

**GROUNDS FOR REFUSAL OF ENFORCEMENT OF
 FOREIGN COMMERCIAL ARBITRAL AWARDS IN
 GCC STATES LAW**

WITH SPECIAL REFERENCE TO

(BAHRAIN AND UAE)

By

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Dedicated

With utmost love and gratitude

To

My Father, Mother, Wife and Daughters Noor and Reem

ABSTRACT

This thesis posed the question whether foreign arbitral awards are enforced in accordance with the demands of the New York Convention in the UAE and Bahrain and moreover whether the conditions for enforcement compel the conclusion that these two nations are enforcement-friendly in the same manner as leading arbitral nations such as the UK, France, Hong-Kong and NYC. On the basis of legislative and judicial practice in the UAE and Bahrain it was found that Bahrain and all UAE emirates, with the exception of Dubai, are enforcement friendly and more importantly place few constraints on the enforcement of foreign awards. Dubai is also enforcement-friendly but a small number of decisions, particularly Bechtel, leave significant latitude to foreign investors to consider Dubai courts, and particularly its court of Cassation, as dubious when it comes to enforcement.

It was also found that Islamic law per se is not an obstacle in the enforcement of foreign arbitral awards and very few constraints were found from the perspective of public policy and arbitrability in particular. In fact, the courts of Bahrain and the UAE have applied a rather liberal interpretation of Islamic law in order to accommodate arbitral practices that have been sustained in other jurisdictions and under the *lex mercatoria* with a view to assisting the commercial vision of the two nations. Hence, it was found that Islamic law is an enabling vehicle in the enforcement of foreign arbitral awards in the UAE and Bahrain, rather than an obstacle.

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Table of Contents

Dedication	Error! Bookmark not defined.
Abstract	Error! Bookmark not defined.
Acknowledgements	Error! Bookmark not defined.
Contents.....	Error! Bookmark not defined.
Introduction	1
Chapter one A: SOCIOLOGICAL PERSPECTIVES	15
1.A1 Introduction.....	15
1.A2 The Sociological Dimension of Gulf commerce.....	16
1.A3 Legal Education in Bahrain and the UAE.....	21
1.A4 Pushing the Boundaries of Law and Arbitration in Bahrain and the UAE	25
1.A5 The Methodology Pertinent to Ascertaining Enforcement Practices	29
1 Chapter one: THE SOURCES OF ARBITRATION	31
1.1 Introduction.....	31
1.2 The Bahraini Code of Civil Procedure	32
1.3 The Bahraini International Arbitration Act.....	33
1.4 The Role of Islamic Law in Bahraini and UAE Arbitration.....	35
1.5 The Sources of Arbitral Law in the UAE Legal System.....	37
1.6 Enforcement of Arbitral Awards.....	39
1.6.1 Enforcement through Bilateral Investment Treaties	40
1.7 Jurisdiction of the Dubai International Financial Centre	41
1.7.1 The Bahrain Centre for Dispute Resolution	43
1.8 The Gulf as a Place of Enforcement of Awards	44
1.9 Is the Arbitral Legislation of the UAE and Bahrain a Legal.....	47
2 Chapter two GROUNDS FOR NON-ENFORCEMENT	49

2.1	Introduction.....	49
2.2	Traditional Enforcement Obstacles in the Arab World.....	50
2.3	Exceptions to Liberal Enforcement in the UAE and Bahrain	55
2.4	Grounds for Refusal to Enforce: the UAE and Bahraini Legal Regimes.....	57
2.4.1	The Issue of Capacity	60
2.4.2.1	The Meaning of Proper Notice in Commercial Arbitration	64
2.4.2.2	The Standard of Proper Notice.....	66
2.4.2.3	Violation of Due Process due to Inability to Present One’s Case	67
2.4.3	Excess of Jurisdiction	70
2.4.3.1	The Scope of the Arbitration Agreement.....	72
2.4.3.2	The Relation of the Arbitration Clause to Contract Annulment	75
2.4.3.3	Separability in the UAE and Bahrain.....	75
2.4.4	Inappropriate Composition of the Arbitral Tribunal	77
2.4.4.1	Challenges of Bias against Arbitrators	81
3	Chapter Three LACK OF ARBITRABILITY	83
3.1	Introduction.....	83
3.2	The General Conception of Arbitrability	84
3.3	Islamic Arbitrability	87
3.4	Statutory Arbitrability in the UAE and Bahrain.....	91
3.5	Third Party Funding and Arbitrability	93
3.6	Who Decides Issues of Arbitrability	96
3.7	Arbitrability under the DIFC Rules	97
4	Chapter Four NULLITY OF AWARD	100
4.1	Introduction.....	100
4.2	Nullity in Bahrain and the UAE.....	101
4.3.1	Failure to Apply the Law Stipulated in the Arbitration Clause.....	107
4.3.2	Ijtihad as New Law?	110

5 Chapter Five	THE EFFECT OF PUBLIC POLICY	112
5.1	Introduction.....	112
5.2	The Concept of Public Policy under the New York Convention.....	113
5.3	An Islamic Public Policy?.....	116
5.3.1	Unlawful Contracts in Islamic Law as a Public Policy Barrier	118
5.3.2	The Complexity of Usury as Islamic Public Policy	119
5.4	The Bechtel case as a Precedent	121
5.5	Particular Manifestations of Public Policy in UAE and Bahrain	123
6 Chapter Six	CONCLUSION AND RECOMMENDATIONS.....	127
6.1	Impediments to Enforcement from the Practitioner’s Perspective.....	127
6.2	Arbitral Forums as Places of Contention and Competition	132
6.3	The Need for Judicial Clarity and the Role of Transnational Precedent.....	134
6.4	The Role of Amicus Briefs	136
	Biogeography	139
	Appendix A – Books	139
	Appendix B – Journals	140
	Appendix C – Table of legislations	145
	Appendix D – Table of cases.....	146
	Appendix E – General cases	149
	Appendix F – GCC Conventions	153

INTRODUCTION

The Hypothesis

There is an absence of analytical bibliography on the law and practice relating to the enforcement of foreign arbitral awards in the UAE and Bahrain. The reason for this is that both countries, in response to the Saudi rejection of arbitration in the 1950s and 1960s, followed the same path and it was not until recently that they realised that alternative dispute resolution was a crucial factor in international investment and globalised trade. It was not enough for a country to provide investment incentives or be trade-friendly; rather, it transpires that a country becomes commercially attractive primarily if it provides legal certainty and adheres to the rule of law. The choice to submit business disputes to arbitration and have awards enforced in a country no doubt contribute to a rule of law image. The utility of arbitration was only rather recently realised in the UAE and Bahrain, particularly in the early 1990s, when other industrialised nations had already taken a significant lead.¹

The absence of significant arbitral initiatives in the two nations under examination necessarily meant that the field was not discussed at government level, or indeed at university level and among local lawyers. It is instructive that alternative dispute resolution chairs and lectureships are a recent phenomenon in both the UAE and Bahrain. It is not therefore strange that there is very little commentary on arbitral law and practice, even in Arabic, which as I will explain later on has not been relied to any great degree in the thesis. Rather, the focus has been on English-speaking material, save for primary sources. Equally, however, the relevant works in English are sparse and the few English-language books take the form of commentaries with little devotion to analysis because they are intended as practitioners' guides and are written with this audience in mind.² Alongside this, one finds short comments by lawyers, both Arab and non-Arab, working in the region, but such materials are

¹ This in no way means that one of the aims of the thesis was to decipher whether or not the law had made an impact on business or other social aspects of life. This is a matter that befalls the law and social change literature which is beyond the purview of this thesis. Notwithstanding this disclaimer, it may be possible to discern, although indirectly, some impacts on the social and business climate in the UAE and Bahrain as a result of legislative and judicial initiatives. See SL Roach-Anleu, *Law and Social Change* (Sage Publications, 2009).

² See, for example, the excellent work by AH El-Ahdab, *Arbitration with the Arab Countries* (Kluwer, 3rd edition, 2011), which is an exhaustive guide on the arbitral laws and practices of all Arab nations. However, its nature is principally that of a commentary. See also E Al-Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Brill, 2003).

necessarily short, less analytic than one would have hoped for and are intended equally for professional audiences.

Hence, the result of these considerations is that there is little understanding as to the driving forces, the dynamics, the interplay between policy and law and a direction in respect of the enforcement practice of courts and tribunals in the UAE and Bahrain. There is a widespread assumption that the two countries are not averse to arbitration and are in fact as arbitration-friendly as most Western nations and yet we know very little about the reasons behind the attitudes of their courts.

The hypothesis underlying this thesis is that there are various strands in the enforcement practice of the courts of the UAE and Bahrain. The first strand is coloured by the dictates encompassed in the Qur'an and the *sunnah* and from an outward perspective these seem to play a significant role in the drafting of legislation. Yet, unlike Saudi Arabia, direct religious sources play only a minor restraining role in the legal systems of UAE and Bahrain and at best their significance relates to public policy and certain matters of arbitrability. The second strand is of a secular nature. The courts and the authorities in the two nations have gone far beyond the strict injunctions in the Qur'an, as have other countries in the region and the Arab world, including Oman, Kuwait and North African nations, and have effectively given rise to a new secular commercial environment, which in turn has had a significant impact on the law of arbitration and especially their enforcement laws and practices. A poignant illustration concerns the charging of commercial interest, which although prohibited under the Qur'an, the UAE and Bahrain have designated ceiling limits to financial institutions. The hypothesis thus assumes that the courts in the two countries adhere to the secular strand and only employ the Qur'anic strand in exceptional circumstances and then again without much consistency or predictability. The *Bechtel* case,³ which will be explored extensively in the course of this thesis, will demonstrate that religious injunctions – which have passed into statute law – are applied by some courts in isolated instances in order to protect particular interests; in the case at hand, to avoid enforcing an arbitral award that awarded significant damages against a government entity. Nonetheless, the underlying assumption throughout the thesis is that such exceptions to liberal enforcement constitute isolated incidents and by no means the norm.

³ *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, case No 503/2003, judgment (15 May 2004). This same result was later reaffirmed by the Court in case No 322/2004, judgment (11 April 2005).

Methodology

As already stated, this author was aware from the outset that there existed a very limited Arab-language bibliography on the subject matter of this thesis. In fact, although there is a strong legal culture in both the UAE and Bahrain, legal training there does not have a tradition of extensive and analytical legal writing, as is the case in the UK and USA. Equally, the idea of precedent is rather novel, despite the fact, and unlike Saudi Arabia, that it is employed by the courts and the practitioners. Moreover, given that the primary audience of the thesis is the new generation of Bahraini and UAE lawyers, as well as foreign practitioners, law students and researchers, it was felt that the Arab-language bibliography had little to add to the analysis of the subject matter. Finally, an outstanding consideration was also the fact that it would have been impossible for non-Arab speaking supervisors and external examiners to determine the veracity of statements, quotes and references in Arabic introduced into the text by the author. For all these reasons, it was decided in advance with my supervisor that I would employ English-speaking material in respect of primary and secondary literature, mainly textbooks, monographs and articles.⁴

However, it was also acknowledged that there were inherent limitations to this methodological approach. The primary limitation was that the thesis would fail to achieve originality if it did not examine cases and materials from the case law of the courts of Bahrain and UAE. Given that these judgments and orders are produced in Arabic it would have made little sense to try and retrieve them in English. The *International Journal of Arab Arbitration* contains an extensive list of national court judgments devoted to matters of arbitration, but it only publishes summaries of said judgments, which are clearly inadequate for research at doctoral level. Hence, it was decided between my supervisor and I that I should retrieve and examine all cases determined in the last 20-25 years in the courts of the UAE and Bahrain with a view to assessing which of these constitute an effective precedent and to use these as a skeleton for my thesis. In fact, one of the original elements of the thesis is the research conducted with respect to these cases. The first year of my studies was spent on retrieving, reading and making brief comments on all of these cases.

⁴ This was made easier by the fact that certain institutions in both nations operate officially under the English language. A typical example is the Dubai Financial Investment Centre (DFIC) whose working language is English and the judgments of its courts are also in English, courtesy of the fact that the judges appointed are from English-speaking nations.

