.

Article 12

Applicable Law

The parties shall have the liberty of deciding the law, which the arbitrators shall apply to the issue in dispute. In case the parties do not stipulate the applicable law in the Contract or Arbitration Agreement, the arbitrators shall apply the law determined by the rules of the conflict of laws which they deem appropriate whether it is the law of the place where the contract was made, the law of the place where it is to be performed, the law of the place where it must be implemented or any other law subject always to complying with the terms of the contract and rules and practices of international law.

Article 13

Centre's Arbitration Rules

- (a) Arbitration shall take place in accordance with the Rules of Procedure (the Rules) of the Arbitration Centre unless there is a contrary provision in the contract.
- (b) The Rules applicable to arbitration shall be the prevailing rules at the time of the commencement of Arbitration unless the parties agree to the contrary.
- (c) Save for the arbitrators Panel, the Centre's papers and documents shall be confidential and no one, other than the parties to the arbitration case and the arbitrators, may have access thereto or obtain copies thereof except by the express approval of the parties to the dispute or if the Arbitral Tribunal feels such action necessary for passing a ruling in respect of the dispute.

Article 14

The two parties' agreement to refer the dispute to the Centre's Arbitral Tribunal and the ruling of this tribunal in respect of its competence shall preclude the reference of the dispute or any action pursued upon hearing it before any other judicial authority in any state. It shall also preclude any challenge against the arbitration award or any of the actions required for hearing it before any other judicial authority in any state.

Article 15

The award passed by the Arbitral Tribunal pursuant to these proceedings shall be binding and final upon the two parties after the issuance of an order for enforcement by the competent judicial authority in the states that are parties to this Charter.

Article 16

The Arbitral Tribunal shall refer to the Centre's Secretary General a copy of the award passed and he shall provide the possible assistance in depositing or registering the award whenever necessary in accordance with the law of the country where the award is to be enforced.

Arbitral Tribunal Secretariat

Article 17

The Arbitral Tribunal Secretariat shall be part of the Centre's General Secretariat and work under the supervision of the Secretary General and shall be administratively affiliated thereto.

Article 18

The Secretariat shall have the duty of receiving all the arbitration applications referred thereto by the Secretary General and receiving all papers, correspondence and documents submitted by the parties to the dispute in accordance with the Arbitral Rules of Procedure and as provided for in this Charter. It shall be responsible for recording minutes of the Arbitration Tribunal hearings and implementing its resolutions adopted in the course of hearing the case prior to the final judgement thereon.

Chapter Three: Centre's Budget

Article 19

The Centre shall have a temporary budget to be drawn up from the date of its establishment until the beginning of the following first financial year. The Bahrain Chamber of Commerce and Industry shall finance the Centre's budget until the end of the third financial year. The Chambers of Commerce and Industry in the GCC member States shall equally finance the Centre's budgets in the following years.

Article 20

The Centre shall have an annual budget, the revenues of which shall consist of the following:

- (a) Fees received by the Centre in consideration of its services and the expenses incurred for this purpose.
- (b) Grants and donations received by the Centre and accepted by its Board of Directors.
- (c) Proceeds from the sale of the Centre's publications and periodicals.
- (d) Payments equally made by the Chambers of Commerce and Industry of States,

which are members of this Centre.

Chapter Four: Additional Assistance Provided by the Centre

Article 21

- (a) In case of authorizing the Centre to select arbitrators in accordance with the Rules of Procedure, the Centre's Secretary General shall undertake such task in accordance with the provisions of the said rules.
- (b) The Centre shall charge fees to be determined by the Rules of Procedure. In determining the amounts of such fees, the Centre's administrative expenses, volume of work and actual costs incurred shall be taken into account.

Article 22

If the two parties mutually agree on settling their dispute by arbitration but not through the Centre, the Centre's Secretary General may, upon a written application from the parties, provide or arrange the necessary facilities and assistance for the arbitration proceedings requested by the two parties. The necessary facilities and assistance may include providing an appropriate place for holding the Arbitral Tribunal sittings and assisting with secretarial duties, translations and filing documents and papers.

Chapter Five: Arbitration Costs

Article 23

- (a) The Centre's Secretary General shall prepare a list containing a provisional estimate of arbitration costs and shall instruct each of the parties to the dispute to equally deposit a certain sum as an advance on account for such costs. He may instruct the parties to make supplementary deposits during the course of the arbitration proceedings.
- (b) If the required deposits are not made within thirty days from the date of receiving the instruction, the Secretary General shall notify the remaining parties of this failure pursuant to the provisions of the Rules of Procedure.
- (c) Following the issuance of an award by the Arbitral Tribunal in respect of the dispute, the Secretary General shall deliver to the parties to the dispute a statement of the deposits made and expenses incurred with a view to making a final settlement by refunding the surplus amount of the deposited sums or collecting the balance remaining for the costs pursuant to the provisions of the Rules of Procedure.

Chapter Six: Immunities and Privileges

Article 24

The Chairman and Board Members, Centre's Secretary General, members of the Arbitral Tribunal and members of the Tribunal Secretariat shall enjoy the following immunities:

- (a) Immunity against any legal action upon their exercise of their job duties unless the

Centre decides to relinquish such immunity by a resolution of the Board of Directors.

- (b) Prescribed immunities and prerogatives for members of the diplomatic corps whilst travelling. Further, they shall be exempted from currency restrictions, if any.

The provisions of Paragraph (b) shall not be applicable to the citizens of the host country.

Article 25

The Centre and all its properties and funds shall enjoy immunity against any legal or administrative action upon carrying out its duties in accordance with this Charter.

Article 26

The Centre's papers, documents and archives shall enjoy immunity against any action of any kind whatsoever.

Chapter Seven: Tax Exemptions

Article 27

The Centre, its properties, funds, resources and financial transactions which take place in accordance with the provisions of this Charter shall be exempt from all kinds of taxes, if any, and custom duties.

Further, the Centre may not be subject to any claims in this respect. Any payment made by the Centre to the Secretary-General shall not be subject to any tax that may be imposed.

Such tax shall not be imposed upon salaries, expenses or any other payments made to the Arbitral Tribunal's Secretariat staff. This exemption shall not be applicable to the citizens of the host country.

The preceding provisions shall be applicable to the arbitrators' fees and expenses upon the performance of their duties in accordance with the provisions of this Charter.

Chapter Eight: General Provisions

Article 28

The Arbitral Rules of Procedure shall be prepared by legal experts from the member States within three months from the date of approving this Charter. The Rules shall become effective and enforceable upon their ratification by the GCC Commercial Co-operation Committee.

Article 29

Any GCC member State may seek the amendment of this Charter. An amendment shall be effective three months after its ratification by the Supreme Council.

Article 30

The Charter shall come into effect three months after the date of its ratification by the Supreme Council of the Co-operation Council of Arab States of the Gulf.

Appendix E: Arbitral Rules of Procedure of Procedure for the GCC Commercial Arbitration Centre

Preliminary Provisions

Article (1)

In the application of the provisions of these Rules, the following terms and expressions shall have the meanings assigned to them herein unless the context otherwise requires:

Centre: The Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf.

Rules: Arbitral Rules of Procedure for the Centre.

Secretary General: Centre's Secretary General.

Tribunal: Arbitral Tribunal formed in accordance with the Rules.

Arbitration Agreement: Arbitration Agreement made by the parties in writing for reference to arbitration whether prior to the dispute (arbitration clause) or thereafter (arbitration stipulation).

Panel: List of the names of arbitrators at the Centre.

Article (2)

1. An Arbitration Agreement made in accordance with the provisions of these Rules before the Centre shall preclude the reference of the dispute before any other authority or it shall also preclude any challenge to arbitration award passed by the Arbitral Tribunal.

2. In case of reference to arbitration, it is proposed that the following text be included in the Arbitration Agreement:

All disputes arising from or related to this contract shall be finally settled in accordance with the Charter of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf.

Article (3)

All agreements and stipulations referred to arbitration before the Centre shall be presumed valid unless evidence is provided establishing the invalidity thereof.

Article (4)

Arbitration before the Centre shall take place pursuant to these Rules unless there is a provision to the contrary in the Arbitration Agreement. The parties may select further procedural rules for arbitration before the Centre, provided that such rules shall not affect the powers of the Centre or Arbitral Tribunal provided for in these Rules.

Article (5)

The Centre's Tribunal shall ensure all rights of defense for all parties to the dispute and shall treat them on an equal basis. The Tribunal shall ensure each party in the proceedings has the full opportunity to present his case.

Article (6)

1. The Arbitral Tribunal shall determine the place of the Arbitration unless agreed upon by the parties.
2. The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any place it considers appropriate unless otherwise agreed by the parties.
3. The Arbitral Tribunal may hold the deliberations in any place it deems appropriate.
4. In all cases, the award is considered passed in the place determined for arbitration and on the date mentioned therein.

Article (7)

In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages to be used in the proceedings of arbitration taking into account the conditions of arbitration including the language of the contract.

Arbitral Tribunal

Article (8)

The Arbitral Tribunal shall be composed of a single arbitrator or three arbitrators as mutually agreed upon between the parties. In case there is no agreement, the Secretary General shall form the Tribunal with one arbitrator, unless he finds that the nature of the dispute requires to be formed by three arbitrators.

Submission of Applications and Reference to Arbitration

Article (9)

An applicant for arbitration shall submit a written application to the Secretary General containing the following:

1. His name, surname, capacity, nationality and address.
2. Name of the other party against whom arbitration reference is made, his surname, capacity, nationality and address.
3. Statement of the dispute, its facts, evidence thereof and specified claims.
4. Name of the elected arbitrator, if any.
5. A copy of the Arbitration Agreement and the documents relating to the dispute.

The Secretary General shall ensure that all the necessary documents are available for pursuing the arbitration proceedings. In case the required documents are not complete, the concerned party shall be given notice to produce them.

Article (10)

Upon receipt of the arbitration application and payment of fees, the Secretary General shall notify the applicant, acknowledging receipt of his application, and shall notify the other party against whom arbitration reference is made by registered letter, with a copy thereof within seven days from the date of receiving such application.

Article (11)

The party against whom reference to arbitration is made shall submit, within twenty days from the date of being notified of the application, a reply memorandum containing his defense pleas, counter claims, if any, and the name of his elected arbitrator supported by the documents available to him. The Secretary General may give him, upon his request, a grace period not exceeding twenty days for this purpose.

Article (12)

1. If the Arbitral Tribunal consists of a single arbitrator, the parties shall agree on his appointment within the period fixed in the preceding Article, otherwise the Secretary General shall appoint an arbitrator from among the Centre's Arbitrators' Panel within two weeks from the expiry of such period. The Secretary General shall notify all parties of such appointment.

2. If the applicant for arbitration fails to nominate the arbitrator he wishes to elect in his application, the Secretary General shall appoint the arbitrator within two weeks from the date of receiving the application.

3. If the party, against whom arbitration is referred, fails to nominate the arbitrator of his election during the period stipulated in the preceding Article, the Secretary General shall appoint an arbitrator within two weeks.

4. The Secretary General shall invite the arbitrators nominated by the two parties to elect a third arbitrator who shall be the chairman of the Tribunal. However, in case of failure to reach agreement within twenty days from the date of the invitation, the Secretary General shall appoint, within two weeks, the third arbitrator.

Article (13)

Where there are multiple parties, whether as claimant or as respondent and where the dispute is to be referred to three arbitrators, the multiple claimants jointly, and the multiple respondents jointly shall nominate an arbitrator.

If the parties fail to appoint arbitrators as mentioned hereinabove, the Secretary General shall appoint all the arbitrators including the Chairman of the Tribunal.

Article (14)

If either party disputes the validity of appointing one of the arbitrators, the Secretary General shall settle such dispute within two weeks by a final decision provided that this

dispute on the validity shall be presented before holding the hearing fixed for considering the dispute.

Article (15)

If an arbitrator dies, declines appointment, or force majeure prevents him from carrying out his duties or the continuation thereof, a substitute shall be nominated in his stead in the same manner in which the original arbitrator was appointed.

Article (16)

The Secretary General shall refer the dispute file to the Tribunal within seven days from the date of forming it in the abovesaid manner. The Tribunal shall proceed with carrying out its mandate within fifteen days from the date of notification thereof.

Challenge of Arbitrators

Article (17)

Either party may challenge the appointment of an arbitrator for reasons to be set out in his petition. The challenge shall be submitted to the Secretary General.

Article (18)

1. In case one of the parties seeks to challenge an arbitrator, the other party may agree to such challenge. Further, the arbitrator sought to be challenged may relinquish the hearing of the dispute and a new arbitrator shall be appointed in the same manner in which the said arbitrator was nominated.

2. If the other party does not agree to the plea for challenging the arbitrator and if the said arbitrator sought to be challenged does not relinquish the hearing of the dispute, the Secretary General shall settle the issue of the challenge within three days from receiving an application in this respect.

3. If the Secretary General decides to challenge the arbitrator, a new arbitrator shall be appointed in accordance with the Rule. The challenged arbitrator as well as the parties shall be notified of such decision.

Plea for Jurisdiction of the Arbitral Tribunal

Article (19)

Unless there is an express agreement to the contrary, an Arbitration Agreement shall be deemed as independent from the contract subject to the dispute. If the contract is invalidated or terminated for any reason, the Arbitration Agreement shall remain valid and effective.

Article (20)

The Arbitral Tribunal shall have the power to rule on the issue relating to its non-jurisdiction. This shall include the pleas based upon the lack of an Arbitration Agreement, nullity of such Agreement, lapse thereof or its non-applicability to the issue in dispute. The said pleas shall be presented at the first hearing prior to examining the merits.

Article (21)

The Tribunal shall hold, at the request of either party, at any stage of the proceedings, hearings for verbal pleadings or for hearing testimony from witnesses or experts. If neither party makes such a request, the Tribunal shall have the option either to hold such hearings or to go ahead with the proceedings on the basis of the papers and documents, provided that at least one hearing has already been held.

Article (22)

1. In case of verbal pleadings, the Tribunal shall notify the parties, within a sufficient period of time before the pleading's hearing, of the date, time and place of hearing.
2. In case of providing proof by testimony of witnesses, the party upon whom the onus of proof rests shall notify the Tribunal and the other party, at least seven days before the testimony hearing, of the names of witnesses whom he plans to call to the witness stand, their addresses, the matters in respect of which the said witnesses shall testify and the language to be used for such testimony.
3. The Tribunal shall make the necessary arrangements for translation of verbal statements made at the hearing if such statements are in a language other than Arabic and the Tribunal shall prepare minutes of the hearing.
4. Pleading and testimony hearings shall be held behind closed doors unless the two parties agree to the contrary and the Tribunal shall be at liberty to decide the method of questioning the witnesses.
5. The Tribunal shall decide whether to accept or reject evidence and the existence of a link between the evidence and the issue of the case or lack of such linkage and the significance of the evidence provided.