It was also decided early on with my supervisor that I should not make a significant effort to retrieve arbitral awards relating to the UAE and Bahrain that were otherwise unavailable to the general public by reason of confidentiality agreements. This proved to be a good strategy because in a short quest to find some arbitral awards I was driven to a dead-end and in any event there is no evidence that any meaningful outcome would have been derived by having access to them. Given that the principal aim of the thesis is to assess how foreign arbitral awards are enforced in the UAE and Bahrain, it is only the role and attitudes of the enforcing courts that matter and not the intentions of the parties and the deliberations of the arbitrators.

My supervisor moreover advised me not to enter into quantitative analyses or undertake any interviews with officials in the two nations because they would offer no visible benefits to the thesis.⁵ It would have been ideal had we had the benefit of statements by the judges, but it was known to this author from the outset that judges were instructed not to provide any interviews on matters related to their work and hence no attempt was made to go down this path. However, this author, in the course of his ordinary research in the past three years, has been in contact with numerous practitioners working in the region and who have made their views known. Although the author did not record these views and did not as a result try to incorporate them in the current thesis, many of his ideas and assumptions have necessarily been painted, to a larger or lesser degree, by these conversations. In fact, these discussions helped the author to understand some of the underlying politics behind particular judgments, as well as the politics of practitioners, whether local or international law firms and their perceptions of the legal systems of the UAE and Bahrain.

As a result, the primary basis of this thesis is library-based and lacks any empirical research or the use of questionnaires.⁶ It has relied on original materials published in the

⁵ An original idea that was put on the table was to interview junior and senior ministers as well as policy – makers in the field of commerce and international investment and contrast their views and aspirations with the reality on the ground. This was later, however, viewed as unproductive and significantly time-consuming with no visible results in the horizon. For example, it is not clear, or indeed certain, that said ministers would offer any new insights, such that would make a substantial outcome to any of the points raised in the thesis. Moreover, given that there was no aim from the outset to measure the effects and impact of the law and policies on social change, such an empirical strand to the thesis would have been superfluous.

⁶ By library-based I should make the disclaimer that a number of materials collected for the purposes of this thesis were not found in libraries and many of the Arab-language material that was read and not used was found through personal contacts in the UAE and Bahrain. In addition, some of the recent court judgments by the Dubai Court of Cassation were retrieved by this author from their original source given that at the time of writing the chapters in which they are contained they were not publicly available.

Arabic language, namely court judgments and documents, as well as available secondary literature in English.⁷

It should be noted that, in agreement with the instructions of my supervisor, it was decided that the decisive issue was the quality of the final outcome and not its size. As a result, given the acknowledged scarcity of available material it was decided that the thesis should make up for the shortfall by examining – essentially reiterating – the judgments of other courts around the world from a comparative perspective. Rather, this author felt that it was best that he concentrate exclusively on material from the UAE and Bahrain even if this meant that the total size of the thesis was shorter than usual. Nonetheless, it is natural that precedential and significant judicial determinations offered by courts around the world were important aspects of this author’s analysis because arbitration is above all global and the decision of one court does, and should, play a part in the decisions of other courts around the globe.

Originality of the Thesis

In the course of the last decade there have been a number of doctoral theses, especially in the UK, dealing with matters of arbitration in the Gulf, and some of these have dealt with the particular issue of enforcement. However, to the best of this author’s knowledge no thesis has been written dealing with the enforcement of arbitral awards in the UAE and Bahrain.⁸ This as of itself is a significant element of originality and as already stated the general works on arbitration in the Gulf do not possess the academic and analytical rigour associated with a doctoral thesis.

Secondly, many of the judgments analysed in the course of this thesis are not accessible to non-Arab speakers. Although some of these have appeared in English-language periodicals this has been achieved in the form of summaries and excerpts. No rigorous analysis has ever been attempted in respect of these cases nor have they been linked to wider

⁷ It should be noted that a good source of information has been the websites of local and international law firms working within the jurisdiction of the UAE and Bahrain. Most of these law firms proceed to post new judgments and other developments and their lawyers provide timely analyses thereof. Although such analyses are meant to be descriptive and thus do not possess significant academic rigour because their primary audience are prospective clients, nonetheless they do provide professional insights that are otherwise unavailable and inaccessible in textbooks and monographs.

⁸ This disclaimer is made in respect of English-language theses that were submitted in countries around the world for which there exists a register of successful doctoral theses. Theses with little or significant references to arbitration in the UAE and Bahrain do however exist.

policy imperatives nor has there been an assessment as to their conformity to Islamic legal principles. Moreover, some of the cases analysed are of recent import, some handed down as recently as 2011 and 2012 and hence this is the first time that they are being introduced to a wider audience.⁹

Finally, as will become evident, most of the analyses on the laws of Gulf nations have fleeting references to Islamic law and its compatibility with said legislation. In light of the quasi-secular nature of Gulf legal practice it is widely assumed that Islamic law has little relevance to arbitration. However, no in-depth research on this matter has taken place and the assumption is merely fed by speculation. This author has devoted significant sections to Islamic law in each chapter and demonstrates how and where contemporary legislation seeks to meet or deviate from the prescriptions of the Qur'an and the *sunnah*. This is yet another original element of this thesis, which it is hoped will shed some light on the juxtaposition between the two and demonstrate that they exist in significant harmony with Islam not being irrelevant at all. The final outcome clearly demonstrates that even where an express injunction in the Qur'an is violated by particular arbitral legislation, the legislator is at pains to justify the deviation on the basis of Islamic law and philosophy.

The Structure of the Work

The thesis is devoted to exploring the modalities, challenges and obstacles in the enforcement of foreign arbitral awards in the UAE and Bahrain.¹⁰ It was assumed from the outset that the two nations had similar legal systems, similar economic capacity and similar aspirations in relation to becoming international arbitration centres for parties to solve their disputes. Hence, this was not meant to be a comparison between two dissimilar laws. An introduction to each chapter is as follows:

⁹ In fact, the only English-language monograph on the legal system of any of the two countries under consideration in this thesis is by H Al-Radhi, *Judiciary and Arbitration in Bahrain: Historical and Analytical Study* (Brill, 2003).

¹⁰ The original title of the thesis encompassed also an analysis of the relevant laws of Qatar, this being a small and rich Arab nation, with a legal system similar to that of the UAE and Bahrain and with a jurisprudence that was to a large degree compatible with that of the other two nations. However, ultimately, a decision was taken to exclude Qatar from this work on the basis that the thesis would become less focused and look more like a comparative analysis. A significant part of the decision to exclude Qatar was also the fact that very little English-language bibliography exists on its arbitral laws and practices and this would have made any contribution by this author futile.

Chapter 1a

This chapter aims to provide a sociological perspective to the UAE and Bahrain's legal landscape. It explores the causes for current judicial attitudes, the role, function and outlook of legal education in the two nations and distinguishes the roles of the various stakeholders in the legal profession. It goes on to demonstrate that the boundaries of arbitration, including the enforcement of foreign arbitral awards, are not pushed by local lawyers, who are simply content to litigate before local courts. Rather, these boundaries are pushed by foreign law firms and given the imbalance in education, experience etc there exists an evident asymmetry between foreign lawyers on the one hand and local enforcement judges on the other. The chapter demonstrates through this analysis that the few isolated exceptions to liberal enforcement can be explained by reference to these sociological parameters.

Chapter 1

This was meant as an introductory chapter to thesis. The intention was to draft an introductory chapter that would introduce the research and the reader to the general framework of the subject matter of the thesis. The subject matter being enforcement of foreign arbitral awards in the two selected jurisdictions there was a dilemma as to whether the introductory chapter should focus on the modalities of enforcement more generally or on enforcement practices in the region more specifically. Given this author's stated commitment to producing a thesis that was original from start to end and without simply reiterating existing, old and new, cases decided by the courts of Western nations, it was decided that the introductory chapter should focus on the enforcement of awards in classical and modern Islamic law as well as the rationale of the UAE and Bahrain in enforcing foreign arbitral awards there.

To achieve this result, and in order to maintain a degree of originality despite the inherent difficulty of doing so in an introductory chapter, it was thought that a structured and concise analysis of the relevant parts of the legal system of the two nations was important – but only as far as this is related to enforcement of arbitral awards. The place of Islamic law in the creation of legal rules on arbitration and specifically on enforcement was equally crucial and to this end a number of alternative theories are explained. Moreover, this author goes on to provide a detailed overview of the sources of enforcement in the two nations with an

emphasis on the provisions of the two respective international arbitration acts – the Bahraini was adopted as far as back as 1994, whereas the UAE one was finalised in 2010 and replaced by the Code of Civil Procedure as regards international arbitration. An important dimension of these sources is the degree to which the international conventional obligations of the two nations play a part in their enforcement practices and to this end the author analyses the various regional and global multilateral treaties as well as certain bilateral treaties.

An analysis on the enforcement patterns and practices of the courts of the two nations would have been incomplete without a concrete discussion of the special zones established in both, particularly the Dubai International Finance Centre (DIFC) which has its own laws, courts and facilitates the role and function of arbitration, not to mention its status as a host for international arbitrations. The chapter goes on to analyse important jurisprudence coming out of the DIFC court in relation to jurisdiction – although admittedly little on enforcement, but this is done in order to show the mentality of the DIFC court and the way, therefore, by which it is going to operate in the future in respect of enforcement requests in Dubai and other Gulf nations.

One of the original facets of this chapter is its examination of money laundering in the UAE and Bahrain through the process of enforcement of foreign awards. This is an issue that has been debated fiercely recently by western law-makers and practitioners and this author was of the opinion that its consideration at the Gulf level was much needed. Finally, the chapter discusses, albeit rather briefly, whether the arbitral legislation of the UAE and Bahrain may validly constitute a legal transplant or whether in fact it is the result of an autonomous development. Although this is not a crucial question to the thesis itself, it does tell us whether the two legal systems are followers or independent in their legal thinking.

Chapter 2

It is in this chapter that the author starts to explore those impediments that are mentioned in the New York Convention, the UNCITRAL Model laws and the respective arbitration laws of the UAE and Bahrain that may preclude the enforcement of foreign arbitral awards. The list in all of these instruments is more or less identical given that the two local laws have been drafted on the basis of the UNCITRAL Model Law and hence some degree of legal certainty and homogeneity is retained. One of the principal issues in the chapter is that of incapacity of one of the parties to the arbitration or the agreement preceding it. Although this is not

generally a problem in traditional arbitrations because the parties are corporate entities, certain issues have arisen in the Arab world and the senior courts of the UAE and Bahrain have on occasion dealt with such matters. The matter becomes slightly more complicated by reason of the fact that private international law dictates that in personal matters the applicable is the person's personal law, which for Muslims means Islamic law or the law of their seat or residence. Thus, in many cases, non-Muslim parties may be surprised to learn subsequently that their Muslim counter-party did not have the capacity to enter into an arbitration agreement because of an issue that could not have been foreseen.

The second impediment that is discussed in this chapter is that of improper legal notice. Again, this seems like a minor procedural issue but it is of great importance in the Arab world, where its courts, such as those of the UAE and Bahrain, have devised a standard of notice that is required from the parties to arbitral proceedings. Much of this of course is based on standards adapted from proceedings before the regular courts. One of the particular issues that arise in situations of improper notice is the inability of one of the parties to present his or her case, which constitutes a direct prejudice to the rights of that party.¹¹ This matter is also explored in the course of this analysis.

The third impediment relates to excess of jurisdiction by the arbitral tribunal itself, which again prejudices the rights of a party to the dispute and culminates in a faulty award. This author's analysis on jurisdictional excess goes through three stages, namely: a general discussion of the issue under international practice in order to get a sense of where the problems and solutions lie; an examination of the scope of the arbitration agreement in order to properly assess jurisdiction, which is accomplished by an examination of the jurisprudence of the courts of the UAE and Bahrain and their respective laws; this is then followed by an assessment of the relationship between the arbitration clause and contract annulment in Islamic law and the UAE and Bahraini laws in particular. Finally, we look to

¹¹ One of the issues that arise here and is slightly touched upon is the fact that any prejudice to one of the rights to a party in arbitral proceedings gives rise to human rights questions, particularly that of access to justice, equality of arms and others. The European Court of Human Rights, as explained in chapter 2, has related these matters to the application of Article 6 of the European Convention of Human Rights. The lower and senior courts of Bahrain and the UAE, on the other hand, have not made any references to "rights" in respect of such violations to the parties' entitlements as these arise from arbitral proceedings. This is no doubt attributable to the fact that there exists no regional human rights convention that makes such an inference and local laws tend to disassociate rights language from commercial dealings, although in case No 351/2005, judgment (1 July 2006), the Dubai Court of Cassation held that depriving a litigant from his right to review and reply timely to documents distorts the parties' right to equal treatment and constitutes a violation of due process rules. The matter, however, needs to be discussed more fully and some prominence must be given to it in the jurisprudence of the courts and the law-makers. See generally, A Jaksic, *Arbitration and Human Rights* (Peter Lang, 2002).

the foundations of separability in the laws of the two nations, arguing that this is crucial in understanding and explaining jurisdictional excess.

The final impediment that is analysed in this chapter relates to inappropriate composition of arbitral tribunals. This has given cause to some concern in the Arab world and is closely linked with bias questions, which are also explored. Overall, the grounds for refusal analysed in this chapter and their application by the local courts do not depart in any significant way, if at all, from their Western counterparts.

Chapter 3

Here, this author examines yet another obstacle to the recognition and enforcement of foreign arbitral awards, namely that of arbitrability. It is explained that traditional arbitrability served to limit the extent to which particular disputes could be submitted by the parties to binding arbitration and was an encroachment of the State on personal autonomy. The fundamental principle, as is the case in Muslim countries, is that a dispute can only be referred to arbitration if it is susceptible to a process of conciliation. This, of course, is rather a broad formulation but is no doubt the basis for the arbitrability test under the Qur'an and the *sunnah* and to a large degree it is followed in the Gulf. However, the traditional dichotomy between that which is allowed and that which is not under classical Islamic law has not strictly been adhered in the UAE and Bahrain. More specifically, illegal contracts under Islam, such as those that contain in themselves a large degree of speculation and uncertainty (*gharar*) have been found to be incompatible with the Sharia in countries like Saudi Arabia. An application of the *gharar* prohibition encompasses commercial activities such as Western-type insurance, futures trading, the charging of interest (i.e. Western-type banking) and in some cases the introduction of an arbitration clause in a contract; the latter is considered speculative because of the parties' future thinking about their contractual relationship. While most of the commentaries have in the past held such contracts to offend Islam, this is no longer the case, nor indeed the interpretation preferred by the laws and practices in the UAE and Bahrain.

It is explained that while arbitrability does not in theory have to align with public policy, in practice this is exactly the case. The laws and the courts in the UAE and Bahrain have taken a very pragmatic view of the global commercial reality and in the opinion of this author have distinguished and extrapolated the root of the evil in those commercial activities that were prohibited under classical Islam. The root of the evil is usually the greed that drives

most people to trespass against ethical and religious prescriptions and it is exactly this element of greed that is vanquished in respect of legislation that allows the charging of commercial interest in a well-regulated manner, alongside Islamic financing models which are available for everyone to use. In the case of the UAE and Bahrain, such regulation consists of placing mandatory ceilings on the amount of interest that can be charged. Hence, weight is given throughout the chapter to the links between Islamic thought and jurisprudence and the underlying policies and rationale behind the arbitrability dimension of the laws of the two nations. Finally, the chapter seeks to pinpoint the principal issues of arbitrability as these are found in the statute law of UAE and Bahrain. This is not always a simple exercise, not least because there is no precise formulation in the legislation as to when particular forms of conduct or relationships are not considered arbitrable. Rather, this is either presumed by inference or by the normal operation of the law itself.

Once again, neither the UAE nor Bahrain pose any arbitrability constraints to the enforcement of foreign awards in a manner that is inconsistent with the practices of Western nations. In fact, the UAE and Bahrain are content to bypass fundamental tenets of the Quran in order to avoid posing Islamic arbitrability obstacles.

Chapter 4

Having examined several other impediments to the enforcement of foreign arbitral awards in other chapters, particularly incapacity, improper notice, jurisdictional excess, improper composition of the arbitral tribunal, arbitrability and public policy, this chapter traces the remaining impediments as these are enumerated in the UNCITRAL Model Law and the respective arbitration laws of the two nations under consideration. These include those circumstances where an award is deemed to be null and those where the tribunal applied improper substantive law to the merits of the dispute. It is assumed that along with all the other chapters in this thesis the impediments analysed are those that are referred to in the relevant instruments and it those that frequent before local and international courts and tribunals. As a result, this author assumes that he has exhausted the reasons for which an award may or may not be enforced in the UAE and Bahrain.

As regards the first of these, it will be noted that whether or not an award is null is not sufficiently explained in the UNCITRAL Model Law or the New York Convention and the matter remains rather contentious at international level. This means that national courts can at

their own initiative, following in most cases a request by the losing party, determine that a particular award has been rendered null by the operation of national law. This possibility renders the process rather risky and with little legal certainty. Thus, the chapter goes on to assess the standard practice in international commercial arbitration and to trace how the concept may be subject to abuse and what considerations are available in order to avoid breaches of legal certainty. It then goes on to explain the relevant jurisprudence from the lower and senior courts of the UAE and Bahrain in order to assess whether this practice is consistent with international developments.

With respect to the application of improper substantive law by the arbitral tribunals, one is aware that this matter has been the original issue of contention by Arab nations following the famous ad hoc arbitrations of the 1950s and 1960s, where the arbitrators decided that despite the express reference to Islamic law as the applicable law of the contract, international law was in fact the appropriate substantive law. Such scenarios are improbable today but it is evident that significant sensitivity exists as regards the improper application of law, especially if this is a foreign law that prejudiced the rights of one of the parties to the proceedings.

For good reason, therefore, the courts of the UAE and Bahrain have taken a rather strict approach to this impediment and their judgments reflect this historic reality. It should be noted, however, that there is no abundance of cases on this matter and that much of the research lies on the existing case law of the two courts, coupled with an analysis of international developments. It is clear that all these issues fall within the rubric of public policy and the courts in the two nations have often referred to public policy in respect of such matters. However, the specific matter of public policy is left to the final chapter of the thesis.

Chapter 5

This chapter seeks to illuminate one of the most vague and little-understood areas of Islamic law and practice, namely public policy. It is, not without reason, assumed by Western scholars and practitioners working in the Gulf that Gulf nations and many Arab nations, in fact, apply the principle of public policy arbitrarily and without solid legal reasons in order to divest winning parties of their right to have their awards recognised and enforced in the country of enforcement. This is indeed a serious accusation and it is the reason why this

author decided that it was pertinent that a chapter be devoted to the examination of public policy in the legal spheres of the UAE and Bahrain.

The chapter starts off by examining the meaning of public policy and public order, as well as the meaning of transnational and international public policy. This is then contrasted with the prevailing perceptions as to “whose” public policy one is referring to. The outcome is that public policy under the New York Convention is local and not transnational in nature. The author then turns to elaborate on the meaning of public policy in Islamic jurisprudence with a view to assessing whether this is compatible with the model projected by the courts of the UAE and Bahrain. There is an absence of a precise definition of public policy in the two nations under investigation and it principally as a result of this that the courts are inclined to protect certain interests and project a picture to the outside world according to which foreign clients must be careful when submitting awards to UAE and Bahrain because they may come under serious surprises if they assume to know what local public policy is. In fact, following the *Bechtel* decision it has been noted that failure to acquire sworn statements from witnesses to arbitral proceedings in accordance with the strict requirements of UAE law rendered an award null for the purposes of enforcement.¹²

Moving beyond the narrow dictates of classical Islamic law, where the author identifies permissible contracts, we are then driven to explore the public policy of the UAE and Bahrain from the point of view of their statutory injunctions. There, one finds some interesting case law of recent vintage, as well as a devotion to formalities in the law that would not otherwise be sufficient to convince a judge that a particular award should not be recognised and enforced. What is critical about public policy is the fact that so much is left to the discretion of the local judges and this in itself breeds legal uncertainty and harms the parties’ sense of legitimate expectations. The author does not wish to enter into an appraisal as to whether the rationale behind the *Bechtel* decision will remain in the future jurisprudence of the Dubai Court of Cassation, but he does point out that this has been a shock to the system itself and it is doubtful whether it will be replicated. The chapter goes on to point out that much more research and better drafting is required if the UAE and Bahrain are to eliminate all suspicions from Western businessmen and lawyers that public policy is an erratic and unfathomable aspect of their legal system. It has been advised throughout that the formalisation of precedent will help dispel the perceptions of arbitrariness.

¹² Above note 3.

The Concluding Chapter

The concluding chapter at the very end of the thesis will not simply reiterate what has been mentioned in the course of the thesis itself. If this were the case it might as well have been called a summary of the thesis's proceedings. Although this in itself would not have been faulty or unwise, this author is of the opinion that an original work should, besides summarising the law and its deficiencies, point the way forward and the mistakes of the past. This is especially the case given that the present author will be appointed to an academic post in the Gulf with specialisation in arbitration and therefore this work is meant to some limited degree to provide insights to law-makers and nurture future arbitrators and litigators in the country and the region more generally. Therefore, the primary focus of the concluding chapter is on identifying the problems in the system and suggesting solutions that would enhance it. Some of the conclusions will be of a much broader nature and may not necessarily take stock of some of the research in this thesis. However, it is hoped that the recommendations set out here will provide some kind of benchmark for future developments in both the UAE and Bahrain and will assist in consolidating the excellent work that has been undertaken by the courts and law-makers of these countries over the course of the last years.

CHAPTER 1A
SOCIOLOGICAL PERSPECTIVES TO JUDICIAL AND ARBITRAL ATTITUDES
IN THE UAE AND BAHRAIN

1. A1 Introduction

The aim of this chapter is to present a sociological account of the legal profession and legal education in the UAE and Bahrain with a view to understanding judicial behaviour in the two nations and in order to conceptualise whether the attitude in both nations is arbitration-friendly or not. The latter outcome is not evident in the first sections of the chapter and one has to reach the end of the chapter, as well as read the black-letter analysis of all other chapters, to reach any conclusion. However, although this author is of the opinion that the overall philosophy of both the UAE and Bahrain is by no means hostile to arbitration, including in respect of enforcement of foreign awards, the principal purpose of this chapter is not to substantiate or give credence to this belief. Rather, the various sections are structured in such a way as to demonstrate the distinct but inter-related phases in the evolution of law and the legal profession in the two nations in order to understand why the arbitration system is flexible or inflexible and trace the responsible actors within the system.¹³

It will be shown that the legal profession is split into two camps, that is, local Arab lawyers who are competent to practice before local courts and foreign law firms who provide consultancy services to foreign clients and moreover undertake the vast bulk of arbitration work in the region. The legal education of the judiciary and the availing political climate in the two nations, although extremely trade-friendly, is generally inadequate to cater for the complexity of transnational arbitration. Hence, when a foreign law firm presents a complex award to a GCC judge for enforcement therein, the lower court judge may possess little understanding of the relevant issues and procedures. The judge's biases may also determine the final outcome, but in practice aberrations are rare and the system generally operates

¹³ My starting point, therefore, has been the application of *systems theory*, and in particular the understanding of the enforcement process as part of a larger system that encompasses legal education, the legal profession, judges, attitudes, politics etc. Systems theory recognises that organisations are complex legal systems, from which one cannot redact the parts from the whole without reducing the overall effectiveness of the organisation itself. See N Luhmann, *Law as a Social System* (Oxford University Press, 2004), who applied systems theory to legal systems.

without major distortions.¹⁴ This is not to say that Bahrain and the UAE are among the most attractive forums for conducting arbitrations; on the contrary, the rise of Singapore as a rival to London, Paris, New York and Stockholm should act as an example to lawmakers in the two countries.

I make no claim in this chapter to demonstrate, empirically or otherwise, whether Bahrain and the UAE are enforcement-friendly. Instead, my aim is to map some of the underlying reasons behind judicial attitudes and the actors that push the boundaries of arbitration law and practice. At the end of the chapter I set out some methodological remarks the principal aim of which is to emphasise that the chief objective of the thesis is to explain and analyse the law and practice of enforcement of foreign arbitral awards in the UAE and Bahrain. This is accomplished through a meticulous and critical study of relevant enforcement judgments, the law as it stands and commentaries on the two. Whether or not this discussion leads to the conclusion that the UAE and Bahrain are pro-arbitration is of secondary importance and my expectation is that any outcome will be a reflection of the overall discussion. The fact that I point to inconsistencies in enforcement practices while at the same time I give the impression that the system is indeed arbitration-friendly should not be viewed as confusion on my part or as structuring my arguments on an incoherent methodology. Rather, I take it for granted that even a perfect system may produce isolated, inconsistent, or irrational outcomes which it then proceeds to remedy.¹⁵ A situation of this nature by no means renders the system itself inconsistent or in any way reduces its efficiency.