Article (23)

1. If either party alleged that the documents submitted to the Tribunal have been forged, the Tribunal shall temporarily suspend the Arbitral proceedings.
2. The Tribunal shall refer the alleged forgery to the competent committee for investigating it and taking a decision in respect thereof.
3. If the forgery incident is proved to be true, the Tribunal shall pass a ruling for cancellation of documents proved to have been forged.

Article (24)

The Tribunal may, at any stage of the arbitration, request the parties to produce other documents or evidence, conduct an inspection of the premises subject to the dispute and make investigations it deems fit, including assistance by experts.

Article (25)

The parties to the dispute may authorize the Tribunal to settle the dispute between them by means of reconciliation. They may also request the Tribunal at any stage to confirm what has been agreed upon between them by way of a reconciliation or settlement, and it shall pass a ruling to that effect.

Article (26)

The Tribunal may, ex-officio or at the request of one of the parties to the dispute, decide at any time, after closing of the pleadings and prior to rendering the award, to open pleadings anew on the merits for material reasons.

Failure to Appear

Article (27)

If either party fails to appear at the hearings after receiving notification to appear from the Tribunal, and does not provide, during a period of time being fixed by the Tribunal, an acceptable excuse for his absence, such absence shall not bar proceeding with the arbitration.

Interim Measures

Article (28)

The Tribunal may take, at the request of either party, interim measures in respect of the subject matter of the dispute, including the measures for preservation of the contentious goods, such as ordering the deposit of the goods with third parties or sale of the perishable items thereof in compliance with the procedural rules in the country where the interim measure is adopted.

Applicable Law

Article (29)

The Tribunal shall settle disputes in accordance with the following:

1. The contract concluded between the two parties as well as any subsequent agreement between them.
2. The law chosen by the parties.
3. The law having most relevance to the issue of the dispute in accordance with the rules of the conflict of laws deemed fit by the Tribunal.
4. Local and international business practices.

Article (30)

The GCC regulations and resolutions as well as provisions of the Unified Economic Agreement and their interpretations shall be applicable to the disputes arising from the enforcement thereof.

Deliberations and Award

Article (31)

If there are several arbitrators and the pleadings have ceased, the Tribunal shall meet for deliberations and passing an award. The deliberations shall be held behind closed doors. However, if there is a single arbitrator on the Tribunal, he shall pass the award after ceasing the pleading.

Article (32)

If there are several arbitrators, the award shall be passed by a unanimous or a majority vote. In all cases, an award shall be passed within a maximum period of one hundred days from the date of referring the case file to the Tribunal unless the parties agree on another period for passing the award. The parties covenant with each other to enforce the award with immediate effect. In case an award is passed by a majority vote, the dissenting arbitrator shall note down his opinion in a separate paper to be attached to the award but the dissent shall not be deemed as an integral part thereof.

Article (33)

The period referred to in the preceding Article may be extended by a decision made by the Secretary General upon a grounded request from the Tribunal. If the Secretary General is not convinced of the reasons given by the Tribunal for the extension request, the Secretary General shall fix a deadline in consultation with the parties to the dispute and the Tribunal shall pass its ruling within such deadline and its mandate shall be ended upon the expiry of the said deadline.

Article (34)

The award shall be grounded and must contain the arbitrators' names, their signatures, names of the parties, date of the award, place of issue, facts of the case, litigants' claims, a summary of their defense pleadings, their defenses, replies thereto and the party who shall incur the costs and legal fees either in full or partially.

Article (35)

1. The Tribunal shall send a copy of the award to the Secretary General for the purpose of deposit and registration, if required, under the law of the State in which the award shall be enforced.

2. The Tribunal Secretariat shall send a copy of the award to each of the parties by a registered letter with a note of receipt within three days from the date the award is passed.

Article (36)

1. An award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.

2. The relevant judicial authority shall order the enforcement of the arbitration award unless one of the litigants files an application for the annulment of the award in the following specific events:

A. If it is passed in the absence of an Arbitration Agreement or in pursuance of a null Agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the Agreement.

B. If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed by some of them without being authorized to hand down a ruling in the absence of others, or if it is passed pursuant to an Arbitration Agreement in which the issue of the dispute is not specified, or if it is passed by a person who is not legally qualified to issue such award.

Upon the occurrence of any of the events indicated in the above two paragraphs, the relevant judicial authority shall verify the validity of the annulment petition and shall pass a ruling for non-enforcement of the arbitration award.

Article (37)

The Tribunal may, ex-officio or at a written request from either party to be submitted through the Secretary General, correct any material and similar errors in the award after giving notice to the other party with respect to such request, provided that the correction request shall be submitted within fifteen days from the date of receiving the award. The correction shall be done and considered as an integral part of the award and notice thereof shall be given to the parties.

Article (38)

Either party may request the Tribunal, within seven days from the date of receiving the award, to interpret any ambiguity which may arise therein, provided that the other party shall be given notice of such request. The Tribunal shall provide the interpretation in writing within twenty days from the date of receiving such application. The interpretation shall be deemed as an integral part of the award in all aspects.

Fees and Costs

Article (39)

The Centre shall charge a fee of (BD 50) or the equivalent thereof for every reference to arbitration.

Article (40)

1. The Centre shall charge fees for the services provided to the parties but such fees shall not, under any circumstances, be more than 2% of the amount in dispute.
2. The Secretary General shall propose a scale of fees for its services pursuant to the preceding Paragraph (1) and such scale of fees shall be effective upon approval by the Board of Directors of the Centre.

Article (41)

1. The Secretary General shall prepare a statement of temporary estimate of the arbitrators' fees and other arbitration costs such as the travel expenses of the arbitrators and witnesses, fees of experts and translators and fees for the Centre's services. Each of the parties to a dispute shall be instructed to deposit a certain equal amount as an advance on account of such costs. The parties may be instructed to make supplementary deposits in the course of arbitration proceedings.
2. If the required deposits are not made within thirty days from the date of receiving the instructions, the Secretary General shall notify the parties in this respect so that one of them shall pay the required amounts. In case the amount is not paid, the Tribunal may order the suspension or termination of the arbitration proceedings.
3. Once the Tribunal's award is passed, the Secretary General shall submit a statement of the deposits and expenses and make a final settlement by refunding any surplus amount or collecting the amounts outstanding.

Final Provisions

Article (42)

The GCC Commercial Co-operation Committee shall have the right to amend these Rules and the Board of Directors of the Centre shall have the right to interpret them.

Article (43)

These Rules shall come into effect immediately upon their ratification by the GCC Commercial Co-operation Committee.

Appendix F: Kuwait

The Code of Civil and Commercial Procedure

Chapter 12: Arbitration

Art. 173

Agreement to arbitrate may be made in respect of a specified dispute. Likewise, agreement to arbitrate may be made in respect of all disputes which arise from the implementation of a specific contract. Written proof of arbitration shall be required. Arbitration is not permitted in matters which permit compromise. Likewise, only he who has capacity to dispose of a right which is the subject matter of a dispute may agree on arbitration.

The subject matter of the dispute must be specified in the agreement for arbitration or during the proceedings, otherwise arbitration shall be null and void, even though the arbitrator is authorized to compromise.

The courts shall not be competent to consider disputes which are governed by an arbitration agreement, however, objection to the competence of the court may be waived expressly or implicitly.

Arbitration shall not cover urgent matters otherwise explicitly agreed.

Art. 174

An arbitrator may not be a minor, or be under a court interdiction order, or without civil rights by reason of criminal punishment, or be an undischarged bankrupt.

If there are several arbitrators they must be in all cases an uneven number; also, the appointment of the arbitrator must be stated in the agreement for arbitration or in a separate agreement.

Art. 175

If a dispute arises and the adversaries have not agreed on the arbitrators or one or more of the agreed arbitrators refuses to carry out this task or resigns or is dismissed or declared ineligible, or there is an impediment preventing any of them from carrying on the work and there is no agreement in this respect among the adversaries, the court originally competent to consider the dispute shall appoint the arbitrators required upon application by any of the adversaries by following the procedures normally taken in the filing of a lawsuit.

The number of arbitrators whom the court may appoint must be equal to or complete the number agreed by the adversaries. No appeal by any means whatever shall be allowed against a court order issued in this respect.

Art. 176

Arbitrators may not be authorized to compromise, nor may they make an award in their capacity as compromise arbitrators unless their names were stated when they were appointed in the arbitration agreement.

Art. 177

The Ministry of Justice may set up one or more arbitration panels to hold sittings at the seat of the general court or in any other place designated by the board president. The panel shall have as president a senior judge chosen by the general assembly of the competent court. The members of the panel shall be two businessmen or other professionals. They shall be selected from a roll prepared for this purpose in accordance with the rules and procedures issued in this regard by order of the Minister of justice. A member of staff of the court shall carry out the duties of secretary for the panel. The panel shall consider without fee the dispute referred to it in writing by the parties concerned. The panel shall apply the rules laid down in this chapter. However, it may issue the award and orders referred to in Para. A, B and C of Art. 180.

Art. 178

Without prejudice to any provision in the preceding article or in any other law the arbitrator must signify his acceptance of appointment as arbitrator and written proof of such acceptance shall be required.

If the arbitrator resigns his duties without a reason after accepting arbitration he may be liable for payment of compensation.

An arbitrator may not be dismissed, except by agreement of all the adversaries.

The arbitrator may not be relieved of his duties, except for reasons which occur or appear after his appointment. The request to relieve him must be for the same reasons for which a judge may be relieved or may be considered unfit to give judgment. The application to relieve an arbitrator will be submitted to a court which is originally competent to hear the dispute within five days of the date the adversary has been notified of the appointment of the arbitrator, or from the date of the occurrence of the reason for his relief, or of his knowledge of it if it was subsequent to the date of his notification of the appointment of the arbitrator.

In all cases application to relieve an arbitrator shall not be accepted if the arbitrator's award has been issued, or if the hearing of the case has been closed.

The party applying for removal of the arbitrator may appeal against the judgement in this respect regardless of the value of the dispute which is submitted to the arbitrator.

Art. 179

The arbitrator, within at the latest thirty days from the date of his acceptance of the arbitration, shall notify the adversaries of the date of the first sitting for the hearing of the dispute and its place, without the need to observe the rules laid down in this law for service of notification. He shall fix a date for them to submit their documents, memoranda and arguments. An award may be made in accordance with a submission by one party if the other party has failed to appear on the date fixed.

If there are several arbitrators they must collectively take part in the investigative proceedings and each one will sign the minutes of it, unless they have unanimously agreed to delegate one of them to carry out certain proceedings and have established his delegation in the minutes of that sitting, or if the agreement for arbitration permits such delegation to any one of them.

Art. 180

The dispute before the arbitrator shall be interrupted for any reason laid down in this law for interruption of disputes, and the results of interruption laid down by law shall come into effect.

If during the arbitration a preliminary matter outside the jurisdiction of the arbitration arises, or if there is an allegation of forgery in any document, or if there are any criminal proceedings as a result of forgery or any other criminal event, the arbitrator shall suspend his work until final judgment has been issued in its respect. Also, the arbitrator shall suspend his work in order to refer to the president of the court which is originally competent to hear the dispute to carry out the following:

- A. To order the punishment laid down in the law against a witness who fails to attend or fails to give answer.
- B. To order third parties to produce a document in their possession which is necessary for the award.
- C. To order a judicial act of delegation.

Art. 181

If there is no stipulation by adversaries in their arbitration agreement on a date for the award, the arbitrator shall make the award within six months of the date of notification of the parties to the dispute of the arbitration sitting, otherwise any of the parties to the dispute may refer the dispute to the court or continue with the litigation before that court if the case was already filed with it.

If the dates of the notification of the parties differ, effect shall be given to the later date of notification.

The adversaries may agree expressly or implicitly to extend the date whether it was fixed by agreement or law, and may also authorize the arbitrators to extend it to a certain date.

The date shall also be suspended whenever a dispute before an arbitrator has been suspended or interrupted. The date shall resume from the date the arbitrator learns of removal of the cause of suspension or interruption and if the remainder of the date is less than two months it shall be extended to two months.

Art. 182

The arbitrator shall issue his award without being bound by the procedure laid down by law, except those laid down in this chapter. Nevertheless, the adversaries may agree on certain procedures which the arbitrator shall follow.

The award of the arbitrator shall be issued in accordance with the basic rules of law, unless he has been authorized to compromise, in which case he shall not be bound by these rules except those relating to public policy.

The rules relating to expedited execution of judgment shall apply to the awards of arbitrators. The award of the arbitrator must be issued in Kuwait, otherwise it shall be subject to the basic rules governing awards issued by arbitrators in a foreign country.

Art. 183

The arbitrators' award shall be issued by majority, shall be in writing, shall include in particular a copy of the adversaries, the reasons for the award and its pronouncement, date and place of issue of the award and signatures of the arbitrators.

If one or more of the arbitrators refuse to sign the award the award shall mention the fact. It shall be valid if it is signed by the majority of arbitrators.

The award shall be written in Arabic, unless the adversaries otherwise agree, in which case there must be attached to it an official translation when the award is filed.

The award shall be deemed to be issued on the date it is signed by the arbitrators after writing it.

Art. 184

The original of the award—even though it may have been issued for the purpose of carrying out measures of investigation—together with the original of the arbitration agreement shall be filed with the clerical section of the court originally competent to consider the dispute, within the ten days following the issue of the award which ends the dispute.

The clerk shall draw up a *proces verbal* of such filing.

Art. 185

The arbitrator's award shall not be capable of execution except by order issued by the president of the court after it is filed with its clerical section upon request of any of the interested parties. The order for execution shall be issued after review of the award and the arbitration agreement after ascertaining the absence of impediments for execution and the lapse of the time for appeal, if the award was appealable and was not under expedited execution. The order for execution shall be placed at the end of the original of the award document.

Art. 186

The award of the arbitrator may not be appealed except where the adversaries have agreed otherwise, before its issue, in which case the appeal shall be before the general court sitting in an appeal capacity. Appeal shall be subject to the rules laid down for appeal against court judgments and the date for the appeal shall begin from the day the original of the award was filed with the clerical section of the court in accordance with Art. 184.

In any case, the award shall not be subject to appeal if the arbitrator was authorized to compromise, or was an arbitrator in appeal, or if the value of the case did not exceed KD. 500, or if the award was issued by the panel constituted under Art. 177.