1. A2 The Sociological Dimension of Gulf commerce

Unlike the West where social sciences have a long and entrenched history and a significant empirical background, Muslim societies have not generally generated a sufficient body of empirical research. As a result, the vast majority of sociological and anthropological research on Muslim societies and of the Gulf in particular has originated from Western scholars. It would be pointless to talk about a unifying sociological paradigm encompassing the whole of the Muslim world, given that such an approach negates the very essence of *society* and

¹⁴ Indeed, this is one of the major traits of “systems”, i.e. that they are self-regulating, meaning that they are capable of self-correction through feedback. If the system is moreover self-referential, that is, it receives no influences from external factors (so-called operational closure) then we are talking about an autopoietic system. Luhmann, id, at 6-8. Clearly, the enforcement/arbitration system of the UAE and Bahrain is not subject to operational closure.

¹⁵ This “remedy” corresponds to the “feedback” inherent in self-regulating systems. Luhmann, id, at 8.

societies.¹⁶ The starting point for this discussion should be the distinction between the Gulf's pre-oil and post-oil era. The former was characterised by a primitive lifestyle and inward localised commerce with few, if any, external influences. Tribalism played a central role during this period save for legislation derived from colonial powers (originating from either British or Ottoman rule), with strict Islamic law being the only law known to the local populations. Several of these characteristics were brought forward in the post-oil era. Chief among these were tribalism (or family rule), the application of Islamic law – this time as supreme law – and almost complete reliance on foreign services and goods. Several scholars attribute Islam's "cultural stasis" to the nature of the sacred with which it is infused and which penetrates every aspect of life in the Muslim world. Hertog takes the view that this sacred in Islam suspends the acceleration of social time, hinders change and circumvents secularisation and modernity.¹⁷

It is emblematic of resource-rich nations – otherwise known as *rentiers* on account of the fact that they rent their subsoil to others – to share a number of negative traits. These principally concern acute democratic deficits,¹⁸ the quality of public institutions and the services delivered to their people¹⁹ and finally economic growth itself. The latter has been exemplified by the concept of Dutch disease or resource-curse which has arisen where resource-rich nations expanded their public sector and spending when prices were high, rendering themselves volatile to subsequent international price fluctuations, thus being unable to sustain their excesses.²⁰ As a result, instead of having what would otherwise be a surplus, they find themselves saddled with unbearable debts. Although Gulf nations have not been beset by such issues, the very fact that they can command strong economies and rely on their natural resource in order to perpetuate and sustain their wealthy living has caused a number of social phenomena that will be explored in the course of this section.

¹⁶ See T Keskin (ed.), *The Sociology of Islam: Secularism, Economy and Politics* (Ithaca Press, 2012), which represents one of the few contemporary efforts by an Arab scholar to examine the diffusion of Muslim societies in light of modernity, rather than from a religious and historical lens, which has traditionally been the case.

¹⁷ D Diner, *Lost in the Sacred: Why the Muslim World Stood Still* (Princeton University Press, 2009), particularly the conclusion.

¹⁸ M Ross, Does Oil Hinder Democracy? (2001) 53 *World Politics* 325 who takes this position in respect of all Gulf nations, as well as all other developing nations that are resource-rich. The principal exception is Norway.

¹⁹ J Isham et al, The Varieties of Resource Experience (2005) 19 *World Bank Economic Review* 141.

²⁰ J Sachs, A Warmer, The Curse of Natural Resources (2001) 45 *European Economic Review* 827.

Social scientists argue that the above identified negative impacts in rentier nations arise because of the vast disparity in the ratio under which the resources are possessed by the State to the ratio that these are made available to society. Hertog convincingly argues that: State services will be relatively less valuable and sought after if society has enough productive capacity to satisfy individual needs through private provision. Less individual effort will be put into accessing State services and resources. Conversely, less private wealth and lower productive capacities in society relative to the State will reinforce the reorientation of individuals towards goods provided by the State. The ratio of state to societal resources, however, is specifically skewed in rentier States.²¹

He goes on to demonstrate on the basis of available data that despite the public provision of free or subsidised health, education and utilities, the share of wealth in the GCC between government and people is highly disproportionate.²² As a direct result of this imbalance Gulf societies have given rise to the social phenomenon of intermediaries, that is, people with influence or in positions of some authority who are able to affect government relations in favour of third persons, both locals and foreigners. This is true notwithstanding the fact that with the exception of Bahrain, the biggest part of the local population is employed in the public sector in one form or another. Whereas the percentage for Bahrain is 30 percent, which is still high compared to Western nations, the same figure for UAE, Saudi Arabia, Kuwait and Qatar is between 60 and 80 percent.²³

This state of affairs has created a number of social anomalies. For one thing, it has inhibited the growth of a universal educated class as indeed the growth of local research in both the technical and the social sciences. The secondary and tertiary education that does exist is uncritical and very little emphasis has traditionally been placed upon the social sciences and the humanities, other than classical Islamic studies. This is equally true for the state of legal education, which will be analysed more fully in another section. This absence of critical education in addition to the granting of privileges to nationals, particularly through their employment in the public sector or the requirement for all companies to have a

²¹ S Hertog, *The Sociology of the Gulf Rentier Systems: Societies of Intermediaries* (2010) 52 *Comparative Studies in Society and History* 282, at 285.

²² *Id.*, at 285-86.

²³ *Id.*, at 286-87.

minimum amount of local employees,²⁴ has given birth to successive generations lacking incentives to be productive, entrepreneurial or innovative.

As a result, despite a massive transnational trade, commerce and investment in the Gulf and the existence of a significant expatriate community from all corners of the globe, the majority of the local population clearly distinguishes between “us” and “them”.²⁵ Given the abundance of privileges afforded to the local population, private trade and commerce is largely controlled and dominated by foreign elements and entities.²⁶ This has necessarily augmented the social divide between these two classes and has made communication much more difficult, despite the progressive cultural adaption of Bahrain and the UAE and the adoption of laws that at times contradict even specific injunctions of the Quran.²⁷

In the opinion of this author this failure to enhance communication and cultural understanding – inevitable given the creation of two distinct classes within the same State, ie local civil servants and foreign private entrepreneurs – has ultimately created a chasm and suspicion on the part of the local elite that the foreign elements are distinct from “us” and that they are after our resources and wealth.²⁸ This suspicion is not wholly unjustified and is to a large part attributed to the fact that the institutions of trade, commerce and investment have been derived from the West, as is also the case with the mechanisms by which to resolve disputes. The oil arbitrations that went the way of Western companies from the 1950s until the 1980s have ignited this suspicion,²⁹ but in my opinion this is largely fuelled in the present day by the absence of a common language spoken equally well by all actors (few Arabs speak

²⁴ See H Atiyah, *The Sponsorship System and Infringements of the Rights of Foreign Workers* (1990) 3 *Employee Responsibilities and Rights Journal* 267.

²⁵ Keskin, above note 4, at 155-56.

²⁶ It is for this reason that all Arab nations have traditionally required that agents of foreign franchises be locals rather than foreigners, in order to control that part of the market. The UAE Commercial Agencies Law No 18 of 1981 (as amended by Federal Law No 14 of 1988 and by Federal Law 13 of 17 June 2006) provides that only UAE courts have jurisdiction over commercial agency disputes. See C Montagu, *The Private Sector of Saudi Arabia* (Committee for Middle East Trade, 1994), one of the first studies on the involvement of post-oil local Arab populations in the private sector, which was always dominated by foreigners.

²⁷ I am here referring to the legality of the imposition of interest by financial institutions and the legality of contracts otherwise described as *gharar* under classical Islamic law, particularly clauses looking to the future, such as arbitration clauses. For a detailed analysis of these developments, see chapter 3.3.

²⁸ Social attitudes in the GCC adversely affect potential migration flows thereto. A recent study by Gallup demonstrates that almost 98 per cent of potential migrants to the GCC are from Asia and Africa, their majority being Muslim, with less than 2 per cent from North America and Europe seeing a permanent future for themselves in the GCC. More worryingly, Saudi Arabia and the UAE attract relatively less educated potential migrants. See <<http://www.gallup.com/poll/157058/potential-migration-gcc.aspx?ref=more>>.

²⁹ Particularly *Petroleum Development (Trucial Coasts) Ltd v. Sheikh of Abu Dhabi* (1951) 18 ILR 144; *Ruler of Qatar v. Int'l Marine Oil Co. Ltd* (1953) 20 ILR 534 and *Kingdom of Saudi Arabia v. ARAMCO* (1963) 27 ILR 117.

English fluently and even fewer Westerners speak Arabic),³⁰ the absence of a common legal language until recently (Islamic law versus Western legal systems) and Arab complacency due to the abundance of resources and wealth.

In the context of this social climate it is not surprising that the older generation of Bahraini and UAE judges are disinclined towards those operating the transnational rules of arbitration.³¹ This is particularly true in respect of those judges that have not received any legal education abroad, the vast majority of which will have gained a knowledge of arbitration on the job and not as a matter of training.³² These judges will not have divested themselves of the general Arab hostility towards arbitration. At the same time, however, they will be acutely aware of the local political climate which strongly favours foreign investment and the flexible reading of classical Islamic rules but will no doubt entertain an underlying bias in favour of local public companies, if for no other reason because they are quintessentially “theirs”. This attitude has been on a course for change since the last decade and major changes include the internationalisation of legal studies programs in the region, exposure to Western legal thinking through postgraduate studies and the gradual introduction of female judges.³³

This does not necessarily mean that judges in Bahrain and the UAE are hostile to international arbitration or that they demonstrate malicious bias in favour of local companies or public policy. Rather, the social construction of Gulf societies in the manner described, in which judges constitute an integral part, views entrenched “foreign” practices such as arbitration as a vehicle for investment but at the same time as an unknown entity. This explains why despite the otherwise liberal and arbitration-friendly approach of Bahraini and

³⁰ *A contrario*, the existence of English as a common language in the Dubai International Financial Centre (DIFC), for example, has effectively delocalised it from a cultural and language perspective. Diner, above note 5, at 99, points to the “time suspending impact of Arabic as a sacred language” as yet another cause of the cultural stasis of Muslim societies.

³¹ See JM Lew, *The Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East* (1985) 1 *Arbitration International* 161 who cautioned against enforcing awards in the GCC because of the relevant uncertainty in judicial attitudes at the time.

³² This is reflected in the judgments themselves. These rarely refer to the NY Convention when dealing with enforcement or other related arbitral proceedings and are moreover cursory in their analysis and approach. There is no in-depth analysis and never any reference to key international or transnational judgments before domestic courts. Besides capacity, the other reason no doubt is that since precedent is not permitted locally it would make sense that transnational precedent should also be treated in the same manner. There is a rationale hue to this argument even if its fundamental premise is erred.

³³ In fact, although Article 18 of the UAE Federal Judicial Authority Law of 1983 stipulates that judges must be male, this requirement applies only in respect of federal courts. Thus, there is a good representation of female judges in local courts. See A Mustafa, *More Women Judges Needed in UAE Courts: Panel Says* (24 November 2011), available at: <<http://www.thenational.ae/news/uae-news/courts/more-women-judges-needed-in-uae-courts-panel-says>>.

UAE courts and public institutions there are instances, such as *Bechtel*,³⁴ where the underlying bias surfaces as an exception rather than the rule. It is in order to avoid these aberrations, which arise particularly in Dubai it should be mentioned, that the need for binding precedent becomes pressing. While it is true that countries lacking formal precedent, such as France, Sweden and Switzerland, maintain powerful arbitration forums, it is also true that these countries do not distinguish between “us” and “them”. More importantly, the judgments of their courts are detailed, well-referenced and cognisant of international developments and as a result they possess significant precedential value. The introduction of precedent in the UAE and Bahrain will help render the *transnational* far more *national* and allow local courts to think more fully about justifying and elaborating their judgments. Local courts will also make the effort to distinguish foreign judgments where necessary and thus foster a legal dialogue which in the long run will render arbitration much more harmonised with other major arbitration-friendly nations.