Any interested party may ask for annulment of a final award issued by the arbitrator in any of the following cases, even though there was agreement to the contrary before its issue.

- A. If it has been issued without an arbitration agreement or under an invalid one or if the agreement has lapsed by exceeding the period fixed for it or if the arbitrator has gone beyond the terms of the arbitration agreement.
- B. If there should exist any of the reasons which give rise to a request for review of the award.

C. If there is a basic invalidity in the award or a basic invalidity in the proceedings which affected the award.

Art. 187

A lawsuit for annulment shall be instituted with the court which is originally competent to hear the dispute in the usual manner for the institution of lawsuits, but it must take place within thirty days from notification of the award. This period shall begin in accordance with the provision of Art. 149 in cases where there are reasons which will give rise to a review of judgment.

The complaint sheet shall include the reasons for the request of annulment, without which it will be invalid. The complainant must deposit upon filing of the complaint sheet KD. 20 as guarantee for expenses, and the clerical section of the court shall not accept said filing if there is no proof of deposit of guarantee. It shall be sufficient to deposit one guarantee in the case of a multiplicity of complainants where they have instituted one complaint sheet even though for different reasons for annulment. The government shall be exempted from depositing a guarantee and likewise, those who are exempted from judicial fees.

The guarantee shall be forfeited by law if the lawsuit is pronounced not accepted by the court, or that it may not be instituted, or that it has lapsed, or that it is annulled, or that it is dismissed.

If the court ordered the annulment of the arbitration's award it will consider the substance of the dispute and at the same time give judgment on it.

Art. 188

The institution of a lawsuit for annulment shall not imply suspension of the execution of the arbitrator's award.

In any case, the court which is considering the lawsuit may order, in accordance with the request of the plaintiff, suspension of the execution of the award, if it is feared great damage will result from execution and where the reasons for annulment appear to be likely to prevail.

The court may, when ordering suspension of the execution, order the provision of a guarantee or order whatever is deemed sufficient to protect the right of the defendant. The order suspending execution of the award shall also be extended to cover the execution measures which have been taken by the award creditor from the date of the suspension of execution.

Execution of Judgments, Orders and Foreign Documents

Art. 199

An order may be issued for the execution, in Kuwait, of an order or judgment that has been rendered in a foreign country, in accordance with the same conditions as those provided for in the laws of that country in respect of the execution of judgments and orders rendered in Kuwait.

An order of execution will be filed in the Al Kulliya Court, in accordance with the established rules laid down for the initiation of a suit; an order of execution may not be issued unless the following matters have been verified:

- (a) That the judgment or order was rendered by a competent court, in accordance with the law of the country wherein it had been rendered;
- (b) That the parties to the case, subject matter of the foreign judgment, have been summoned to appear and were duly represented;
- (c) That the judgment or order has become a res judicata according to the law of the court which rendered it;
- (d) That the judgment or order is not conflict with an order or judgment that has already been rendered by a court in Kuwait and does not contain anything which is in violation of morality or public order in Kuwait.

Art. 200

The provision of Article 199 shall apply to the awards rendered by arbitrations in a foreign country; the foreign arbitrators' award must have been rendered in a matter which may be the subject of arbitration, in accordance with the laws of Kuwait, and must be enforceable in the country wherein it was rendered.

Law No. 11/1995 On Judicial Arbitration in Civil and Commercial Matters

Article 1

At the seat of the Court of Appeal, one or several Arbitration Councils are created, composed of three judges and two arbitrators, the latter being respectively chosen by each of the parties to the dispute - even if there are several - amongst those persons whose names shall be contained in the list prepared in this respect by the Department of Arbitration of the Court of Appeal, or amongst others. If a party does not make such an appointment within ten days following the date at which it was invited to do so by the Department of Arbitration, this Department shall appoint for this mission the arbitrator whose turn it is on the list of specialized arbitrators for the subject-matter of the dispute. The chairman of the Arbitral council shall be the judge having the longest duration of service as judge, provided that he has the rank of counsellor.

The Secretariat of the Arbitral Council shall be ensured by one of the officials of the Court of Appeal and the Council shall hold its hearings at the Court of Appeal or at any other place appointed by its chairman.

The choice of the arbitrators chosen amongst judges is made by decision of the Superior Council of Judges. This appointment is made for two years as of the date of such decision.

Article 2

The Arbitration Council shall:

- 1 – Settle disputes referred to it by the parties as well as disputes which will arise out of contracts entered into after the implementation hereof and under which disputes shall be settled by way of arbitration, unless the contract or a set of arbitration rules provide otherwise;
- 2 – Have exclusive jurisdiction over disputes arising between Ministries, Governmental Authorities, juristic persons of public law and companies whose

capital is entirely held by the State, or amongst these companies;

- 3 – Settle claims to arbitration submitted by private persons or corporations against Ministries, Governmental Authorities, or juristic persons of public law. These authorities must submit to arbitration unless the dispute had previously been referred to the courts.

When the Council examines the disputes, no legal fees are due.

Article 3

The claim to arbitration is submitted to the Arbitration department which must put it on the role relating thereto the day it is presented.

Within three days following the choice of the other arbitrators, the request is referred to the Chairman of the Arbitration Council to estimate the amount both parties must deposit as fees for their respective arbitrator, unless such arbitrator previously acknowledged receipt of his fees. The Arbitration Department must invite each party to deposit the amount required with the cashier of the department within ten days. If it does not do so, the Department informs the other party thereof within the following five days. If it wishes to continue the arbitral proceedings, the latter must deposit itself the requested amount within ten days. If this time-period expired without any party depositing this amount, the Arbitration Department refers this question to the Chairman of the Arbitration Council so that he orders the case to be closed and the amount already paid by one or the other party as fees for its own arbitrator is to be repaid to it.

Article 4

Within ten days following the deposit of the amount, for the fees of the arbitrators appointed by the parties, the Arbitration Department refers the claim to arbitration to the Chairman of the Arbitral Councils so that he sets a date for hearing this claim. The Arbitral Council must notify the parties of the date of this hearing and inform them of the composition of the Arbitral Council within the five days that follow. It must also give a time-period for exchange of exhibits, memoranda and means of defence. The notification must be made as foreseen in Article 179 of the Code of Civil and Commercial Procedure, unless the parties to the dispute agree otherwise.

Article 5

The Arbitral Council may settle preliminary questions which are referred to it concerning the dispute and which are of the jurisdiction of the civil and commercial courts. It also settles questions of its own jurisdiction such as those based on the absence of an agreement to arbitrate, the expiry of such an agreement, its invalidity or impossibility to apply it to the subject-matter of the dispute. These means must be raised before any discussion on the substance of the dispute. Likewise, the argument that the agreement to arbitrate cannot apply to the claims made by the other party made during the examination of the dispute, must be raised as and when these claims are made, else one is deprived of the right to raise such an argument.

In all cases, the Arbitral Council may accept such an argument made too late, if it deems that such delay is justified.

The Arbitral Council settles the above-mentioned arguments before settling the subject-matter of the dispute, or it may join these questions, to settle them together.

It may also make awards or injunctions mentioned in paragraphs a, b and c of Article 180 of the Code of Civil and Commercial Procedure.

It may also settle urgent questions relating to the subject matter of the dispute, unless the parties explicitly agreed otherwise.

Article 6

The Court of Cassation has jurisdiction over possible challenges of one of the members of the Arbitral Council. The challenge must be made with the Secretariat of the Court of Cassation within five days as of the notification of the composition of the Council to the author of such request, or of the date where the cause of challenge has arisen, or that where the author of the request became aware thereof, if this is later.

A challenge does not suspend the arbitral proceedings. If the challenge is successful, all procedural steps already made, including a possible making of the award, are considered as inexistent. A decision rejecting a challenge is not subject to any means of recourse.

If an arbitrator is removed following a challenge, or if an arbitrator withdraws or is dismissed for any reason whatsoever, the appointment of the replacing arbitrator is made in compliance with the procedure followed for the appointment of the initial arbitrator.

Article 7

There is no duty to make the award of the Arbitral Council in a determined time, with the exception of the rule laid down by Article 181 of the Code of Civil Procedure.

The Arbitral Council's award is made at a majority. It is pronounced during a public hearing the date of which is notified to both parties. The award must notably contain a summary of the agreement to arbitrate and the parties' arguments, the mention of the Exhibits that were communicated, the reasons for the decision and the decision itself, the date and place of its making and the signature of the arbitrators. The original copy of the award containing the reasons and the arbitrator's signature must be deposited upon its making.

If one or several arbitrators refuse to sign, this must be mentioned in the award and the award is held to be valid if it was signed by the majority of the arbitrators, even if one or several of the latter/s has/have withdrawn or were removed after the hearings were closed and the Council started deliberations.

The original of the award which closes the proceedings is deposited, together with the original of the agreement to arbitrate, with the Secretariat of the Court of Appeal within five days of its being pronounced.

The Arbitral Council's award can only be published, in whole or in part, with the parties' consent.

Article 8

The Arbitral Council has jurisdiction to repair material errors contained in its award, if they are errors in writing or calculation. It also has power to interpret the award if it is ambiguous or equivocal. It may also decide on claims it had omitted to settle. All this is to be made in compliance with the rules foreseen in Articles 124, 125 and 126 of the Code of Civil and Commercial Procedure. If this is not possible, these questions are of the jurisdiction of the Court initially having jurisdiction over the dispute.

If the award is subject to a recourse before the Court of Appeal, this Court alone may repair material errors contained therein, or interpret it.

Article 9

Awards made by the Arbitral Council becomes *res judicata* and are executory in compliance with the procedure foreseen in the Code of Civil and Commercial Procedure, after the executory formula has been set upon the award by the Secretariat of the Court of Appeal.

Article 10

Awards made by the Arbitral Council may be subject to a recourse to the Court of Cassation in the following cases:

- (a) If the law was violated or incorrectly applied or interpreted;
- (b) If the award is void or there is a procedural invalidity which influenced the award;
- (c) If the Arbitral Council made a decision contrary to a previous judgment made between the same parties and having become *res judicata*, whether it was made by the ordinary courts or an arbitral tribunal;
- (d) If any of the grounds for the request for review arises.

An award made by an Arbitral Council is not subject to any other means of recourse.

Article 11

Without prejudice to the provisions of Article 130 of the Code of Civil and Commercial Procedure, the request is made to the Court of Cassation in compliance with procedure foreseen in this respect by such Code. It must be made within thirty days following the date at which the award of the Arbitral Council is pronounced, in the cases foreseen in paragraphs a, b, and c of the preceding Article. Should one of the grounds indicated in paragraph (d) of such article arise, the time-period starts in compliance with the provisions of Article 149 of the Code of Civil and Commercial Procedure.

Article 12

Are to be applied the provisions of this law relating to the Arbitral Councils which are mentioned therein, these Councils also being subject to the provisions of the Code of Civil and Commercial Procedure in anything which is not contrary hereto.

Article 177 of the Code of Civil and Commercial Procedure is repealed.

Article 13

The Minister of Justice will issue the decrees necessary to the execution hereof. These decrees must contain the necessary provisions for the organization of the Arbitration Department with the Court of Appeal and the inscription on the lists of arbitrators, as well as the procedure for appointment, replacement and determination of their fees.

Article 14

This law shall be published in the Official Gazette and shall come into force one month after the date of its publication. The Ministers must execute it, each in the field of its own attributions.

Appendix G: Bahrain

The Code of Civil and Commercial Procedure

Chapter Seven: Arbitration

Article 233:

Contracting parties may make general provisions for arbitration in respect of disputes arising between them over the execution of a certain contract, or agreement may be reached on arbitration in respect of a particular dispute by means of a special arbitration agreement.

Agreement on arbitration shall be valid only if it is made in writing.

The issue of the dispute must be specified in the arbitration agreement or in the course of proceedings, even where the arbitrators are authorized to bring about conciliation, otherwise the arbitration is invalid.

Arbitration is not permissible in matters where conciliation is not allowed. Arbitration is only permissible for those competent to dispose of their rights, without prejudice to the provisions of any other law.

Article 234:

An arbitrator may not be a minor, interdicted, deprived of his civil rights as a result of a criminal punishment, or bankrupt, unless he has been rehabilitated. Where there are several arbitrators, their number must be uneven; otherwise the arbitration is invalid. The arbitrators must be named in the arbitration agreement or in a separate agreement. The asset of the arbitrator must be given in writing. Once he has agreed to arbitrate he may not withdraw without substantial cause; otherwise he may be found liable for damages.

The arbitrators may not be dismissed except by mutual consent of the litigants or by court order.

Article 235:

If a dispute arises and the litigants have not agreed on the arbitrators, or if one or more of the agreed arbitrators has abstained, withdrawn or been dismissed, or an impediment has arisen to prevent him from acting, and there is no agreement between the litigants concerning this matter, the Court originally given jurisdiction to examine the dispute shall appoint the necessary arbitrators at the request of the party concerned with expediting the matter, in the presence of the other litigant or with him absent, having been summoned to attend. The decision given in this respect may not be challenged or appealed against.

Article 236:

The litigants shall, in consequence of the arbitration clause, relinquish their rights of recourse to the Court originally given jurisdiction to examine the dispute.

If a dispute arises concerning the execution of a contract containing an arbitration clause and one of the parties thereto commences proceedings in the Competent Court, the other

party may invoke the rules by means of a plea for the case not to be heard and for recourse to be had to the arbitration clause in accordance with the agreement.

Article 237:

If the litigants do not specify in the arbitration agreement a time limit for the award, the arbitrators must give an award within three months of their agreeing to arbitrate; otherwise either litigant may take the dispute to the Competent Court, unless they have jointly agreed to extend the time limit.

The award of the arbitrators shall be based on the principles of law, unless they are authorized to bring about conciliation, in which case they are not bound by these principles.

If the arbitration agreement was made in Bahrain, the Law of Bahrain must be applied in all aspects of the dispute, unless the parties agree otherwise and provided the arbitration takes place in Bahrain.

Article 238:

The arbitrators' award concerning the dispute shall be made on the basis of the litigants' submissions. The arbitrators must set a time limit for them to submit their documentary evidence, briefs and points of defence.

The litigants must submit to the arbitrators all documents, papers, accounts and written evidence in their possession or charge, and do all that the arbitrators require of them.

Either of the litigants, or the arbitration committee, may file an application to the Court for any document necessary to the arbitration in the possession of others to be produced or for notice to be sent to any witness to attend in order to give evidence before the arbitration committee.

The arbitrators may make witnesses take an oath or charge them to make a formal declaration to tell the truth. Anyone giving false evidence concerning an essential issue before an arbitrator or umpire shall be held to have committed perjury just as if he had been giving evidence before a Competent Court. He may be cross-examined and punished according to the penalty laid down for perjury.

Article 239:

The award of the arbitrators shall be made by a majority of opinions. The award must be made in writing, and must include in particular a copy of the arbitration agreement, a summary of the litigants' statements and documents, reasons for the award, the dispositive portion and date of issue of the award, and the signatures of the arbitrators.

If one or more of the arbitrators refuses to sign the award, this should be stated therein. The award shall be legally valid if it is signed by a majority of the arbitrators.

Awards made as a result of arbitration may not be challenged.

Article 240:

All awards made by the arbitrators, even if made by way of confirmation, must be deposited in the original, together with the original arbitration agreement, at the office of the Clerk of the Court originally given jurisdiction to hear the case within three days of being issued. The Clerk of the Court shall record this deposition and send a copy of the record to the arbitrators.

If the arbitration arises in connection with an appeal case, deposition shall be made at the office of the Clerk of the Court originally given jurisdiction to hear the appeal.

Article 241:

The arbitrators' award shall not be executable without an order issued by the President of the Court with whose Clerk's Office the original award was filed at the request of any of the concerned parties after perusal of the award and arbitration agreement and after ascertaining that there is nothing to prevent its execution, and after the lapse of the period for appeal, where the award admits of appeal.

The executive judge is responsible for all matters concerning the execution of the arbitrators' award.

Article 242:

The award of the arbitrators may be appealed against in accordance with the established principles for appealing against court judgements, within thirty days of the record on the original award's deposition being sent to the arbitrators. The appeal shall be submitted to the Competent Court of appeal.

However, the award may not be appealed against if the arbitrators are authorized to bring about conciliation or if they are arbitrating on an appeal, or if the litigants have explicitly waived the right to appeal.

Article 243:

Any interested party may request that the final award of the arbitrators be invalidated in the following cases:

1. if it was issued on the basis of an invalid arbitration agreement or departed from the bounds of a valid agreement.
2. if it was issued by arbitrators who were not appointed in accordance with the Law.
3. if any of the reasons is established for which a rehearing of the trial can be requested.
4. if an invalidating fact in the award or the proceedings affects the award.

Requests for invalidation shall be filed in the normal manner to the Court originally given jurisdiction to examine the dispute, on payment of the prescribed fee. The litigant's waiver of his rights prior to the arbitrators' award being issued shall not prevent the request from being accepted.

Execution of the arbitrators' award shall be suspended once a claim has been submitted for its invalidation, unless the Court decides that execution shall continue.

Appendix H: Qatar

The Code of Civil and Commercial Procedure

Chapter 13 Arbitration

Article 190

In an arbitration agreement (Special Arbitration Deed), one may agree to arbitrate in a determined dispute. Likewise, one may agree to arbitrate all disputes arising out of performance of a determined contract.

An agreement to arbitrate may only be made in writing.

The subject-matter of the dispute must be determined in the agreement to arbitrate or during the proceedings, even if the arbitrators may settle the case as *amiables compositeurs*, else the arbitration may be set aside. There can be no arbitration in matters which the parties cannot settle amicably.

Arbitration is only valid if those persons who resort to it have the capacity to dispose of their rights.

Article 191

If arbitrators are to receive the mission to settle the case amicably between the parties, or to act as *amiables compositeurs*, they must be appointed by name in the agreement to arbitrate, or in a separate agreement.

Article 192

Signature of an arbitration clause entails waiver, by the parties, of their right to resort to the Court originally having jurisdiction over the dispute.

If a dispute arises concerning performance of a contract containing an arbitration clause, and if one of the parties refers to the Court originally having jurisdiction, the other party may request this claim to be held inadmissible due to the arbitration clause.

Article 193

The arbitrator may not be a minor, under custody or deprived from his civil rights due to a felony or bankruptcy, unless he is rehabilitated.

Should there be several arbitrators, the number thereof shall in all cases be uneven, else the arbitration is void.

Without prejudice to the provision of special laws, the arbitrators must be appointed by name in the agreement to arbitrate or in a separate agreement.

Article 194

The arbitrator's acceptance must be made in writing, unless he was appointed by the Court. If the arbitrator withdraws, without serious grounds, he may be liable in damages to the parties.

An arbitrator can only be dismissed by the mutual agreement of the parties, or by a Court decision.

Arbitrators may be challenged only for grounds which arise after signature of the agreement to arbitrate. The request for challenge must be made according to the same procedure, and upon the same grounds, as challenges of judges. The request for challenge must be made to the Court originally having jurisdiction over the dispute within five days following the date of the notification to the other party of the appointment of the arbitrator.

The Court's judgment in this respect is subject to appeal in compliance with the rules mentioned in Article 205.

Article 195

Should a dispute occur and the parties have not agreed upon arbitrators or should one or more of the arbitrators refrain from work, or withdraws or is dismissed, and if there is no agreement in this respect between the parties, the Court originally having jurisdiction over the dispute may appoint the required arbitrators following a request made by either party in conformity with normal proceedings for raising the relevant claim.

The Court examines this request in the presence of the other parties, or the absence thereof, after they have been summoned. The judgment of the court appointing the arbitrators is not subject to appeal. The judgment refusing to appoint arbitrators is subject to appeal in compliance with the rules foreseen in Article 205.

Article 196

Arbitral proceedings are stayed for the same reasons as those indicated in the Code of Procedure.

This suspension will have the same effects as those foreseen in this Code.

Article 197

The arbitrators must make their award within the time-period foreseen in the agreement to arbitrate, unless the parties accept an extension.

If no time-period was foreseen by the parties in the agreement to arbitrate, the arbitrators must make their award on the dispute within three months following the date of acceptance of their mission.

If the arbitrators do not make their award within the time foreseen in the agreement to arbitrate or that foreseen in the above-paragraph or for any reason of *force majeure*, each of the parties may refer the question to the Court originally having jurisdiction over the dispute, so that the time-period be extended, or the case settled, or other arbitrators appointed.

Should one of the parties die, or arbitrators be dismissed, or a challenge against an arbitrator be made, the time-period for making the award shall be extended by a period equivalent to the duration of the suspension resulting from one of these causes.

Article 198

Arbitrators make their award without being bound by the procedures foreseen in this Code, except those foreseen in the present Chapter. The award must comply with the

rules of law, unless the arbitrators are empowered to act as *amiables compositeurs*, and provided they do not violate the rules of public order and good morals.

If the agreement to arbitrate was made in Qatar, Qatari law is necessarily applicable to the element of the dispute, unless the parties agreed otherwise.

Article 199

If, during the arbitration, an interlocutory question arises, which is not of the jurisdiction of the arbitrators, if a question of forgery or any criminal difficulty arises, the arbitrators stay the proceedings until a final judgment is made in this respect.

Article 200

The arbitrators shall make their award on the basis of the agreement to arbitrate and the memoranda submitted by the parties, they must determine a time-period for the parties to discover all documents, memoranda and arguments.

The parties must present to the arbitrators all evidence, papers and documents at their disposal. They must perform any request made by the arbitrators.

The Arbitral Tribunal may request the Court originally having jurisdiction over the dispute, to make an injunction to a third party to produce any document necessary for the arbitration and held by this third party, or to summon a witness to appear before the Arbitral Tribunal to give a statement.

Witnesses may be heard under oath. Any person having given false witness statements before the Arbitral Tribunal shall be held to have committed the same felony before a Court of Law. The Court originally having jurisdiction over the dispute may, after having been notified by the Arbitral Tribunal, question such a person in this respect and summon him so that he be sentenced to the penalty legally foreseen.

Article 201

The parties shall refer to the Court originally having jurisdiction to:

1. sentence a witness refraining from appearing or replying, to the penalties foreseen in Chapter 3 of the Second Book of this Law;
2. order necessary rogatory commissions to settle the case.

Article 202

Arbitral awards are made at a majority. They must be in writing and must notably contain a copy of the agreement to arbitrate, a summary of the claims and arguments of the parties, the decision and reasons therefor, the indication of the date and place where they are made as well as the signature of the arbitrators.

If one or several arbitrators refuse to sign the award, this must be mentioned therein and the award is held to be valid if it was signed by the majority of arbitrators.

Arbitral awards are held to be made at the date at which they are signed by the arbitrators after having been drafted, even if this date precedes the date at which it is read to the parties or its filing.

Article 203

The original of all arbitral awards—even if made for investigation proceedings—must be filed with the clerk of the Court originally having jurisdiction over this dispute. It must be accompanied by the original of the agreement to arbitrate. This must be done within fifteen days following the making of the award.

The clerk of the Court shall make a record regarding this filing and notify copy thereof to the parties.

If the arbitration was made in appeal, this filing must be made with the clerk of the Court of Appeal.

Article 204

Arbitral awards are only enforceable upon leave to enforce granted by the President of the Court with whose clerk the award was registered upon request of the concerned party. This leave is granted after consideration of the award and the agreement to arbitrate and after having made sure that there is no obstacle against its enforcement. The leave to enforce shall be endorsed on the award. The enforcing judge has jurisdiction over all questions relating to enforcement.

Article 205

Arbitral awards are subject to appeal according to the rules foreseen for appeal against judgments made by the Court originally having jurisdiction over the dispute. Such an appeal must be made within fifteen days following the date of the filing of the original of the award with the clerk of the Court, and it must be made before the competent Court of Appeal.

However, the award is not subject to appeal if it was made by arbitrators acting as *amiables compositeurs* or arbitrators in appeal or if the parties explicitly waived their right to appeal.

Article 206

Except in the cases foreseen in Article 178 (5) and (6), arbitral awards are subject to a request for review according to the same rules as those foreseen for court decisions.

This request for review must be presented to the Court originally having jurisdiction over the dispute.

Article 207

Any interested party may request setting aside of arbitral awards in the following cases:

1. if the award was made without there being an agreement to arbitrate, or on the basis of a void or expired agreement to arbitrate, if the award is outside the scope of the agreement to arbitrate or if the award breaches one of the rules of public order or good morals;
2. if there was a breach of the provisions of paras. 3, 4 and 5 of Article 190, or para. 1 of Article 193;
3. if the award is made by arbitrators irregularly appointed, or if it was made by some arbitrators who could not make the award without the other arbitrators;

4. if the award is void or there was an error of procedure which affects the award.

Article 208

The request for setting aside must be made according to the formal rules normally applicable to the Court originally having jurisdiction over the dispute. Waiver of the right to have the award set aside, before such award is made, does not lead to the inadmissibility of such a request for setting aside.

The request for setting aside the award suspends enforcement thereof, unless the Court decides to continue enforcement.

Article 209

The court having jurisdiction over the request for setting aside may either confirm the award, or set the award aside totally or partially.

If the award is totally or partially set aside, the Court may refer the case back to the arbitrators to repair the violations contained in the award, or the Court may decide on the merits of the case itself if it holds that it has jurisdiction to do so.

Judgments thus made are not subject to “opposition.” However, they may be subject to appeal, under the legally foreseen conditions.

Article 210

Arbitrators fees are determined by the parties’ agreement, either in the agreement to arbitrate or a later agreement.

Failing this, they shall be determined by the Court originally having jurisdiction over the dispute, upon request of one of the interested parties, in the presence or absence of the others, once they have been summoned. The Court’s decision in this respect is final.

Chapter III On performance of judgments, decrees and foreign titles

Article 379

Judgments and decrees made in a foreign country may be performed in Qatar under the same conditions foreseen by the law of this foreign country for performance of Qatari judgments and decrees.

The request for performance must be referred to the judge of the court of first instance, by summoning the other party to appear, under the normal conditions for legal proceedings.

Article 380

Leave to enforce will only be granted after verification of the following:

1. that Qatari courts do not have exclusive jurisdiction over this dispute and that the court who made it has jurisdiction according to the international rules of jurisdiction foreseen in its law;
2. that the parties to the proceeding where the award was made were regularly summoned and represented;

3. that the judgment or award has become *res judicata* according to the law of the court which made it;
4. that the judgment or award is not contrary to a prior judgment made by a Qatari court and does not breach the rules of public order and good morals in Qatar.

Article 381

The provisions of the two above Articles are applicable to arbitral awards made in a foreign country. The award must be made in matters which, under the laws of the State of Qatar, are arbitrable.

Appendix I: Oman

The Law of Arbitration in Civil and Commercial Disputes

Part One – General Provisions

Article 1

Without prejudice to the provisions of international conventions in force in the Sultanate, the provisions of this Law shall have effect in relation to any arbitration between parties being persons of public or private law, whatever the nature of the legal relationship around which the dispute revolves, if such arbitration takes place in the Sultanate, or is an international commercial arbitration taking place abroad which the parties thereto have agreed to make subject to the provisions of this Law.

Article 2

An arbitration shall be commercial in terms of this Law if the dispute arises in respect of a legal relationship of an economic character, be it contractual or non-contractual. This shall for example include the supply of goods or services or commercial agencies, contracts for construction and engineering or technical know-how, the granting of industrial, tourism and other licences, the transfer of technology and investment, development contracts, banking, insurance and transportation operations, natural resources prospection and extraction operations, power supply, gas or oil pipelaying, the building of roads and tunnels, the reclamation of agricultural lands, the protection of the environment, and the setting-up of nuclear reactors.

Article 3

An arbitration shall be international in terms of this Law if its subject-matter is a dispute relating to international commerce in the following cases:

First: If the principal place of business of each of the two parties to the arbitration is situated in two different States at the time of the making of the agreement to arbitrate. If either party has more than one place of business, the place most closely associated with the subject-matter of the agreement to arbitrate shall be what is material, and if either party to the arbitration has no place of business, his place of ordinary residence shall be what is material.

Second: If the two parties to the arbitration agree to have resort to a permanent arbitral institution or to an arbitration centre having its official seat within the Sultanate of Oman or abroad.

Third: If the subject-matter of the dispute comprised within the agreement to arbitrate is associated with more than one State.

Fourth: If the principal place of business of each of the two parties to the arbitration is situated in the same State at the time of the making of the agreement to arbitrate, and one of the following places is situated outwith such State:

- a. the place where the arbitration takes place, as the agreement to arbitrate has designated or has intimated the method of designating the same;
- b. the place of performance of an essential aspect of the obligations arising under the

- commercial relationship between the two parties;
- c. the place most closely associated with the subject-matter of the dispute.