These observations tie in with research on the reasons behind the independence of the judiciary in the Gulf. It has been vociferously contended that while this independence may be attributed to imperialism or liberal ideology, the primary purpose of the system is to provide support for the officially sanctioned order.³⁵ Hence, the system’s independence from the executive could at least better be served by an institution, such as precedent, that is not susceptible to overt manipulation and which ensures consistency and the rule of law.

1. A3 Legal Education in Bahrain and the UAE

The typical medium for becoming a legal professional in the Gulf has always been an excellent knowledge of Islamic law, a good reputation and certainly a good level of literacy. Professional lawyers’ bars are a recent phenomenon. Given that the regulation of all matters falling within the subject matter and *ratione loci* jurisdiction of GCC courts in the pre-oil era were resolved on the basis of Islamic law it was only natural that judges (*kadis*) were not

³⁴ *International Bechtel v Department of Civil Aviation of Dubai*, Case No 503/2003, judgment (15 May 2005).

³⁵ See the empirical work of N Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press, 2007), who takes the view that this system of “judicial independence” in the Gulf was copied from Egypt, which itself made use of it for similar ends.

required to be acquainted with any other branch of law. However, the infusion of external influences, mostly in the form of legal transplants from French and particularly Egyptian laws meant that the legal system was gradually becoming mixed and bifurcated. This eventuality was particularly highlighted by the introduction of statutes covering almost all areas of activity, often times overlapping with Islamic law itself. Hence, the new generation of *kadis* and advocates enhanced their legal education by delving into civil law theories and jurisprudence. However, before the advent of globalisation (for the purposes of this thesis this date is 1990) these influences did not render the legal systems of Bahrain and the UAE cosmopolitan nor did they engage the application of transnational law – mainly best practices from other advanced legal systems – by the local courts. It should be stressed that prior to the era of globalisation the use of arbitration in the UAE and Bahrain was minimal.

Both prior and after globalisation judges were asked to determine complex cases involving a plethora of transnational elements brought by experienced litigators working as partners in top international law firms.³⁶ They were largely unfamiliar with the issues at hand and given that US courts, for example, had considered matters as complex as the arbitrability of anti-trust issues from the late 1950s, it is obvious that the legal arguments brought forward by said foreign litigators was something alien to local judges. Quite clearly, their legal education and their everyday case load could not match the pace and expertise of international law firms who by the late 1980s had firmly established themselves in the GCC.

The implications of this observation have never been studied in the Gulf, but in my opinion help to explain many of the system's deficiencies. For one thing, there may well be unrecorded cases where the courts failed to understand counsel's arguments and hence tended to agree out of embarrassment. Equally, the opposite is also likely; i.e. cases where the court disagreed with sound arguments it did not itself understand out of resentment. Although such occurrences may be rare for the federal courts of the UAE where judgments are recorded, this assumption is not necessarily true with respect to lower courts. Secondly, the lack of familiarity with transnational rules and cases may explain the development of cursory judgments in transnational cases and the reluctance of the courts to elaborate further. The fact that UAE and Bahraini laws do not follow precedent is a poor excuse, particularly since important judgments in civil law systems tend to be elaborate and make reference to foreign

³⁶ In the UAE and Bahrain, foreign lawyers cannot represent the parties before the courts as this is only available to local lawyers. As a result, local lawyers typically act as barristers in complex cases before local courts whereas international law firms undertake all the substantive work in the background. This is further explained below.

cases. One would have thought that Bahrain and the UAE would have welcomed any attempt to demonstrate legal certainty and the rule of law in their territory by establishing some sort of precedent rule. Finally, as is usually the case with legal transplants, the life of the transplant in its original home is not static and takes on a different life than that of the country where it has been transplanted. Thus, whereas Egyptian laws were themselves clearly influenced by France, the surge of Egyptian lawyers throughout the world from the 1970s onwards gave rise to a current of new influences, many of which originated in transnational practices (i.e. arbitration, *lex mercatoria*, judgments with transnational impact etc) and legal developments from common law jurisdictions. Thus, whilst Egypt viewed its laws antiquated, the UAE and Bahrain found Egyptian laws as a suitable paradigm, even if compelled to some degree to follow the new Egyptian trends, which would be difficult because the majority of Egyptian case law is unreported.

This state of affairs was necessarily filtered into the region's legal education. No research has ever been carried out by Gulf States on their legal education. Serious questions have never really been asked and only recently has there appeared a rudimentary scholarship on higher education in general. The overall conclusion is that there is no particular aim to higher education in the Gulf and despite the import of a "baroque arsenal" of sophisticated and costly educational programs Gulf nations simply consume other countries' knowledge and products, all of which are of declining utility and sustainability.³⁷ This of course does not mean that the sudden influx of Western universities in the region and the establishment of publicly-funded colleges and universities has not provided a stimulating environment for the local populations or that this has not enhanced democratic governance, rights, status of women in society etc. All this is very well documented³⁸ and I am not arguing otherwise.

What is problematic is the direction, or the lack thereof, of legal education in Bahrain and the UAE. For one thing, whereas these nations are international hubs for trade and commerce, the existing legal curriculum is to a large degree of local character and outlook. As has already been stated, there exists much complacency in the fact that foreign lawyers cannot appear as counsel before local courts³⁹ and hence local lawyers are content with their

³⁷ G Donn, YA Manthri, *Globalisation and Higher Education in the Arab Gulf States* (Symposium Books, 2010), at 7-10.

³⁸ See, for example, CM Davidson, P Mackenzie Smith (eds), *Higher Education in the Gulf States: Shaping Economies, Politics and Cultures* (Saqi Books, 2008).

³⁹ The situation differs from one emirate to the next but the result is the same throughout. In Dubai, for example, lawyers operate at the discretion of the Ruler's court. In addition, law firms must obtain a professional licence from the Dubai Department of Economic Development. Only Dubai nationals can practice

foreign counterparts' domination of the arbitration scene. This has given rise to a conscious self-admission of inferiority in the sense that Arab lawyers could not possibly carry through complex arbitral proceedings whether because they lack the vast resources of their Western counterparts or simply because foreign (and perhaps local) corporations generally prefer Western-style legal services even if they cost more. This attitude is necessarily reflected in the curriculum, with arbitration and private international law not featuring at all until recently in the legal curricula of law schools in the region. Secondly, Gulf law and practice lacks a clear international outlook. Although certain laws, such as those on interest, favour international trade, their outlook is domestic and this is reflected in the teaching of the laws in local law schools. As a result, succeeding generations of lawyers and judges view local law from a domestic lens and this explains to a very large degree our aforementioned remark regarding the absence of references to transnational law in the judgments of the courts of the UAE and Bahrain, unless absolutely necessary.

Finally, the scholarly output of law academics in the region in international periodicals, or in the form of scholarly monographs, is relatively poor. Although universities encourage academics to write and publish there is no clear vision as to why this is beneficial for the university or its students. The situation is further compounded by the fact that the teaching schedule in local law schools is exceptionally heavy and students are burdened with a large number of modules which leaves little room for critical thinking⁴⁰ or depth in any particular field. This heavy teaching load does not allow Gulf academics any time to undertake quality research and thus to expand the horizons of legal thinking in the region. As a result, there is very little scholarly output from local law academics,⁴¹ with the majority being authored in Arabic and published in local legal periodicals whose peer-review

before local courts, whereas other GCC nationals may exceptionally do so if they are entitled to practice in other GCC jurisdictions. Overall, the regulation of the legal profession in the UAE is achieved by reference to Federal Law No 23 (1991), which limits the practice of law to UAE nationals, albeit licensing is exclusively dependent on each ruler's office. The latitude for discretion is therefore significant.

⁴⁰ In fact, critical thinking is among the pinnacles of Islam, reflected not only in secondary sources, but in the Koran itself. Verse 8:22 stipulates quite clearly that: "Most certainly the worst of animals in Allah's sight are the deaf, the dumb who do not use their brains". Moreover, Imran ibn Khalid has been quoted as saying that a person's religion is not completed until his intellect is perfected [Al-Aql wa Fadlih/17].

⁴¹ Of course, I am not underestimating the absence of critical scholarship in Gulf academia generally, which would make it very difficult for Gulf academics to publish in foreign periodicals despite the fact that they are otherwise extremely well qualified with excellent studies abroad. The reason is that Western-style periodicals are weary of non-critical, dry, pieces of research. There is an emphasis on socio-legal output, even in fields such as commercial law, which is alien to Gulf academics who are not accustomed to thinking and writing in this manner.

processes are nowhere as scrupulous as those in Western periodicals.⁴² It is of no surprise, therefore, that the majority of scholarly analysis on Gulf laws and progressive Islamic legal thinking has largely been derived from Western legal scholars publishing abroad⁴³ or from Gulf students undertaking postgraduate degrees in the USA and the UK. Equally, it has been from the ranks of the legal profession in the Arab world that the most significant commentaries have been derived, whether in the form of comprehensive commentaries by distinguished Arab lawyers,⁴⁴ or in the form of short, succinct analyses provided by foreign law firms working in the Gulf.

1. A4 Pushing the Boundaries of Law and Arbitration in Bahrain and the UAE

The previous sections of this chapter should also be read as a prelude and a starting point to the discussion in this section. One would be astonished to learn that individual lawyers in Dubai were not required to register with the government until the passing of a Decree that took effect on 24 August 2011. Until then, anyone claiming to be a lawyer – save for law firms which were required to register – could provide legal services even if that person did not possess any relevant qualifications. As a result, there were no hard standards to which lawyers could adhere, such as a binding code of conduct or the threat of disciplinary action.⁴⁵ This is particularly striking given that Dubai courts are the most vociferous among the courts in the region and as will be explained throughout the course of this thesis the Dubai Court of Cassation has adopted several landmark judgments that have baffled international commentators as to the sincerity of the UAE, and Dubai in particular, as regards their claims of being arbitration friendly. Of course, there are exceptions to the rule posited above and which largely confirm the argument by Brown on the GCC judiciary.⁴⁶ In one of these, Scottish law firm HBJ Gateley Wareing was granted a legal advocates license by the ruler of

⁴² There are of course some exceptions, but these are isolated cases. Chief among these is the *Arab Law Quarterly* and the *International Journal of Arab Arbitration*, both of which are internationally peer-reviewed and published by the Dutch publisher Wolters Kluwer. The *International Journal of Arab Arbitration* also publishes excerpts and analyses of key judgments relating to arbitration from all countries in the Arab world.

⁴³ Of course, the possession of critical insights is no compensation where the authors, despite their best efforts, do not master Arabic and rely exclusively on second hand information available in their own language. There is an extensive array of literature in this genre, particularly in the field of human rights in the Gulf.

⁴⁴ See particularly, AH Al-Ahdab, J Al-Ahdab, *Arbitration with the Arab Countries* (Kluwer, 3rd edition, 2011); A Al-Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Kluwer, 2004).

⁴⁵ See K Brass, Dubai Lawyers to Require Licenses from Next Month, *The National* (8 July 2011), available at: <<http://www.thenational.ae/business/economy/dubai-lawyers-to-require-licences-from-next-month>>.

⁴⁶ See Brown, above note 23.

Dubai, effectively allowing a foreign law firm for the first time to hire local advocates and thus represent the firm before local courts.⁴⁷ For all intents and purposes the Scottish law firm was given the status of a local law firm. Despite the obvious BIT implications relating to the varying standards of treatment afforded to foreign investors⁴⁸ there is a question mark here about the system's consistency overall.

Foreign law firms operate what Flood and Lederer call global lawyering or cosmopolitan lawyering.⁴⁹ Transnational law firms, as well as global auditing firms, have a twofold aim when venturing to expand their operations in a new country: namely, the protection of the interests of existing clients therein, and the desire of breaking into new markets and new clients. Where the regulation of the legal profession operates under a protectionist umbrella, as is the case with the UAE and Bahrain, the choices are limited. Either one teams-up and refers the litigation dimension of cases to local partner firms, or, where possible, establishes a branch and hires local lawyers in addition to expatriates. Foreign companies in the UAE and Bahrain (whether legal, financial or auditing), as indeed in all other GCC nations, have applied significant peer and political pressure in one way or another to local governments and rulers to push the boundaries of existing laws that were viewed as hostile to trade and commerce. The adoption of the NY Convention, the relative trend towards a much friendlier approach to arbitration, the adoption of the Model Law and others are examples of the impact of peer pressure⁵⁰ – although by no means the only cause. Moreover, it would have made no sense for the UAE and Bahrain to facilitate the entry of foreign law firms on their territory if they were not prepared to accept change themselves; an archaic, inflexible and anachronistic legal system, no matter how wealthy the country is, cannot generate sufficient legal business to attract a multitude of law firms of the size of those in Bahrain and the UAE. The influx of top-flight law firms and the creation of thousands of legal openings in the two nations necessarily mean that they not only generate enough revenues internally but that they are also appropriate forums for conducting business or settling disputes externally.

⁴⁷ Construction Week (15 March 2008), available at: <<http://www.arabianbusiness.com/foreign-lawyer-can-go-court-52527.html>>.

⁴⁸ Of course, it is debatable whether the establishment of a law firm, even a big one, constitutes an "investment" for the purposes of a particular BIT, but there is no compelling reason as to why it cannot. See R Dolzer, C Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), at 60-71.

⁴⁹ J Flood, PD Lederer, *Becoming a Cosmopolitan Lawyer* (2012) 80 *Fordham Law Review* 2513.

⁵⁰ It is no accident that many law firms include a so-called "political law" section, which deal with much more than just electoral practices and are in fact the right hand consultants of powerful nations such as the USA with Perkins Coie LLP undertaking this role for the Democrats and the Obama administration.

As has already been indicated, foreign law firms have concentrated on consultancies and arbitration, given that litigation is preserved exclusively for local lawyers. Yet, it is true that a very select, yet very small, number of local firms have been able to take a share, albeit small, of the available arbitration market. Foreign law firms are capable of dominating this market for a number of reasons, namely reputation, long-standing expertise, long-standing client relationships, immediate access to financial mechanisms such as third party funding⁵¹ and their excellent government relations with Western industrialised nations. Although rare, local firms such as Al-Tamimi are an exception to this mould and are successful in attracting arbitration business because they resemble their Western counterparts in their outlook and structure.⁵²

Having reached the conclusion that foreign law firms dominate the local arbitration market through their non-Arab lawyers, it is pertinent to question to what degree they push the boundaries of arbitral practice in the UAE and Bahrain. By arbitral practice I mean both in terms of contract law as well as the actual dispute resolution stage, which may include mediation in addition to arbitration proceedings. Empirical research suggests that in Latin America, at least, law firms, among others, played a leading role in the structuring of power and the constitution of nations.⁵³ This is also true to some degree in certain parts of the GCC. Despite the confidentiality involved in arbitration we are able to have a rather clear picture as to the companies that dominate the market at the global scale. ALB published its 2012 Arbitration Rankings which makes use of a solid questionnaire to discern the leading arbitration firms in terms of both volume and quality of service.⁵⁴ Although the Rankings are not confined to a particular area and hence we do not have accurate information about Bahrain and the UAE, given that they are both international hubs, it is unlikely that the global result will be unreflective of the situation there. Not surprisingly, no Bahraini or UAE law firm is included in the top fifty, despite the fact that some of the international firms in the list have undertaken significant arbitration work there.⁵⁵ Presumably, other arbitration work

⁵¹ See chapter 3.5 for an analysis of third party funding and arbitrability.

⁵² Their website is available at: <<http://www.tamimi.com/en>>.

⁵³ Y Dezalay, BG Garth, *The Internationalisation of Palace Wars: Lawyers, Economists and the Struggle to Transform Latin American States* (University of Chicago Press, 2002).

⁵⁴ See ALB 2012 Arbitration Rankings, available at: <<http://asia.legalbusinessonline.com/Files/file/pdfs/SALB-Jun-2012.pdf>>.

⁵⁵ *Id.*, at 18. Even so, as will become evident Al-Tamimi is a very minor player in both the global and regional arbitration market.

outside of the UAE and Bahrain, the awards from which are intended to be enforced in the UAE and Bahrain, will also have been handled by international law firms.

What this effectively means is that both at the stage of enforcement of a foreign arbitral award but also in terms of contract formation and arbitral proceedings in the UAE and Bahrain foreign law firms dictate the rules of the game and push – not always succeeding – to alter legislative boundaries and remedy what they see as impediments to an arbitration-friendly business environment. Throughout the course of this thesis the analysis makes no reference to the “invisible actors” behind the enforcement of foreign awards, these being the law firms representing the interests of their clients; the analysis largely focuses on the applicable law and the challenges posed by the courts in the enforcement of foreign awards. Yet, even when an award is not enforced on technical grounds, as in the case of *Bechtel*, the law firm has communicated to the local court and the government itself the position of the international arbitration community and its objections to an arbitration-hostile stance.⁵⁶ This communication should not lightly be dismissed by the courts or the government at hand, because of its undoubted effect on existing and future business and trade relations. Indeed, *Bechtel* was followed by a number of judgments that clearly departed from its enforcement-hostile reasoning, thus demonstrating that the shock waves were not only felt but that also the warning signs were heeded to.⁵⁷ It also reinforces the argument that all active participants in the legal process, i.e. lawyers, law firms, courts, activists and others, are legitimate stakeholders, each shaping and challenging the system in his or her own distinct way.⁵⁸

Thus, at present there is tug-of-war between those few elements in the courts and perhaps also the executive that are reluctant to harmonise arbitral practices with those in the developed arbitration centres across the globe and those who attempt to remedy such policies by taking a much more liberal approach. This tug-of-war is not always evident in the main analysis of the thesis, but is no doubt a poignant aspect of the politics of arbitration in the UAE and Bahrain, although it is particularly acute in Dubai as compared to the other UAE emirates and Bahrain. Overall, it is not the claim of this author that all, or any, of these

⁵⁶ See M Van Hoecke, *Law as Communication*, (Hart, 2002), in which Van Hoecke’s central thesis is that all legal relations are to be understood in terms of dialogue, conversation and communicative processes, rather than as traditional command-obedience structures. This is so, argues Van Hoecke, because legal systems are open systems (as opposed to autopoietic systems), thus allowing for this type of interaction between their various participants.

⁵⁷ I am referring particularly to Fujairah Federal Court of First Instance, Case No 35/2010, judgment (27 April 2010), which is explained more fully in chapter 2.3.

⁵⁸ For an exposition of stakeholder theory, see AL Friedman, S Miles, *Stakeholders: Theory and Practice* (Oxford University Press, 2006).

jurisdictions clearly pursues an arbitration-hostile policy or approach; this could not be further from the truth. Rather, a combination of conservatism, protectionism (especially in respect of government entities), outdated legal education, legal language gap and the fact that the boundaries are pushed by foreign law firms have contributed to isolated incidents of hostility. The fact that foreign law firms continue to augment their presence in the region and more and more awards are enforced there confirms the view that said isolated instances have not inhibited the international arbitration community.

1. A5 the Methodology Pertinent to Ascertaining Enforcement Practices

The aim of this thesis is to examine the law the practice relating to enforcement of foreign arbitral awards in the UAE and Bahrain. Moreover, although I have not set out to demonstrate whether the UAE and Bahrain are enforcement-friendly jurisdictions, it is expected that this will flow from the overall discussion. The inherent limitations have already been emphasised in the introductory chapter and concern particularly the absence of a database containing all relevant judgments. Hence, our understanding of the prevailing situation is necessarily fragmented but it is doubtful that the available case law contradicts that which is not publicly available, especially given that the judgments of superior courts are well publicised and included in the scope of this research. Therefore, what is missing from the overall puzzle are decisions on matters not covered in other judgments and in respect of which we I have employed a comparative approach by relying on jurisprudence from the courts of other nations. The extent of this gap in the jurisprudence of Bahraini and UAE courts is a matter of some speculation and cannot be fathomed with any degree of certainty. My assumption is that because on all other matters the jurisprudence of Bahraini and UAE courts is similar to that of their Western counterparts – save for obvious public or other grounds – that the comparative method is sound and reflective of similar trends and approaches in the GCC.

Because the empirical dimension of the thesis is extremely limited – I have spoken with lawyers, judges and government officials on a confidential basis but have not made any direct references to these discussions in the thesis – it is evident that I do not intend to provide an empirically-based conclusion as to the arbitration-friendly stance of the two nations under consideration. My expectation is that any conclusion will be derived from the exposition of the law and practice itself. Therefore, I generally avoid making acute

characterisations one way or another, albeit from the outset my leading hypothesis has been that save for isolated instances both countries are indeed arbitration-friendly. This result is further confirmed by the number of award enforcements, at least those that are recorded and are known. Again, one can only speculate as to those awards that were not enforced by lower courts. Nonetheless, it is unlikely that their number is significant otherwise the two nations would not be viewed as attractive arbitration forums by foreign law firms. Another methodological limitation concerns the enforcement choices of law firms and this is clearly not the case.

If a law firm can enforce against the losing party in more than one jurisdiction, with the available assets in just one sufficing, then the fact that the UAE and Bahrain were not on the top of the list obscures our understanding of law firms' conception of arbitration-friendly as regards the phase of enforcement. The issue becomes more complicated where a law firm takes into consideration in reaching its decision other factors, such as the likelihood of securing the assets, their size, cost, etc. Thus, in order to fully locate and conceptualise whether foreign law firms consider Bahrain and the UAE as arbitration friendly we need direct access to raw data, particularly interviews, something which is beyond the purview of this thesis.⁵⁹ We possess no record of such perceptions and what we do have is fragmented. By way of illustration, the 2010 Queen Mary International Arbitration Study showed that the Dubai International Arbitration Centre (DIAC) is poorly regarded and perceived by arbitration lawyers.⁶⁰ Of course, DIAC is simply an arbitral institution and the reasons behind lawyers' choices may not be relevant to Dubai as such. This is particularly true, given that lawyers did not profess the same feelings against other GCC arbitral forums. Nonetheless, this should be a worrying sign for the developers of DIAC and Dubai itself who invested heavily in this institution and some thought should certainly go into understanding how relevant perceptions can be improved.

⁵⁹ Empirical studies of this nature are rare even for a dedicated team of professionals. One of the few in the field is that by Queen Mary Law School on the key factors that drive corporate choices regarding arbitration. The results of the study are available at: http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

⁶⁰ *Id.*, at 68.

CHAPTER 1

THE SOURCES OF ARBITRATION IN BAHRAIN AND UAE

1.1 Introduction

The aim of this chapter is to discuss the various sources that apply to arbitral proceedings in Bahrain and UAE, with an emphasis on the subject matter of the thesis, namely enforcement of foreign arbitral awards. In order to construct the ladder of sources it is important to clarify certain differences from western legal thinking. Although both the UAE and Bahraini legal systems may be viewed as either civil law-based or mixed because of the Shari'a courts and legislation (as this relates to personal matters and Islamic financing among others), this is a rather neat categorisation that does not aptly reflect their respective realities. As will be

demonstrated in the course of the chapter in the duration of their existence these two dynamic legal systems have been plagued by various paradoxes and conflicts which they have reconciled without much doctrinal justification. By way of illustration, the superior status of the Shari'a overall other legislation has not curtailed the promulgation of legislation that is clearly contrary to it. Although such practices are undertaken in order to advance commercial imperatives and as a result can be accommodated within the flexible nature of the Shari'a, they are discussed outside the context of Islamic law. This has been severely criticised by a number of authors. Moreover, although western legal audiences usually have access to judgments by the various courts in the two nations, Islamic law has not traditionally condoned the use of judicial precedent on account, so it is claimed, of man's inherent fallibility. As a result, precedent runs the risk of reproducing faulty human judgment over and over. Although one can see the benefits of this line of thinking, one is also privy to its underlying disadvantages. Human conditions and interactions are so complex that statute alone is unable to cover all possible deviations. Judicial precedent, even in civil law nations, has become the only way of legal certainty, especially in relation to antiquated or inadequate statutes. Although the UAE and Bahrain refuse to formally recognise the authority of precedent, nonetheless their courts and those who have recourse to their courts observe local precedent religiously. In practice, the judgments of local courts have been excellent and are respected by the international community, particularly the foreign jurists who practice law in the Gulf as consultants and arbitrators.