Article 4

1. In terms of this Law, the word “arbitration” shall mean arbitration upon which the two parties to the dispute have agreed of their autonomous volition, whether or not the body taking under its charge the arbitral procedures pursuant to the two parties' agreement is an institution or permanent centre for arbitration.
2. The expression “arbitral tribunal” shall mean the tribunal composed of one or more arbitrators for the determining of the dispute referred to arbitration, and the word “court” shall mean the Commercial Court or the Appellate Division thereof, as the case may be.
3. The expression “two parties to the arbitration” in this Law shall mean the parties to the arbitration, even if there is a number of them.

Article 5

In the cases where this Law allows the two parties to the arbitration the choice of the procedure to be followed in relation to any given matter, each of them may permit a third party to make the choice of such procedure, and in this regard any institution or centre for arbitration within or outwith the Sultanate of Oman shall be deemed to be a third party.

Article 6

1. The two parties to the arbitration shall have autonomy to stipulate the law which the arbitrators are required to apply to the subject-matter of the dispute.
2. If the two parties to the arbitration agree to make the legal relationship between them subject to the provisions of a model-format contract, an international convention or any other text, effect shall be given to the provisions of such text, including any provisions relating to arbitration which it contains.

Article 7

1. Unless there is specific agreement between the two parties to the arbitration, any letter or notification shall be delivered to the addressee in person, or at his place of work, or at his usual place of residence, or at his postal address known to the two parties or designated in the agreement to arbitrate or in the text regulating the relationship with which the arbitration is concerned.
2. If none of these addresses can be ascertained after the making of the requisite inquiries, delivery shall be deemed to have been effected if the notification is by registered letter to the addressee's last-known place of work, usual place of residence or postal address.
3. The provisions of this Article shall have no effect in relation to judicial notices of process before the court.

Article 8

If one of the two parties to the dispute continues to proceed with the arbitration while having knowledge that there has been non-compliance with a stipulation in the agreement to arbitrate, or with a provision of this Law where non-compliance is permissible by agreement, and does not raise objection to such non-compliance within the agreed time or within sixty days from the date of the knowledge where there is no agreement, the same shall be deemed a waiver by him of his right to object.

Article 9

Competence to adjudicate upon the arbitral matters which this Law remits to the Omani judicature shall lie with the Commercial Court. If however the arbitration is an international commercial one, whether taking place in Oman or abroad, the competence shall lie with the Appellate Division of such court.

Part Two – The Agreement to Arbitrate

Article 10

1. An agreement to arbitrate is an agreement whereby the two parties thereto decide to have resort to arbitration in order to settle any or some of the disputes which have arisen or are capable of arising between them in respect of a given legal relationship, whether contractual or non-contractual.
2. It shall be permissible for the arbitration to be in the form of an arbitration clause appearing in a given contract prior to the arising of the dispute, or in the form of a separate agreement made after the dispute has arisen, even if an action has already been brought in relation thereto before a judicial instance, and in such case the agreement shall specify the matters within the scope of the arbitration, failing which the agreement shall be a nullity.
3. Any reference appearing in the contract to a text containing an arbitration clause shall be deemed to be an agreement to arbitrate, if the reference is clear in holding such clause to be part of the contract.

Article 11

Agreement to arbitrate shall be permissible only for a natural or juristic person possessing capacity to dispose of his rights, and arbitration shall not be permissible for matters on which compromise is not permissible.

Article 12

An agreement to arbitrate shall be in writing, failing which it shall be a nullity. An agreement to arbitrate shall be in writing if it is contained in a document which the two parties have signed, or if it is contained in letters, telegrams or other written means of communication which the two parties have exchanged.

Article 13

1. A court before which is brought a dispute in respect of which an agreement to arbitrate subsists shall rule the action inadmissible if the defendant takes such plea prior to his seeking of any relief or remedy or presenting any defence in the action.

2. The bringing of the action referred to in the preceding paragraph shall not preclude the commencing of arbitral proceedings, the continuing of the same, or the rendering of the arbitral award.

Article 14

It shall be permissible for the court provided for in Article 9 of this Law to order, upon application by either of the two parties to the arbitration, the taking of interim or conservatory measures, whether before the commencing of the arbitral proceedings or while the same are in progress.

Part Three – The Arbitral Tribunal

Article 15

1. The arbitral tribunal shall be composed, by agreement of the two parties, of one or more arbitrators, and, if they do not agree upon the number of arbitrators, the number shall be three.
2. If there is a number of arbitrators, their number shall be odd, failing which the arbitration shall be a nullity.

Article 16

1. It shall not be permissible for an arbitrator to be a minor or a person under judicial restriction or deprived of his civil rights by reason of his having been convicted of an offence involving a violation of honour or trust, or by reason of his bankruptcy having been declared unless he has been rehabilitated.
2. An arbitrator shall not be required to be of any given gender or nationality, unless the two parties to the arbitration agree, or the law provides, otherwise.
3. An arbitrator's acceptance to undertake his mandate shall be in writing. On his acceptance he shall disclose any circumstances such as to give rise to doubts as to his independence or impartiality. If any such circumstances come into being subsequent to his appointment or during the arbitration proceedings, he shall of his own accord declare the same to the two parties to the arbitration and the other arbitrators.

Article 17

1. The two parties to the arbitration shall be at liberty to agree upon the choice of the arbitrators, and upon the manner and the time of the choosing of the same. If they do not agree, the procedure shall be as follows.
 - a. If the arbitral tribunal is composed of a sole arbitrator, the President of the Commercial Court shall proceed to choose him upon application by either of the two parties.
 - b. If the arbitral tribunal is composed of three arbitrators, each party shall choose an arbitrator, then the two arbitrators shall agree upon the choice of the third arbitrator. If either of the two parties does not appoint his arbitrator within the thirty days following his receipt of a request therefor from the other party, or if the two arbitrators appointed do not agree upon the choice of the third arbitrator within the thirty days following the date of the appointment of the second of them, the President of the Commercial Court shall proceed to choose him upon application by either of the two parties.

The arbitrator who is chosen by the two appointed arbitrators, or who is chosen by the President of the Court, shall have the presidency of the arbitral tribunal. These provisions shall have effect in the event that the arbitral tribunal is composed of more than three arbitrators.

2. If either of the two parties breaches the procedures which both have agreed for the choosing of arbitrators, or they do not agree, or the two appointed arbitrators do not agree upon any matter requiring their agreement, or if a third party fails to perform that with which he has been entrusted in this regard, the President of the Commercial Court shall upon application by either of the two parties proceed to effect the act or action required, unless there is provision in the agreement for other means for the accomplishing of such act or action.

3. In the arbitrator whom he chooses, the President of the Court shall respect the conditions demanded by this Law and those which the two parties have agreed upon, and he shall render his decision choosing the arbitrator on an expedited basis. Without prejudice to the provisions of Articles 18 and 19 of this Law, such decision shall not be appealable in any manner whatsoever.

Article 18

1. It shall not be permissible for an arbitrator to be challenged unless there be circumstances giving rise to serious doubts as to his impartiality or independence.

2. It shall not be permissible for either of the two parties to the arbitration to challenge an arbitrator whom he has appointed or in whose appointment he has participated save for a reason of which he becomes aware after such appointment has been made.

Article 19

1. An application by way of challenge shall be submitted in writing to the arbitral tribunal setting forth the grounds for the challenge within fifteen days from the date the applicant making the challenge had knowledge of the composition of such tribunal or of the circumstances justifying the challenge. If the arbitrator under challenge does not withdraw, the arbitral tribunal shall rule on the challenge.

2. An application by way of challenge from a person who has previously submitted an application by way of challenge of the same arbitrator in the same arbitration shall be inadmissible.

3. An applicant by way of challenge may appeal against a ruling dismissing his application within thirty days from the date of his notification thereof to the court referred to in Article 9 of this Law, and its judgment shall not be appealable in any manner.

4. The submitting of an application by way of challenge, or the appealing of an arbitral ruling dismissing it, shall not cause the arbitral proceedings to be stayed. If either the arbitral tribunal or the court hearing the appeal rules that the arbitrator be removed, this shall cause any arbitral proceedings already effected, including the award of the arbitrators, to be deemed as if they never had been.

Article 20

If an arbitrator is unable to perform his mandate, or does not proceed with it, or ceases to perform it in such manner as leads to unjustifiable delay in the arbitral proceedings, and if he does not withdraw and the two parties do not agree on his removal, it shall be

permissible for the President of the Commercial Court to order that his mandate be terminated, on application by either of the two parties.

Article 21

If an arbitrator's mandate terminates by his removal, by his being withdrawn, by a ruling upholding a challenge against him, or for any other reason, a substitute for him shall be appointed pursuant to the procedures which were followed in choosing the arbitrator whose mandate has terminated.

Article 22

1. The arbitral tribunal shall rule on pleas as to it not having competence, including pleas founded on there being no agreement to arbitrate or the lapsing or nullity of the same, or on it being insufficient in scope for the subject-matter of the dispute.

2. Such pleas shall be taken at a time not later than the time of submitting the respondent's defence referred to in the second paragraph of Article 30 of this Law. The appointment, or participation in the appointment, of an arbitrator by either of the two parties to the arbitration shall not cause his right to raise any such plea to lapse. As to the plea that the agreement to arbitrate is insufficient in scope, in relation to matters raised by the other party while the dispute is pending, the same shall be taken immediately, failing which the right to do so shall lapse. It shall in any event be permissible for the arbitral tribunal to admit a late plea if it considers the delay to have been for an acceptable reason.

3. The arbitral tribunal shall rule on the pleas referred to in the first paragraph of this Article prior to determining the substantive issues, and it shall be permissible for it to join them with the substantive issues in order to determine them together. If it dismisses the plea, the maintaining of the same shall only be permissible by way of action raised for annulment of the arbitral award terminating the proceedings as a whole pursuant to Article 53 of this Law.

Article 23

An arbitration clause shall be deemed to be an agreement independent from the other stipulations of the contract. The nullity, rescission or termination of the contract shall not cause the arbitration clause incorporated in it to be affected, if such clause is in itself valid.

Article 24

1. It shall be permissible for the two parties to the arbitration to agree that the arbitral tribunal have the power to order, upon application by either of them, that either of them take, as it sees fit, interim or conservatory measures necessitated by the nature of the dispute, and to require the furnishing of adequate security to cover the costs of the measure which it orders.

2. If a person in respect of whom an order is made fails to comply with it, it shall be permissible for the arbitral tribunal, upon application by the other party, to grant leave to that party to take the procedures necessary for compliance with the same, this being without prejudice to the right of such party to apply to the President of the Commercial Court for an order for compliance.

Part Four – Procedure in the Arbitration

Article 25

The two parties to the arbitration shall be at liberty to agree upon the procedure to be followed by the arbitral tribunal, including their right to make such procedure subject to the rules in force in any arbitral organization or centre in the Sultanate of Oman or abroad. If there is no such agreement, the arbitral tribunal shall be at liberty, subject to the provisions of this Law, to choose the arbitration procedure it deems appropriate.

Article 26

The two parties to the arbitration shall be afforded parity of treatment, and each of the two shall be given equal and full opportunity to present his case.

Article 27

The arbitral proceedings shall commence from the day upon which the respondent receives the request for arbitration from the claimant, unless the two parties agree upon a different date.

Article 28

The two parties to the arbitration shall be at liberty to agree upon the place of arbitration within the Sultanate of Oman or abroad. If there is no agreement, the arbitral tribunal shall appoint the place of arbitration, having regard to the circumstances of the case and the suitability of the place for the parties thereto.

This shall not derogate from the power of the arbitral tribunal to convene in any place it deems appropriate to undertake any arbitral procedure, such as the oral hearing of the parties to the dispute, witnesses or experts, the sighting of documents, the viewing of merchandise or property, the conducting of deliberations amongst its members, or otherwise.

Article 29

1. The arbitration shall proceed in the Arabic language, unless the two parties agree, or the arbitral tribunal specifies, another language or languages. That which is laid down in the agreement or the decision shall also have effect in relation to the language of written statements and memoranda, and to oral submissions, and likewise to any decision such tribunal takes, any letter it sends, or any award it renders, unless the agreement of the two parties or a decision by the arbitral tribunal, provides otherwise.

2. The arbitral tribunal shall be at liberty to rule that all or part of the written documentation submitted in the case be accompanied by a translation into the language or languages used in the arbitration. In the event of there being a number of such languages, it shall be permissible to restrict the translation to certain of them.

Article 30

1. Within the time agreed upon between the two parties, or that which the arbitral tribunal appoints, the claimant shall send to the respondent and to each of the arbitrators a written statement of his case, to include his name and his address, the name of the respondent and his address, an exposition of the facts of the case, an identification of the matters in dispute, the relief or remedies he seeks, and any other matter which the agreement of the two parties requires to be mentioned in such statement.

2. Within the time agreed upon between the two parties, or that which the arbitral tribunal appoints, the respondent shall send to the claimant and to each of the arbitrators a written memorandum of his defence, replying to what appears in the statement of case. He shall be at liberty to include within such memorandum any incidental relief or remedy sought in connection with the subject-matter of the dispute, or to assert a right arising therefrom with the object of claiming a set-off. He shall be at liberty to do so even at a subsequent stage in the proceedings if the arbitral tribunal deems that the circumstances justify the delay.

3. It shall be permissible for each of the two parties to attach to the statement of case or the memorandum of defence, as the case may be, copies of the documentation upon which he relies, and to refer to all or some of the documentation and evidential materials which he proposes to adduce. This shall not prejudice the right of the arbitral tribunal to require, at any stage the case has reached, the production of the originals of the documents or documentation upon which either of the two parties to the case relies.

Article 31

A copy of any memorandum, document or other documentary material which either of the two parties submits to the arbitral tribunal shall be sent to the other party. There shall likewise be sent to each of the two parties a copy of all experts' reports, documents and other evidential items submitted to such tribunal.

Article 32

Each of the two parties to the arbitration shall be at liberty to amend or supplement the relief or remedy he seeks or his defences during the arbitral proceedings, unless the arbitral tribunal rules the same inadmissible in order to prevent delay in the determining of the dispute.

Article 33

1. The arbitral tribunal shall hold hearings for the making of oral submissions in order to enable each of the two parties to explain the subject-matter of the case and present his arguments and evidence, and it shall be at liberty to require no more than the submitting of written memoranda and documentation unless the two parties otherwise agree.

2. The two parties to the arbitration shall be notified of the dates of the hearings and meetings which the arbitral tribunal decides to hold, prior to the date set by it therefor by such period as such tribunal determines in the circumstances to be sufficient.

3. A summary of what takes place at each hearing held by the arbitral tribunal shall be recorded in minutes a copy of which shall be delivered to each of the two parties, unless they agree otherwise.

4. Witnesses and experts shall be heard unsworn.

Article 34

1. If the claimant does not without acceptable cause submit a written statement of his case in accordance with the first paragraph of Article 30 of this Law, the arbitral tribunal shall order that the arbitral proceedings be terminated, unless the two parties otherwise agree.
2. If the respondent does not submit a memorandum of his defence in accordance with the second paragraph of Article 30 of this Law, the arbitral tribunal shall continue with the arbitral proceedings, without that in itself being deemed an admission by the respondent of the claimant's case, unless the two parties otherwise agree.

Article 35

If either of the two parties fails to appear at any hearing, or to submit any document requested of him, it shall be permissible for the arbitral tribunal to continue with the arbitral proceedings and render an award upon the dispute on the basis of such evidence as is before it.

Article 36

1. It shall be permissible for the arbitral tribunal to appoint one or more experts to submit a written or oral report to be recorded in the minutes of the hearing, in relation to specific issues designated by it. Each of the two parties shall be sent a copy of its decision specifying the task entrusted to the expert.
2. Each of the two parties shall provide the expert with the information relating to the dispute, and shall make it possible for him to view and examine any documentation, merchandise or other property which he requests relating to the dispute. The arbitral tribunal shall determine any dispute arising between either of the two parties and the expert in this regard.
3. The arbitral tribunal shall send a copy of the expert's report forthwith upon the submitting of the same to each of the two parties, giving him the opportunity to express his views thereon. Each party shall have the right to sight the documentation upon which the expert relies in his report, and to examine the same.
4. After the submitting of the expert's report, it shall be permissible for the arbitral tribunal to decide, of its own motion or upon application by either of the two parties to the arbitration, to hold a hearing to hear what the expert has to say, giving the opportunity to the two parties to hear him and take up with him what is stated in his report. Each of the two parties shall be at liberty to produce at this hearing one or more experts from his own side in order to express a view upon the issues addressed in the report of the expert appointed by the arbitral tribunal, unless the two parties to the arbitration agree otherwise.

Article 37

The President of the Commercial Court shall, upon application by the arbitral tribunal, have competence as to the following:

- a. To fine any witness who fails to appear or refuses to answer not less than five ryals and not more than twenty ryals, by unappealable decision possessing such force in relation to enforcement as judgments possess.
- b. To order judicial deputisation.

Article 38

Proceedings before the arbitral tribunal shall be suspended in such cases and on such terms as are prescribed by law.

Part Five – The Arbitral Award and the Termination of Proceedings

Article 39

1. The arbitral tribunal shall apply to the subject-matter of the dispute the rules which the two parties agree upon. If they agree upon the application of the law of a given State, the substantive rules thereof shall be followed, and not the rules as to conflict of laws, unless otherwise agreed.
2. If the two parties do not agree on the legal rules to be applied to the subject-matter of the dispute, the arbitral tribunal shall apply the substantive rules of the law which it considers the most closely connected with the dispute.
3. In deciding the subject-matter of the dispute the arbitral tribunal shall observe the stipulations of the contract in dispute, and current custom.
4. It shall be permissible for the arbitral tribunal, if the two parties to the arbitration have expressly agreed to empower it to effect a compromise, to decide upon the subject-matter of the dispute in accordance with the rules of justice and equity, without being bound by the provisions of the law.

Article 40

The award of an arbitral tribunal composed of more than one arbitrator shall be rendered in terms of the majority of the opinions, after deliberation taking place in the manner determined by the arbitral tribunal, unless the two parties to the arbitration agree otherwise.

Article 41

If during the arbitral proceedings the two parties agree upon a settlement which ends the dispute, they shall be at liberty to request that the terms of the settlement be recorded by the arbitral tribunal, which shall, in such event, render a decision incorporating the terms of the settlement and terminating their proceedings. Such decision shall have such force in relation to enforcement as arbitrators' awards have.

Article 42

It shall be permissible for an arbitral tribunal to render awards which are interim or on part of the relief and remedies sought, prior to the rendering of the award ending the dispute as a whole.

Article 43

1. An arbitral award shall be rendered in writing and the arbitrators shall sign it. In the event that the arbitral tribunal is composed of more than one arbitrator, the signatures of the majority of the arbitrators shall suffice, provided that the reasons why the minority did not sign are recorded in the award.

2. An arbitral award shall state reasons, unless the two parties to the arbitration have agreed otherwise, or the law to be applied to the arbitral procedure does not require mention of the reasons for the award.

3. The arbitral award shall include the names of the parties and their addresses, the names of the arbitrators and their addresses, their nationalities and their capacities, the text of the agreement to arbitrate, a summary of the relief and remedies sought by the parties and their submissions and documents, the operative words of the award, the date and place it is rendered, and the reasons therefor if mention thereof is required.

Article 44

1. The arbitral tribunal shall deliver to each of the two parties a copy of the arbitral award signed by the arbitrators approving the same within thirty days from the date it is rendered.

2. It shall not be permissible to publish the arbitral award or parts thereof save with the consent of the two parties to the arbitration.

Article 45

1. The arbitral tribunal shall render the award ending the dispute as a whole within the period which the two parties agree. If there is no agreement, the award shall be rendered within twelve months from the date of commencement of the arbitral proceedings. In all events it shall be permissible for the arbitral tribunal to decide to extend the period, but no extension shall exceed six months unless the two parties agree a period in excess of that.

2. If the arbitral award is not rendered within the period referred to in the preceding paragraph, it shall be permissible for either of the two parties to the arbitration to apply to the President of the Commercial Court for the making of an order setting an additional period or terminating the arbitral proceedings, whereupon either of the two parties shall be at liberty to bring his case before the court ordinarily competent to adjudicate thereon.

Article 46

If during the arbitral proceedings an issue arises which goes beyond the arbitral tribunal's jurisdiction or if a document submitted to it is impugned for forgery, or criminal proceedings are taken in respect of the forging thereof or in respect of another criminal act, it shall be permissible for the arbitral tribunal to continue to adjudicate upon the subject-matter of the dispute if it considers that a determination upon such issue, or the forgery of the document, or the other criminal act, is not necessary in order to determine the subject-matter of the dispute, but otherwise it shall stay proceedings until a final judgment is rendered in regard to the same, and this shall cause the running of the time set for the rendering of the arbitral award to be halted.

Article 47

A person in whose favour an arbitral award is rendered shall deposit the original of the award, or a signed copy thereof in the language in which it was rendered, or a translation in the Arabic language certified by approved authority if it was rendered in a foreign language, with the registry of the court referred to in Article 9 of this Law.

The registrar of the court shall draw up a minute of such deposit, and it shall be permissible for each of the two parties to the arbitration to bespeak a copy of such minute.

Article 48

1. Arbitral proceedings shall terminate upon the rendering of the award ending the dispute as a whole, or upon the making of an order terminating the arbitral proceedings in accordance with the second paragraph of Article 45 of this Law. They shall also terminate upon the rendering of a decision by the arbitral tribunal terminating the proceedings in the following cases:

- a. If the two parties agree to terminate the arbitration.
- b. If the claimant abandons the dispute under arbitration, unless the arbitral tribunal decides, upon application by the respondent, that he has a legitimate interest in the continuation of the proceedings until the dispute is decided upon.
- c. If for any other reason the arbitral tribunal considers that the continuation of the arbitral proceedings is futile or impossible.

2. Without prejudice to the provisions of Articles 49, 50 and 51 of this Law, the mandate of the arbitral tribunal shall terminate upon the termination of the arbitral proceedings.

Article 49

1. It shall be permissible for each of the two parties to the arbitration to apply to the arbitral tribunal within the thirty days following his receipt of the arbitral award for interpretation of any obscurity present in the operative words thereof. An applicant for interpretation shall notify the other party of such application before it is submitted to the arbitral tribunal.

2. The interpretation shall be issued in writing within the thirty days following the date of submitting the application for interpretation to the arbitral tribunal. It shall be permissible for such tribunal to extend such period by thirty further days if it considers the same to be necessary.

3. An award rendered by way of interpretation shall be considered as complementing the arbitral award which it interprets, and shall be governed in like manner.

Article 50

1. The arbitral tribunal shall undertake the correction of any purely material errors of a clerical or arithmetical character occurring in its award, by decision rendered of its own motion or upon application of one of the parties. The arbitral tribunal shall effect the correction without receiving oral submissions within the thirty days following the date of the rendering of the award or the lodging of the application for correction, as the case may be. It shall be at liberty to extend the period by thirty further days if it considers the same to be necessary.

2. The decision by way of correction shall be rendered in writing by the arbitral tribunal, and shall be notified to the two parties within thirty days from the date it is rendered. If the arbitral tribunal exceeds its power to correct, the nullity of such decision

may be asserted in an action for annulment governed by the provisions of Articles 53 and 54 of this Law.

Article 51

1. It shall be permissible, even after the arbitration period has ended, for each of the two parties to the arbitration to apply to the arbitral tribunal within the thirty days following his receipt of the arbitral award for an additional arbitral award to be rendered in respect of relief or remedies sought during the proceedings and omitted from the arbitral award. Such application shall be notified to the other party before it is submitted.

2. The arbitral tribunal shall render its award within sixty days from the date of the submitting of the application, and it shall be permissible for it to extend such period by thirty further days if it considers the same to be necessary.

Part Six – Nullity of the Arbitral Award

Article 52

1. No arbitral award rendered in accordance with the provisions of this Law shall be appealable by any of the modes of appeal prescribed by law.

2. It shall be permissible to bring an action to annul an arbitral award in accordance with the provisions appearing in the following Articles.

Article 53

1. No action for annulment of an arbitral award shall be admissible save in the following cases.

a. If there is no agreement to arbitrate, or such agreement is void or voidable, or has lapsed upon the expiry of its duration.

b. If the capacity of either of the two parties to the agreement to arbitrate at the time of the making thereof was lacking or defective in accordance with the law governing his capacity.

c. If either of the two parties to the arbitration was unable to present his case as result of not being properly notified as to the appointment of an arbitrator or the arbitral proceedings or for any other reason beyond his control.

d. If the arbitral award failed to apply the law which the parties agreed to apply to the subject-matter of the dispute.

e. If the composition of the arbitral tribunal or the appointment of the arbitrators took place in a manner contrary to law or the agreement of the two parties.

f. If the arbitral award determined issues beyond the scope of the agreement to arbitrate or exceeded the limits of such agreement. If however it is possible to sever the parts of the award relating to issues which were subject to arbitration from the parts of it relating to issues not subject thereto, the latter parts alone shall be annulled.

g. If nullity is present in the arbitral award, or the arbitral proceedings were void in a manner affecting the award.

2. A court adjudicating upon an action for annulment shall of its own motion annul the arbitral award if there is any thing in it contrary to public order in the Sultanate of Oman.

Article 54

1. An action for annulment of an arbitral award shall be brought within the ninety days following the date of notification of the arbitral award to the person against whom it is rendered. The action for annulment shall not be inadmissible by reason of the party claiming annulment having waived his right to bring such action prior to the rendering of the arbitral award.
2. Competence in regard to an action for annulment shall lie with the Appellate Division of the Commercial Court referred to in Article 9 of this Law.

Part Seven – Recognition and Enforcement of Arbitrators’ Awards

Article 55

Arbitrators’ awards rendered in accordance with this Law shall have the force of res judicata, and shall be enforced in conformity with the provisions appearing in this Law.

Article 56

Competence to make an order enforcing an arbitrators’ award shall lie with the President of the Commercial Court or the judge therein whom he delegates. An application for enforcement of the award shall be submitted with the following attached thereto.

1. The original of the award or a signed copy thereof.
2. A copy of the agreement to arbitrate.
3. A translation of the arbitral award into the Arabic language certified by approved authority, if it was not rendered in that language.
4. A copy of the minute evidencing deposit of the award pursuant to Article 47 of this Law.

Article 57

The bringing of an action for annulment shall not cause enforcement of the arbitral award to be stayed. It shall however be permissible for the court to order a stay of enforcement if the plaintiff applies for the same in the statement of claim and the application is founded on serious grounds. The court shall rule on the application for a stay of enforcement within sixty days from the date of the first hearing set for the same to be considered. If it orders a stay of execution, it shall be permissible for it to order the furnishing of a guarantee or security for property. It shall, if it orders a stay of enforcement, determine the action for annulment within six months from the date of making such order.

Article 58

1. Enforcement of an arbitral award shall not be admissible if the time for bringing an action for annulment of the award has not expired.
2. It shall not be permissible to order enforcement of an arbitral award pursuant to this Law without the following having first been ascertained.
 - a. That it does not conflict with a judgment previously rendered by the Omani courts

- upon the subject-matter of the dispute.
 - b. That there is not any thing in it contrary to public order in the Sultanate of Oman.
 - c. That it was properly notified to the person against whom it is rendered.
3. It shall not be permissible to appeal against an order rendered enforcing an arbitral award. However as regards an order rendered refusing enforcement, it shall be permissible to appeal against it within thirty days from the date it was rendered, to the court referred to in Article 9 of this Law.

Appendix J: The UAE

The UAE Civil Procedure Code, Federal Law No. (11) Of 1992 Chapter Three

ARBITRATION

Article (203)

1. The parties to a contract may generally stipulate in the basic contract or by a supplementary agreement that any dispute arising between them in respect of the performance of a particular contract shall be referred to one or more arbitrators and may also agree to refer certain disputes to arbitration under special conditions.
2. No agreement for arbitration shall be valid unless evidenced in writing.
3. The subject of the dispute shall be specified in the terms of reference or during the hearing of the suit even if the arbitrators were authorized to act as amiable compositors; otherwise the arbitration shall be avoid.
4. Arbitration shall not be permissible in matters, which are not capable of being reconciled. An arbitration agreement may be made only by the parties who are legally entitled to dispose of the disputed right.
5. If the parties to a dispute agree to refer the dispute to arbitration, no suit may be filed before the courts. Notwithstanding the foregoing, if one of the parties files a suit, irrespective of the arbitration provision, and the other party does not object to such filing at the first hearing, the suit may be considered, and in such case, the arbitration provision shall be deemed cancelled.

Article (204)

1. If a dispute arises between the parties prior to the execution of an agreement between them to refer the same to arbitration, or if one or more of the nominated arbitrators refuses to act as such, withdraws, is dismissed, has his appointment revoked, or is prevented from acting due to an encumbrance, and no agreement exists between the parties in this respect, the court which has jurisdiction to consider the dispute shall appoint the necessary number of arbitrators at the request of one of the parties filed in the normal procedure for filing a suit. The number of arbitrators appointed by the court shall be equal, or complementary, to the number agreed between the parties to the dispute.
2. The court's decision in respect of the foregoing may not be contested in any way whatsoever.