An emphasis was placed on the primary sources that have a direct bearing on the practice of arbitration and on its enforcement in the two nations. Moreover, an extensive discussion on their international obligations has been undertaken with a view to ascertaining the exact boundaries of such obligations. Moreover, we have analysed the Shari'a factor from the point of view of enforcement, given that Shari'a will be discussed in other chapters, particularly that dealing with public policy. At the end of the chapter we have given a thorough overview of two distinct arbitration zones that exist in the UAE and Bahrain because of their impact on the enforcement of arbitral awards in the region and globally.

1.2 The Bahraini Code of Civil Procedure

Codes of civil procedure in respect of arbitral proceedings typically serve to regulate the conduct and operation of domestic arbitration. Moreover, although certainly in conjunction with other domestic laws, they also serve as the necessary *lex arbitri* in respect of transnational or international arbitral proceedings taking place in the territory of that State. The Bahraini Code of Commercial and Civil Procedure were adopted in 1971 and were later modified in 1990. Articles 233ff regulate matters regarding arbitration, albeit only in respect of domestic arbitration. This provision stipulates that:

Contracting parties may make general provisions for arbitration in respect of disputes arising between them over the performance of a certain contract, or agreement may be reached on arbitration in respect of a particular dispute by means of a special arbitration agreement.

Nonetheless, there is disagreement as to whether the Code of Civil Procedure (CCP) applies only to domestic arbitrations, given that Article 1 of the Decree promulgating the Code expressly provided that it was meant to repeal any provisions contrary to it. No doubt, although no conflicts have arisen to date, it is unlikely that the CCP can override Bahrain's international arbitration act, which is examined in the following section. This follows from the maxim that *lex posterior derogat lex priori*, as well as implicitly from the maxim *lex posterior generalis non derogat legi priori speciali*. Quite clearly, the 1994 International Arbitration Act, unlike the CCP, is not a general law but a very specific one, applicable to international arbitrations. These two maxims, which constitute general principles of law, are not only confined to statutory interpretation but more fundamentally they provide legal certainty and protect legitimate expectations. It is rather unlikely for the Bahraini superior courts to construe these two pieces of legislation as being in conflict with each other. The only problematic situation that may be envisaged is the possible fragmentation of the two regimes (ie domestic and international arbitrations), with the courts issuing diverse judgments based on the nature of the arbitration under consideration. Such diversity would not generally be problematic were the two regimes to remain permanently fragmented. However, if they ever became wholly or partly unified, conflicts would certainly arise. For example, imagine a situation whereby the regime of international arbitration tolerated the resolution of international disputes concerning gambling, especially if Bahrain were to become an attractive forum for the settlement of disputes. The country's domestic regime banning such activities should in theory be compatible with their resolution on Bahraini territory, particularly when the parties to a dispute are international actors who do not intend to enforce

their award in Bahrain, because Bahrain only serves as a forum for resolution. Nonetheless, the government may well take the view, following public opinion, that Bahraini laws and its courts serve to validate the effects of gambling, thus violating its public policy. In this case, the CCP and the relevant judgments by which it has been interpreted would have to become applicable against the International Arbitration Act.

It should also be stated that Bahraini courts have used the CCP to enforce foreign civil judgments and arbitral awards in cases where there was an absence of a bilateral or multilateral agreement with the country whose courts issued the judgment. In *Merrill Lynch v Abdul Jalil Behbehani* a judgment against the respondent was issued by an English court pursuant to an arbitral award and plaintiffs sought to enforce against his assets in Bahrain, among other jurisdictions. The problem was that at the time no reciprocal agreement existed between the two nations whereby civil judgments and arbitral awards could be mutually enforced. On the basis of Articles 252 and 253 of the CPC the Bahraini Civil High Court, reversing the decision of a lower court, held that it was authorised to examine the merits of the case and assess whether it had been issued under conditions of possible reciprocity. It ruled that the tribunal had complied with all relevant rules, such as would have been applied by Bahrain had the case been lodged there, and hence found the judgment to be in good order and in conformity with public morals and order. More specifically, it held that:

[t]here is agreement between English law and Bahraini law in terms of the manner of enforcing foreign judgments. A legal action seeking the issue of an order for enforcing a judgment in Bahraini law is equalled by a legal action for recognition of the right represented by the foreign judgment according to English law. The conditions contained in the Article 252 of the Bahraini Law of Civil and Commercial Procedures applicable to the admissibility of adopting an order for enforcing a foreign judgment are the same as conditions required by English law for recognising a foreign judgment.

Reference to the CCP and the aforementioned judgment was meant to highlight the importance of the CCP in respect of international arbitration, and in particular enforcement of foreign arbitral awards. It should be noted that application of the CCP under such circumstances raises issues of reciprocity that are beyond the purview of this thesis. However, if one were to assess the application of reciprocity on the basis of statutory provisions in the Gulf region, one would come to the conclusion that although said practice

does indeed exist, local courts, especially lower ones, have been conspicuously conservative. Given the sociological analysis in chapter 1a, it is not at all surprising that judges in superior courts are far more flexible and less prone to technicalities as compared to their colleagues in lower courts.

1.3 The Bahraini International Arbitration Act

It has already been explained that Bahraini civil law has been influenced by Egyptian law, which in turn heavily relied on French civil law and legal theory. It was only natural therefore for the country to decide the implementation of rules relating to international arbitration not in a spirit of isolation, as was the case with Saudi Arabia, but in a manner that rendered Bahrain an attractive investment destination. This has certainly been achieved to a significant degree by the adoption of the 1994 International Arbitration Act. The Act is quintessentially an almost verbatim implementation of the UNCITRAL Model Law on International Commercial Arbitration. It will be recalled that the primary objective of the Model Law was to serve as a benchmark, if not wholesale as a model law that would be implemented by as many countries in the world as possible with a view to harmonising arbitral processes. Given that enforcement of arbitral awards had already achieved some uniformity with the adoption of the 1958 New York Convention, it was rightly felt that the puzzle was still incomplete from the point of view of the pre-enforcement stages of arbitration, from the validity of the agreement wherein the arbitration clause is contained to the recognition of the award once rendered. No doubt, the objective of Bahrain was to become a major player in international commerce as well as establish itself as an arbitration-friendly location. The adoption of the Act on the basis of the UNCITRAL Model Law certainly worked towards fulfilling this goal.

We shall limit ourselves in this section only to those parts of the Act which the Bahraini legislator adapted to the particular exigencies of the Kingdom. The scope of application of the Act has been taken verbatim from Article 1 of the Model Law and what is more it has also incorporated within the meaning of “commercial activities” all those activities stipulated in footnote 1 to UNCITRAL’s 2006 revision of the Law.

In terms of the provision of assistance and supervision over arbitral proceedings the Act has designated as competent the Supreme Civil Court of Appeals. The designation of such a senior court, as opposed to the Diwan in Saudi Arabia, is evidence of the significance afforded to arbitration and dispute resolution in Bahrain. Unlike Saudi law, which imposes numerous restrictions on personal autonomy as is the case with the religion of arbitrators, the 1994 Act poses no obstacles to parties wishing to conduct their arbitration in Bahrain. The only limitations placed by the Act are those which all countries would necessarily have to impose even if they were to copy the Model Law verbatim. For one thing, recognition of foreign awards rendered in a language other than Arabic requires a duly authenticated translation. Secondly, an award may be refused recognition if the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Bahrain, or where the recognition or enforcement of the award would be contrary to the public policy of Bahrain. The issue of arbitrability is further reinforced by Article 1(3) which stipulates that the Act “shall not affect any other law of the State of Bahrain by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law”. We shall not expand on the concept of arbitrability at this stage as it will become of the focus of analysis in other sections of this thesis, particularly chapter 3.

It should be stressed at the close of this section that as important as the 1994 Act is, it should not be read in isolation, but should be examined in conjunction with Bahrain’s other international commitments in the field, principally the New York convention, regional arbitration agreements and foreign investment law. The latter is important because under ordinary circumstances it would have no place in the scope of the Act. However, the aforementioned footnote in the explanatory notes to the UNCITRAL Model Law stipulated that “investments” are subject to the ordinary law of arbitration. Although it is beyond the purview of this thesis to discuss in any detail the concept of investment and investment arbitration, it is clear that the Bahraini legislator, perhaps rather inadvertently, thought it wise to give investors the choice of whether they would rather have recourse to commercial, as opposed to investment, arbitration. The repercussions of this provision are not entirely clear in practice, particularly whether the investor who has opted for commercial arbitration, can take advantage of the BIT between his country and the host State in order to initiate investment arbitration. In all probability, “investment” disputes within the meaning of the

1994 Act correspond to private disputes, not disputes between a foreign investor and a Bahraini public entity.

1.3 The Role of Islamic Law in Bahraini and UAE Arbitration

We have chosen to assess the position of Islamic law in relation to the Bahraini position on arbitration not because it is less important than the official laws analysed in previous sections, but because its place in the Bahraini legal system is contingent. Moreover, its place against other legal systems is at times confusing. Indeed, Article 2 of the Constitution clearly states that the “Islamic Shari’a is a principal source of legislation”. This is further coupled with express injunctions in the large preamble to the 2002 amended version of the Constitution, wherein the role of Islamic law is rendered paramount. This is further reinforced by the dominance of Shari’a in the political, business and cultural life of the kingdom. A former Bahraini justice and Islamic affairs Minister, in responding to a question on arbitration in the Gulf States, was quoted as saying:

The Arab is conscious of the fact that a case in a court is actually a dispute between two adversaries, whereas in the case of arbitration it is a dispute between brothers. This clear distinction makes arbitration harmonise with an Arab’s psychological make-up, which is imbued with sentimentalism and which is more at home with a spirit of peace, good will and conciliatory brotherhood. This makes arbitration as a method of settling disputes more effective on Arab soil, which provides an appropriate environment for the acceptance, strengthening and popularising of this model and infusing a spirit of respect for it.

This statement, although implicitly referring to Shari’a as an element of the Muslim’s life, nonetheless focuses on the nature of the Arab. It is instructive for the purposes of the regulation of arbitration for it suggests that unlike other areas of law where Shari’a is compulsory on the parties; commercial arbitration may not necessarily fall within this strict category. This line of thinking is reflected in the Kingdom’s court structure. The judiciary is organized into two branches: the civil law courts and the Shari’a law courts. The civil law courts are typically entitled to discuss and settle all commercial, civil, and criminal cases, and all cases involving disputes related to the personal status of non-Muslims. These courts are

structured in a three-tier system, starting with the courts of minor causes, also called the lower courts and the court of execution, which have jurisdiction over civil and commercial matters. The middle courts have jurisdiction over criminal matters. At the second level is the High Court of Appeal, or the Senior Civil Court. Cases at these levels are presided over by a minimum of two judges.

The Shari'a law courts have jurisdiction over all issues related to the personal status of Muslims, both Bahraini and non-Bahraini. The Judiciary Act stipulates that they are competent to hear all matters relating to inheritance, gifts, wills and charitable donations (waqf). There are at present two levels of Shari'a courts, namely: the Senior Shari'a Court and the High Shari'a Court of Appeal. At each level there exists a Sunni Shari'a Court with jurisdiction over all personal status cases brought by Sunni Muslims, and a Jaafari Shari'a Court with jurisdiction over cases brought by Shi'a Muslims. The High Shari'a Court of Appeal must be composed by a minimum of two judges. In the event of a disagreement, the Ministry of Justice shall provide a third judge and the decision will be based on a majority vote.

Law No 8 of 1989 established the Supreme Court of Appeal or Court of Cassation. This institution serves as the final court of appeal for all civil, commercial, and criminal matters. In addition, cases dealing with the personal status of non-Muslims may be appealed to this body. The Court of Cassation is composed of a chairman and three other judges who are appointed by decree. As a practical matter, the civil courts do not invoke Shari'a law except when the issue is concerned with inheritance.