Article (205)

1. Unless their names are specifically mentioned in the arbitration agreement or a subsequent document, arbitrators may not be authorized to act as amiable compositors.

Article (206)

1. An arbitrator may not be a minor, bankrupt, legally incapacitated or deprived of his civil rights due to a criminal offence unless he has been rehabilitated.
2. If there are more than one arbitrators, the number shall, at all times be odd.

Article (207)

1. The acceptance of the appointment of an arbitrator shall be in writing or may be evidenced by recording the same in the minutes of the sessions.
2. If an arbitrator, after having accepted his appointment, withdraws without good reason, he may be held liable for compensation.
3. No arbitrator may be removed except with the approval of all the parties to the dispute. However, if it is established that the arbitrator has willfully neglected to act in accordance with the terms of reference, despite a written notice to him in this respect, the court which had jurisdiction to consider the dispute may, at the request of one of the parties, dismiss the arbitrator and order a replacement in the same manner as he was originally appointed.
4. An arbitrator may not be disqualified except for reasons occurring or appearing after his appointment. A request for disqualification must be based on the same grounds on which a judge may be dismissed or deemed unfit for passing judgement. The request for disqualification shall be filed with the court which has jurisdiction to consider the dispute within five days from notifying the parties of the appointment of the arbitrator or from the date on which the reason for disqualification arose or from the time it became known if subsequent to the notification of the appointment of the arbitrator. In all events, the request for disqualification shall not be granted if the court has already passed a judgement or if the hearing of pleadings has been concluded.

Article (208)

1. Within a maximum period of thirty days from the acceptance of his appointment, the arbitrator shall, without the need to comply with the rules provided under this Law in respect of serving of notices, notify the parties to the dispute of the date of the first hearing scheduled for consideration of the dispute and the venue thereof. The arbitrator shall fix a date for the parties to the dispute to submit their documents, memoranda and pleadings.
2. A decision may be issued on the basis of the documents submitted by only one of the parties to the dispute if the other party fails to submit his documents within the time specified.
3. If there shall be more than one arbitrator, they shall jointly conduct the investigation and each of them shall sign the minutes of sessions.

Article (209)

1. The hearing of a dispute before the arbitrator shall terminate if a reason for such termination, as stipulated under this Law, exists. Unless the matter has been reserved for award, such termination shall have the legal effects stipulated under the law.
2. If, during the course of arbitration, a preliminary issue, which is outside the powers of the arbitrator, arises or if a challenge has been filed that a document has been counterfeited, or if criminal proceedings have been taken regarding such counterfeiting or for any other criminal act, the arbitrator shall suspend the proceedings until a final judgement on the same has been passed. In addition, the arbitrator shall suspend the proceedings to refer to the President of the competent court the following:
 - a. To pass a judgement in accordance with the law to penalize any witness who fails to appear or refuses to give statement.
 - b. To order a party to submit any documents in its possession which are necessary for the issue of the arbitration award.
 - c. To decide on evidence by commission.

Article (210)

1. If the parties to the dispute did not specify in the arbitration agreement a date for the issue of the award, the arbitrator shall pass his award within six months from the date of the first arbitration session; otherwise any of the parties shall be entitled to refer the dispute to the court or, if a suit has already been filed, to proceed with the same before the court.
2. The parties to the dispute may, expressly or impliedly, agree to extend the date fixed by agreement or under the law and may authorize the arbitrator to extend the same for a specified period. The court may, at the request of the arbitrator or one of the parties, extend the period specified under the above paragraph for such a period, as the court may deem sufficient to decide on the dispute.
3. The period specified as aforesaid shall cease to run whenever the arbitration is discontinued or terminated before the arbitrator and shall recommence from the date on which the arbitrators are notified of the removal of the reason for which the dispute was discontinued or terminated. If the remaining period is less than a month, it shall be extended to one full month.

Article (211)

1. The arbitrators shall cause the witnesses to take oath. Whoever makes a false statement before the arbitrators shall be deemed to have committed the crime of perjury.

Article (212)

1. The arbitrator shall issue his award without being bound by any procedures other than those stipulated in this Chapter and those pertaining to calling of the parties, hearing of their pleas and enabling them to submit their documents. Notwithstanding the foregoing, the parties to the dispute may agree on certain procedures to be followed by the arbitrator.
2. The arbitrators award shall be in conformity with the provisions of law unless the arbitrator was authorized to reconcile the dispute, in which event he shall not be bound to comply with such rules except in matters which concern public order.
3. The special rules pertaining to immediate enforcement shall apply to arbitration awards.
4. The arbitrators' award shall be issued within the United Arab Emirates; otherwise, the rules applicable to arbitration awards passed in foreign countries shall apply thereto.
5. The arbitrators' award shall be passed by a majority and shall be made in writing and accompanied by the dissenting vote. In particular, the award shall contain a copy of the arbitration agreement, a summary of the statements of the parties, their documents, the grounds and context of the award, the date and place of issue and the signatures of the arbitrators. Should one or more arbitrators refuse to sign the award, such refusal shall be stated in the award; provided, however, that the award shall be valid if signed by a majority of the arbitrators.
6. Unless otherwise agreed between the parties to the dispute, the award shall be in the Arabic language; otherwise, the award shall, at the time of filing, be accompanied by a legalized translation thereof.
7. The award shall be deemed to have been issued from the date of signing the same by the arbitrators.

Article (213)

1. When arbitration is conducted through court, the arbitrators shall, within fifteen days following the issue of their award, file with the competent court the award together with the original terms of reference, minutes of sessions and documents. They shall also file with the court a copy of the award to be delivered to each of the parties within five days from the date of filing of the original copy thereof. The court clerk shall prepare a report on the said filing to be submitted to the judge or the head of the department, as the case may be, so as a hearing may be convened within fifteen days for the purpose of approving the award. The parties of the dispute shall be notified of the date fixed for the hearing as aforesaid.
2. Where the arbitration is conducted in connection with an appeal suit, the filing shall be made with the court, which has jurisdiction to consider the appeal.
3. Where arbitration is conducted between the parties to a dispute outside the court, the arbitrators shall provide each party with a copy of their award within five days from the date of the issue of the same. The court shall, at the request of one of the parties filed within the normal course of filing the suit, consider whether the award shall be approved or nullified.

Article (214)

1. While considering the request for approving the arbitrators' award, the court may refer the same back to the arbitrators to reconsider any issues which they have omitted or to clarify the award if it was not specific to the extent that the enforcement of the same is not possible. Unless otherwise decided by the court, the arbitrators shall, in both cases, issue their revised award within three months from the date of their notification of the court's decision.
2. The decision of the court may not be contested except upon the passing of the final judgment in respect of the approving or nullifying of the award.

Article (215)

1. The arbitrators' award may not be enforced unless the same has been approved by the court with which the award was filed; provided that the court has reviewed the award and the terms of reference and ensured that there is no encumbrance to such enforcement. The said court shall, at the request of one of the parties concerned, correct the material errors in the arbitrators award in accordance with the legally prescribed manners applicable to correction of errors.

Article (216)

1. The parties to a dispute may, at the time of consideration of the arbitrators award, request the nullification of the same in the following events:
2. If the award was issued without, or was based on invalid terms of reference or an agreement which has expired by time prescription, or if the arbitrator has exceeded his limits under the terms of reference.
3. If the award was issued by arbitrators who were not appointed in accordance with the law, or by only a number of the arbitrators who were not authorized to issue the award in the absence of the others, or if it was based on terms of reference in which the dispute was not specified, or if it was issued by a person who is not competent to act as an arbitrator or by an arbitrator who does not satisfy the legal requirements.
4. If the award of the arbitrators or the arbitration proceedings become void and such voidness affected the award.
5. A request for nullification of the award shall not be rejected on the grounds of a waiver by a party of its right to the same prior to the issue of the award.

Article (217)

1. The award of the arbitrators may not be contested by any manner of appeal.
2. The judgement approving the arbitrators' award may be contested in any of the appropriate manners of appeal.
3. Notwithstanding the preceding paragraph, the award shall not be appealable if the arbitrators were authorized to reconcile the dispute or, if the parties have

expressly waived their rights to file an appeal or if the disputed amount was not in excess of Dirhams ten thousand.

Article (218)

1. The arbitrators shall estimate their fees and arbitration expenses and may decide that such amount, in whole or in part, be borne by the party against whom the award was issued. The court may, at the request of one of the parties, amend the said estimation taking into account the efforts of the arbitrators and the nature of the dispute.

Chapter (IV)

"Execution of Foreign Judgments"

Article (235)

1. Judgments and orders passed in a foreign country may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state.
2. Petition for execution order shall be filed before the Court of First Instance under which jurisdiction execution is sought under lawsuit filing standard procedures. Execution may not be ordered unless the following was verified:-
 - a. State courts have no jurisdiction over the dispute on which the judgment or the order was passed and that the issuing foreign courts have such jurisdiction in accordance with the International Judicial Jurisdiction Rules decided in its applicable law.
 - b. Judgment or order was passed by the competent court according to the law of the country in which it was passed.
 - c. Adversaries in the lawsuit on which the foreign judgment was passed were summoned and duly represented.
 - d. Judgment or order had obtained the absolute degree in accordance with law of the issuing court.
 - e. It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order.

Article (236)

1. Provisions of the preceding Article shall apply to the arbitration decision passed in foreign countries. Arbitration decisions must be passed on a matter which may be decided on by arbitration according to the law of the country and must be enforceable in the country it was passed in.

Appendix K: Saudi Arabia

Arbitration Regulation of Saudi Arabia 25 April 1983

Article 1

The parties may agree to arbitrate a specific existing dispute; a prior agreement to arbitrate may also be made in respect of any dispute resulting from the performance of a specific contract.

Article 2

Arbitration shall not be permitted in cases where a settlement (Arabic: *sulh*) is not allowed. An agreement to arbitrate (Arabic: *al-ittifaq ala al-tahkim*) may not be made except by those who have capacity to act.

Article 3

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. This ruling may be amended by resolution of the Council of Ministers.

Article 4

The arbitrator shall have expertise and be of good conduct and behaviour, and shall have full legal capacity. If there are several arbitrators, their number shall be uneven.

Article 5

The parties to the dispute shall file the arbitration instrument (Arabic: *wathiqat al-tahkim*) 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.

Article 6

The Authority originally competent to hear the dispute shall record the applications for arbitration submitted to it, and take a decision approving the arbitration instrument (Arabic: *wathiqat al-tahkim*).

Article 7

If the parties have agreed to arbitrate before the occurrence of the dispute, or if the arbitration instrument relating to a specific existing dispute has been approved, then the subject matter of the dispute shall be heard only according to the provisions of this Regulation.

Article 8

The clerk of the Authority originally competent to hear the dispute shall be in charge of all the notifications and notices provided for in this Regulation.

Article 9

The arbitrators' decision shall be taken within the time limit specified in the arbitration instrument (Arabic: *wathiqat al-tahkim*), unless it is agreed to extend it. If the parties have not fixed in the arbitration instrument a time limit for the decision, the arbitrators shall take their decision within ninety days from the date on which the arbitration instrument was approved; otherwise any of the parties may, if he so desires, appeal to the Authority originally competent to hear the dispute which shall decide either hearing the subject matter or extending the time limit for another period.

Article 10

If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s), or if one or more of the arbitrators refuses to assume his task or withdraws, or something prevents him from carrying out his tasks, or if he is dismissed, and there is no special agreement between the parties, the Authority originally competent to hear the dispute shall appoint the required arbitrators upon request of the party who is interested in expediting the arbitration, in the presence of the other party or in his absence after being summoned to a meeting to be held for this purpose. The Authority shall appoint as many arbitrators as are necessary to complete the total number of arbitrators agreed to by the parties; the decision taken in this respect shall be final.

Article 11

The arbitrator may not be removed except with the mutual consent of the parties, and the arbitrator so removed may claim compensation if he had already proceeded and if he had not been the cause of such removal. Furthermore, he cannot be removed except for reasons that occur or appear after the filing of the arbitration instrument (Arabic: *wathiqat al-tahkim*).

Article 12

The arbitrator may be challenged for the same reasons for which a judge may be challenged. The request for challenge shall be submitted to the Authority originally competent to hear the dispute within five days from the day on which the party was notified of the appointment of the arbitrator, or the day on which one of the reasons for challenge appeared or occurred. The decision on the request for challenge shall be taken

in a meeting to be held for this purpose and attended by the parties and the arbitrator whose challenge is requested.

Article 13

The arbitration shall not terminate because of the death of one of the parties, but the time fixed for award shall be extended by thirty days unless the arbitrators decide on a further extension.

Article 14

If an arbitrator is appointed in place of the removed arbitrator or the one who has withdrawn, the date fixed for the award shall be extended by thirty days.

Article 15

The arbitrators, by the majority by which the award shall be made, may, through a justified decision, extend the periods fixed for the award on account of circumstances pertaining to the subject matter of the dispute.

Article 16

The decision of the arbitrators shall be taken by a majority vote and if they are authorized to reach a compromise solution (Arabic: *sulh*), their decision shall be by unanimity.

Article 17

The award document shall especially include the arbitration instrument (Arabic: *wathiqat al-tahkim*), a résumé of the depositions of the parties and their documents, reasons for the award and its text and date, and the signatures of the arbitrators. If one or more of them refuse to sign the award, such refusal shall be stated in the award document.

Article 18

All awards issued by the arbitrators, even if they are issued in relation to one of the procedures of investigation, shall be filed within five days with the Authority originally competent to hear the dispute and the parties shall be notified by copies of them. The parties may submit their objections against what is issued by the arbitrators to the Authority with whom the awards were filed, within fifteen days from the date on which they were notified of the arbitrators' awards; otherwise such awards shall be final.

Article 19

If the parties or one of them submitted an objection against the award of the arbitrators within the period provided for in the preceding Article, the Authority originally

competent to hear the dispute shall consider the dispute and shall either dismiss the objection and issue an order for execution of the award, or accept the objection and decide the case.

Article 20

The award of the arbitrators shall be due for execution, when it becomes final, by an order from the Authority originally competent to hear the dispute. This order shall be issued upon request of one of the concerned parties after confirming that there is nothing to prevent its execution legally.

Article 21

The award made by the arbitrators shall be considered, after issuance of the order of execution in accordance with the previous Article, as effective as a judgment made by the Authority which issued the order of execution.

Article 22

Fees of arbitrators shall be determined by agreement between the parties and unpaid sums of such fees shall be deposited with the Authority originally competent to hear the dispute within five days after approval of the arbitration instrument (Arabic: *wathiqat al-tahkim*), and shall be paid within a week from the date on which the order for execution of award is issued.

Article 23

If there is no agreement on the fees of arbitrators, and a dispute ensues, the matter shall be settled by the Authority originally competent to hear the dispute, which decision shall be final.

Article 24

The decisions required for the execution of this Regulation shall be issued by the President of the Council of Ministers, on the basis of a proposal made by the Minister of Justice after agreement with the Minister of Commerce and the President of the Board of Grievances.

Article 25

This Regulation shall be published in the Official Gazette, and shall be effective thirty days after the date of its publication.

Rules for the Implementation of the Saudi Arabian Arbitration Regulation (27 May 1985)

Chapter 1. Arbitration, Arbitrators and Parties

Section 1

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.

Section 2

An agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court.

Section 3

The arbitrator shall be a Saudi national or Muslim expatriate from the free profession section or others. The arbitrator may also be an employee of the state, provided approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the umpire shall have a knowledge of sharia rules, commercial regulations, customs and traditions applicable in Saudi Arabia.

Section 4

Any person having an interest in the dispute or having been sentenced to a *hud* or penalty in a crime of dishonour, or being dismissed from a public position following a disciplinary order, or being adjudicated as bankrupt, unless being relieved, shall not act as arbitrator.

Section 5

Subject to the provisions of Sections 2 and 3 above, a list containing the names of arbitrators shall be prepared by agreement between the minister of justice, the minister of commerce and the chairman of the Grievance Board. The courts, judicial committees, and chambers of commerce and industry shall be informed of such lists and the respective parties may select arbitrators from these lists or from others.

Section 6

The appointment of an arbitrator or arbitrators shall be completed by agreement between the disputing parties in an arbitration instrument which shall sufficiently outline the dispute and the names of the arbitrators. Agreement to arbitration may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract.

Section 7

The authority originally competent to decide in the dispute shall issue a decision for approval of the arbitration instrument within 15 days and shall notify the arbitration panel of the same.

Section 8

In disputes where a government authority is a party with others, such a government authority shall prepare a memorandum with respect to arbitration in such a dispute, stating its subject matter, the reasons for arbitration and the names of parties. Such a memorandum shall be submitted to the council of ministers for approval of arbitration. The prime minister may, by a prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases, the council of ministers shall be notified of the arbitration awards adopted.

Section 9

The clerk of the authority originally competent to decide on the dispute shall act as secretary for the arbitration panel, establish the necessary records for registration or arbitration application and shall submit the same to the concerned authority for approval of the arbitration instrument. Such clerk shall also be in charge of the summons and notices provided for in the arbitration regulations and by any other assignments as may be decided by the relevant minister. The concerned authorities shall make the necessary arrangements regarding the above.

Section 10

The arbitration panel shall fix the date of the hearing for consideration of the dispute within a period not exceeding five days from the date in which approval of the arbitration document had been notified to the arbitration panel, and shall notify the disputing parties of the same through the clerk of the authority originally competent to decide on the dispute.

Chapter II. Notification of Parties, Appearance, Default and Proxies in Arbitration

Section 11

Every summons or notice relating to the subject matter of arbitration made through the clerk of the authority originally competent to decide on the dispute, shall be made through the messenger or the official authorities, whether the said proceeding is requested by the disputing parties or initiated by the arbitrators. Police or mayors are

required to assist the relevant authority in performing its duties within their prescribed jurisdiction.

Section 12

The summons or notice shall be written in the Arabic language and shall consist of two or more copies - according to the number of disputing parties - and shall contain the following:

- a) The date, day, month and year in which the summons or notice was made.
- b) The first name, surname, title, profession and domicile of the party requesting the summons or notice, and the first name, surname, title, profession and domicile of his representative, if he is working for another person.
- c) The name of the messenger who forwarded the summons or notice, his employer and his signature on the original and copy of the summons or notice.
- d) The first name, surname, profession and domicile of the person to be summoned or notified, and if his domicile is not known at the time of issuance of the summons, then his latest domicile.
- e) Title of the person to whom copy of the summons has been served, and his signature on the original indicating receipt, or indication of his refusal to take receipt of the summons when returned to the concerned authority.
- f) Name and place of the arbitration panel, the subject matter of procedures, and the date specified therefor.

Section 13

1. The papers to be served on summons shall be delivered to the respective person, or to his place of domicile, and may be delivered to a chosen place of domicile determined by the concerned parties.
2. In case such person is not present in his place of domicile, the summons papers shall be delivered to any person who declares that he is an agent or responsible for the business of the person to be summoned, or his employee, or that he or she is living with him - such as spouse, relative or other.

Section 14

If the messenger did not find the proper person to whom the papers are to be delivered pursuant to the preceding section, or if the person mentioned therein refrained from accepting the papers, the messenger shall state that in the original copy and deliver the same that day to the police commissioner or mayor or the representative of any of them, if the residence of the person summoned falls within their authority. Also, the messenger shall within 24 hours send the person summoned at his original or chosen domicile a registered letter, informing that the copy had been delivered to the administration and stating all such details in the original copy of the summons. The summons or notice shall be valid and effective from the time of delivery thereof as aforementioned.

Section 15

Except as provided for in special regulations, the copy of summons or notice shall be delivered in the following manner:

- a) In matters relating to the state, it shall be delivered to the ministers, district governors, directors of government departments or their representatives.
- b) In matters relating to public persons, it shall be delivered to the person acting on his behalf according to the law, or his representative.
- c) In matters relating to companies, societies and private establishments, it shall be delivered to the head offices, as indicated in the commercial registration, to the chairman, managing director or his representative from among the employees. With respect to foreign companies having branches or agents in Saudi Arabia, the papers shall be delivered to the branch or the agent.

Section 16

The official in charge shall submit the arbitration file to the authority responsible for trial of the dispute, for approval of the arbitration instrument. The clerk of such authority shall notify the parties and the arbitrators of the decision taken with respect to approval of the arbitration instrument within one week from the date of adoption of such decision.

Section 17

On the day fixed for arbitration, the parties shall appear by themselves or through their representatives, by virtue of a notarized power of attorney, or by a proxy issued by any official authority or certified by one of the chambers of commerce and industry. A copy of the power of attorney shall be kept in the file of the claim after the original has been reviewed by the arbitrator, without prejudice to the right of the arbitrator or arbitrators to require the personal appearance of the respective party if the circumstances so require.

Section 18

1. In the event of default by one of the parties in appearing at the first hearing, and if the arbitration panel is satisfied that such defaulting party had been properly served notice, the arbitration panel may decide on the dispute as long as the respective parties have filed their statements of claim, defences and documentation. The award adopted shall, in such case, be considered a decision made in the presence of the parties. However, if the defaulting party was not properly served a summons, the hearing shall be adjourned to another hearing so that the defaulting party is properly notified. If the defendant parties are many and are only partially served a personal summons, and if they have all, or those who are not served notice, defaulted to appear, the arbitration panel in other than urgent matters shall adjourn the hearing so that the defaulting parties

are properly served notice, and the award adopted in such other hearing shall be deemed as if made in the presence of all defaulting parties.

2. Also, the award of arbitration shall constructively be deemed made in the presence of the party who appears personally or by proxy in any of the hearings, or filed his statement of defence in the claim or in document relating thereto. However, if the defaulting party appeared prior to the end of the hearing, any award or decision adopted therein shall be deemed null and void.

Section 19

If the arbitration panel discovers that a summons published to a defaulting party in a newspaper is not proper, it shall adjourn arbitration of the dispute to another hearing and such defaulting party shall be properly served a summons in respect thereto.

Chapter III. Hearings, Trial and Recordings of Claim

Section 20

The claim shall be tried openly unless the arbitration panel decides by its own motion, or if one of the parties so requests, that the hearing be held in camera for reasons appreciated by the arbitration panel.

Section 21

The arbitration of the claim shall not, without an acceptable reason, be adjourned more than once for a reason attributed to one of the parties.

Section 22

The arbitration panel shall reasonably allow each party to make his remarks and defences either orally or in writing in the times specified by the arbitration panel. The defendant party shall be the last to make submission and the panel shall complete the case and prepare the award.

Section 23

The umpire shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing anyone in contempt of the hearing. However, if anyone present commits a violation, the umpire shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the umpire.

Section 24

The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing as related to admission, conciliation, assignment or otherwise, and the arbitration panel shall make an award of the same.

Section 25

The Arabic language shall be the official language to be used before the arbitration panel, whether in the discussions or in correspondence. The arbitration panel and the parties may not speak other than the Arabic language and any party who does not speak Arabic shall be accompanied by an accredited translator, who shall sign with him the minutes of the hearing, approving the statements made.

Section 26

Any party may request adjournment of the proceedings for a reasonable period, that period to be decided by the arbitration panel, so that such a party can submit any documents, papers, or remarks which may be productive or have a material effect on the case. The arbitration panel may allow further adjournments if there is justification therefor.

Section 27

The arbitration panel shall record the facts and proceedings which take place in the hearing, in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties, the minutes shall be signed by the umpire, arbitrators and the secretary.

Section 28

1. The arbitration panel may, by its own motion, or pursuant to a request from one of the parties, require the other party to produce any document which he may possess and which may have material effect on the proceedings, in the following cases:
 - a) If such document is a joint document between the parties. Such document will be deemed joint if, in particular, it is in favour of both parties or if it proves their mutual rights and obligations.
 - b) If one of the parties invoked such a document in any phase of the claim.
 - c) If the regulations permit demand for delivery or release of such a document.
2. The application must state the following:
 - a) description of the document requested
 - b) contents of the document, with as much detail as possible
 - c) the fact in issue for which such document is called
 - d) the evidence and circumstances proving that the document is under the possession of the other party
 - e) the reason for obligating the other party to present the said document.

Section 29

The arbitration panel may designate the effective means of inquiry in the claim whenever the facts to be proven are proximate to the dispute and are admissible.

Section 30

The arbitration panel may disregard the evidentiary procedures it has ordered, provided that reasons for such disregard shall be stated in the minutes of the hearing. The arbitration panel may not consider the result of such procedures and shall state its reasons in the award.

Section 31

The party requesting testimony of witnesses shall specify the facts to be proved in the testimony, either orally or in writing, and shall accompany his witnesses in the specified hearing. Admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to the shariatic rules, and the other party may refute such testimony in the same manner.

Section 32

The arbitration panel may cross-examine the parties at the request of either party or on its own motion.

Section 33

The arbitration panel may, if necessary, seek the assistance of one or more experts to provide a technical report regarding a technical or material matter which may have effect on the claim. The arbitration panel shall mention in its award an accurate statement of the expert's mission and the urgent arrangements which he is permitted to take. The arbitration panel shall estimate the fees of the said expert, the party who shall pay them, and the deposit to be made to the account of the expert. In case such deposit is not made by the party required to do so, or by the other parties to the arbitration, the expert will not be bound to perform his duty, and the right to adhere to the decision made for the appointment of the expert shall be void, if the arbitration panel finds that the reasons given are unacceptable. In performing his duty, the expert may hear the statements of both parties or others and shall submit a report of his opinion on the specified date. The arbitration panel may cross-examine the expert in the hearing concerning the result of his report. If there is more than one expert, the panel shall specify the manner of their performance, whether severally or collectively.

Section 34

The arbitration panel may request the expert to provide a complementary report to overcome any default or omissions in his previous report and the parties may submit

advisory reports to the panel. However, in all cases the arbitration panel shall not be bound by the expert's opinions.

Section 35

The arbitration panel may, on its own motion or at the request of either party, decide to move for inspection of some facts or matters which were disputed and have a material effect on the claim and shall make a report of the inspection proceedings.

Section 36

The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defences and contents in the hearing, either orally or in writing and to record them in the minutes.

Section 37

If a preliminary issue of a matter falling outside the jurisdiction of the arbitration panel arose during the process of arbitration, or if a document had been claimed to have been forged, or if criminal proceedings had been instituted for the forgery or for any other criminal act, the arbitration panel shall suspend proceedings and the date fixed for the award until a final decision is issued from the concerned authority in relation to that matter which had arisen.

Chapter IV. Awards, Objections and Execution

Section 38

When the arbitration panel is ready to render a decision, the panel shall close the case for review and deliberations. Deliberations shall be held in camera and shall only be attended collectively by the arbitration panel who attended the hearings. The panel shall fix, at the time the case is closed or in another hearing, a date for issuance of the award, subject to the provisions of articles 9, 13, 14 and 15 of the arbitration regulations.

Section 39

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

Section 40

When the case is closed for review and deliberation, the arbitration panel may not hear further submissions from either of the parties or their representative except in the presence of the other party, and shall not accept any memorandum or document without the document being reviewed by the other party; if such explanation, memorandum or document is deemed material, the panel may extend the date fixed for the award and reopen the proceedings by virtue of a decision stating the reasons and justifications therefor, and shall notify the parties of the date fixed for continuation of the proceedings.

Section 41

Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the umpire in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defences, substantial defences, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign the original copy of the award which comprises the above contents and which shall be kept in the file of the claim.

Section 42

Without prejudice to the provisions of articles 18 and 19 of the arbitration regulations, the arbitration panel shall rectify any material typing or arithmetical errors that may occur in its awards, by virtue of a decision to be issued on its own motion, or at the request of either party without pleading procedures. Such rectification shall be made on the original copy of the award and duly signed by the arbitrators. The decision for rectification of the award may be objected to by all possible means of objection if the arbitration panel exceeded its right of rectification as provided for in this section. The decision issued against a request for rectification may not be objected to independently.

Section 43

The parties may request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well to the rules relating to means of objection.

Section 44

Whenever an order is issued for execution of the arbitration award, the latter becomes an executionary instrument and the clerk of the authority originally competent to try the

case shall give the winning party the execution copy of the arbitration award, containing the order for execution and ending with the following phrase:

“All concerned government authorities and departments shall cause this award to be executed with all legally applicable means even if such execution required application of force by the police.”

Fees of Arbitrators

Section 45.

If both opponents fail to agree on the fees, a decision may be issued for division of fees between them at the discretion of the authority originally competent to try the case; a decision also may be issued for payment of all such fees by one of the parties in dispute.

Section 46

Any party may object to the estimate of the arbitrators' fees to the authority which issued the decision, the objection to be made within eight days from notification of the fees; the authority's decision on the said objection shall be final.

Section 47

The concerned authorities shall execute these rules.

Section 48

These rules shall be published in the Official Gazette and shall be effective from their date of publication.