It is clear from this structure and the substantive laws that grant the parties access to civil courts rather than the Shari'a courts that Bahrain operates a mixed system, wherein secular law plays a dominant role. This rationale has even permeated fields that would otherwise be viewed as sacrosanct to Islamic legal and theological thinking, as is the case with interest (riba) whose prohibition is clearly prohibited under the Shari'a. Bahrain, as well as other Gulf States with similar adherence to Islamic law as their primary basis for legislation tend to circumvent, or indeed bypass, on certain occasions the express dictates of this body of law by reason of statute in order to accommodate commercial or other social imperatives. Whether or not such legislative practices are strictly in conformity with the constitution and hence Islamic law is something that is beyond the ambit of this thesis, but it is suggested that it is

probably wise of the legislature to adopt laws that respect the spirit of Islam rather than focus stubbornly on the letter. In any event, it is evident from the analysis in this section that Islamic law does not operate in Bahrain, as indeed in all other Gulf States, as an impediment to the introduction of progressive commercial legislation and the courts of these nations construe commercial relationships rather liberally. This attitude has a direct impact on the practice of arbitration taking place on said territories (essentially giving rise to a liberal and arbitration-friendly *lex arbitri*) as well as on the enforcement practices thereof.

1.5 The Sources of Arbitral Law in the UAE Legal System

Unlike Bahrain, the UAE is a federation of emirates, seven in number, welded together under the terms of a provisional or temporary constitution that was adopted in 1971 and subsequently amended in 1996. A brief overview of the UAE's law-making authorities is crucial in order to fully understand the rationale of the legislative process. According to Article 45 of the UAE Constitution the federal authorities consist of the Supreme Council of the Union (SC), the President of the Union and his deputy, the Council of Ministers, the Federal National Council (FNC) and the federal judiciary. The FNC is the closest thing to a representative body and in theory it is supposed to discuss and/or suggest amendments to laws submitted by the SC. In practice, however, it is neither democratic nor does it live up to its purported role. Only half of its members are elected, the other being appointed by the respective emirs. Even so, the elected members are chosen by an appointed electoral college, thus depriving the FNC of the democratic credentials available to western-style parliamentary bodies. While in theory the FNC may reject a bill, the UAE Constitution establishes a process whereby ultimately the SC can bypass it.

The Supreme Council is vested with full legislative power. It consists of the rulers of the emirates, which although are of different sizes, each is entitled to a single and equal vote in the Council. Article 47 of the UAE Constitution enumerates a non-exhaustive list of competencies conferred upon the Council, encompassing, *inter alia*, the adoption of federal laws, including the national budget, the endorsement of certain decrees of the Council of Ministers and the ratification of international treaties. The Council is moreover vested with authority to approve the appointment of the Prime Minister and the members of the federal Supreme Court. Finally, as a general proposition, the Council enjoys the “[s]upreme control

over the affairs of the Union generally’ and is competent to consider ‘all matters ... to achieve the aims of the Union and the common interests of the member Emirates.’”

Despite the fact that the various emirates have authority to adopt local (i.e. non-federal) legislation, this has only sparsely been undertaken to date. Legislation is typically of a federal nature, although this may change in the near future given that the various emirates are now actively competing among themselves for investment and commercial opportunities in the region, thus giving rise to the need for tailor-made non-federal laws. A typical example is offered by the Dubai International Financial Centre (DIFC) which consists of a financial free zone with autonomous jurisdiction where the ordinary commercial legislation of the UAE finds no application. As will be discussed in other parts of this thesis, such developments will have a significant impact on the practice of arbitration in the region, which is evolving into a profitable commercial activity for emirates like Dubai. It will probably produce repercussions in terms of enforcement in other nations that do not accept free zones such as DFIC, especially where they produce an abundance of awards.

The court structure of the UAE consists of local courts in each emirate with jurisdiction over matters that are not encompassed in the jurisdiction of federal courts. There are two federal courts, namely the Federal Courts of First Instance and the Federal Supreme Court. The first instance courts enjoy jurisdiction over civil, commercial and administrative disputes arising between an individual and any of the emirates, as well as over civil, commercial and personal status disputes (Shari’a-related cases) between persons normally resident in the UAE capital. The Supreme Court enjoys jurisdiction over any dispute amongst the emirates or between any emirate and the UAE concerning the construction of the Constitution. Its jurisdiction also extends to the resolution of conflicts between the emirates’ judicial bodies, among others. There is also a range of other specialist chambers operating at the federal or emirate level. Reference to some of these will be made in the course of this thesis.

From the point of view of arbitration, a federal arbitration act was promulgated in 1992 within the framework of the then-newly formed federal code of Civil Procedure. Arbitration was included in chapter III thereof. Chapter III was effectively repealed in 2009 with the passage of the UAE Federal Arbitration Act, which much like the 1994 Bahraini International Arbitration Act is predicated on the UNCITRAL Model Law. However, it is

different in a number of ways from its Bahraini counterpart. For one thing, it is not a verbatim adaptation of the Model Law. An excellent illustration is provided by Article 3 which concerns the scope of application and which, although containing many of the activities listed in the Model Law, excludes a fair number and enumerates several new ones, such as “exploration and extraction of natural wealth, energy supply, the laying of gas or oil pipelines, the building of roads and tunnels, the reclamation of agricultural land, the protection of the environment and the establishment of nuclear reactors”. Secondly, the 2009 is sufficiently linked to the Egyptian Arbitration Act, from which it has been influenced. For the purposes of this thesis although the analysis will focus on the 2009 UAE Act, it is important to have recourse to federal judgments based on the Civil Procedure Code, especially where these are not in conflict with the new Act. This is natural given that many of the provisions contained in chapter III generally reflect principles of arbitration law that are common to all nations or to the various UAE emirates and which have not been abrogated by the passing of the new Act.

Besides the 2009 Act, there are several other pieces of legislation that have a bearing on arbitration. In order to avoid providing a brief overview of all of these, given that many, such as the federal Commercial Agency Act, give rise to arbitral proceedings, we will simply mention one Act that relates to enforcement of arbitral awards. The Act on the Organisation of Judicial Relations between the Emirates of the Federation obliges all UAE entities to render awards made in other emirates enforceable within the space of a year. This Act is particularly important given the dispersal of assets of both UAE and foreign companies in all of the emirates in one form or another and the increasing use of arbitration throughout the UAE, not to mention its potential utilisation by DFIC. It should be noted that Article 13 of the Act does not subject UAE arbitral awards to further judicial scrutiny in order to give effect to their enforcement. The rationale is no doubt that matters of public policy and arbitrability are identical throughout the UAE, but the potential asymmetric financial situation of the various entities in the future may push some to contest this legislation, especially where it causes, or is perceived to cause, financial harm.

1.6. Enforcement of Arbitral Awards on the Basis of Multilateral Treaty Obligations: The Riyadh and New York Conventions

Bahrain and the UAE are parties to five multilateral treaties dealing with enforcement of foreign arbitral awards and foreign civil judgments. These are: the 1995 Gulf Cooperation Council (GCC) Agreement on the Execution of Rulings, Requests of Legal Assistance and Judicial Notices (Oman GCC Convention), the 1995 GCC Protocol on the Enforcement of Judgments, Letters Rogatory and Judicial Notices (GCC Protocol); the 1983 Riyadh Convention on Judicial Cooperation between members States of the Arab League; the 1952 Inter-Arab Convention on the Enforcement of Judgments and Awards (which was superseded by the Riyadh convention), and; the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Of these the most important for the purposes of this thesis are the New York and the Riyadh conventions because they serve as a basis for the enforcement of arbitral awards, whereas the other two were formulated with a view to facilitating the enforcement of civil and commercial judgments.

Unlike the New York Convention, its Riyadh counterpart only briefly deals with arbitration. Article 37, which deals with the recognition and enforcement of civil, commercial and administrative judgments, stipulates that arbitral awards shall be recognised and enforced in each Member State under the same conditions envisaged in respect of court judgments. It is for this reason that the Riyadh Convention is considered the regional equivalent of its New York counterpart. Certain key features of the convention will be highlighted as they will illuminate our discussion on the enforcement obligations of Bahrain and the UAE. Under Article 32 the court of enforcement cannot assess the merits of the award. It is restricted solely to the examination of two conditions, namely: the form and nature of the award, as well as its procedure and content. The former includes: a) decisions made against the government of the contracting State where recognition or enforcement is sought, or against any of its employees for acts only undertaken during the fulfilment of duty or at the occasion thereof; b) decisions whose recognition and enforcement would be contrary to international agreements applicable in the country of enforcement, and; c) provisional and conservatory measures rendered in cases relating to bankruptcy, taxes and fees. The conditions imposed under Article 30, on the other hand, concern: a) situations where the merits of the dispute violate public policy and morals, particularly violations of the Shari'a; b) restrictions on form generally require the existence of a valid notice, the provision of adequate representation rights to both parties, especially those lacking capacity (although rather improbable in arbitral awards) and the refusal to enforce an arbitral award whose subject

matter has already been litigated before regular courts. Additional reasons whereby the enforcement court may refuse recognition include, under Article 37, the absence of arbitrability in respect of particular types of dispute, the existence of a void arbitration agreement or compromis, the absence of arbitral jurisdiction and the absence of proper notification.

Recent practice suggests that both UAE and Bahrain judicial institutions are at pains to emphasise that they are enforcement-friendly and that they respect their obligations under the New York Convention. In *Hedley International Emirates Contracting LLC v Nakheel PJSC*, the parties had inserted a binding arbitration clause in their contract which stipulated that future disputes would be referred to arbitration in Dubai under the DIAC rules. Hedley International commenced a claim before a special tribunal established by Dubai to hear cases relating to the restructuring of the Dubai World group. The Decree vested the special tribunal with authority to hear “any demand or claim submitted against Dubai World” [and its subsidiaries]. Nakheel challenged the tribunal’s jurisdiction as a result of a Tribunal Practice Direction which provides that the tribunal will respect and enforce arbitration agreements made between Dubai World and its creditors and that, where disputes have already arisen, the tribunal expects the parties to continue with their arbitral proceedings. Hedley, however, argued, that the Practice Direction applied only to proceedings in process and not to those which had not yet been initiated. The special tribunal in the case held that the Tribunal Practice Direction applied to all arbitration agreements, regardless of whether proceedings had already been commenced. It also held that it applied to both international and domestic arbitrations. One observation of the tribunal was that to rule otherwise would put the UAE in breach of its obligations as a signatory to the New York Convention because the Convention requires the courts of signatory states to refer the parties to arbitration where the parties have entered into an arbitration agreement, unless the agreement is void, inoperative or incapable of being performed.

Given the proliferation of UAE and Bahraini companies throughout the world, they can expect a degree of reciprocity even when enforcement of judgments or awards are not issued by UAE or Bahraini judicial or arbitral institutions. This is true in respect of judgments rendered in the world’s large financial centers, particularly New York and London, which judgments said companies are seeking to enforce elsewhere.

1.6.1 Enforcement through Bilateral Investment Treaties

BITs are not typically perceived as vehicles through which foreign arbitral awards can be enforced. The principal reason is that their primary purpose is to protect the interests of investors through the adoption of investor guarantees between homes and host States. Moreover, it is also envisaged therein that any future disputes between the parties will culminate in investor arbitration claims, rather than commercial arbitration claims. Indeed, private parties generally find investment arbitration less time-consuming because there is no *lex arbitri* (and attendant delay tactics) to speak of and more importantly the award does not require enforcement in the same manner as regular commercial arbitration awards. Despite these observations, several BITs do in fact deal with commercial arbitration and enforcement of awards. This is generally because they are of an older generation and furthermore because prior to the 2000s many investors did not even envisage recourse to investment arbitration as a realistic option.

The 1999 USA-Bahrain BIT is a typical example of a BIT that makes extensive reference to commercial arbitration and enforcement. Article 9(4)(b) emphasizes that all agreements referring to commercial arbitration will not be precluded from being considered by arbitral tribunals, noting further under paragraph 5 that any arbitration shall be held in a State that is a party to the New York convention. More importantly, under paragraph 6, “any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.” Although there is no empirical evidence available, the author’s personal experience suggests that given the rise of arbitral centres and the arbitration-friendly environment in the Gulf, more and more investors consider the prospect of commercial arbitration a better, and certainly cheaper, prospect than investment arbitration.

1.7 Jurisdiction of the Dubai International Financial Centre and Enforcement of Awards

The DIFC is an exceptional measure under international law. It is unclear whether it constitutes a self-limitation of sovereignty that does not require the consent of other States, or whether States otherwise enjoy the prerogative, regardless of the consent of others, to establish free zones if by doing so they do not violate existing international obligations. The creation of the DIFC was primarily undertaken in order to attract business to Dubai through a fast-track process that bypasses many of the bureaucratic hurdles imposed by existing UAE laws. Its creation in fact necessitated an amendment to the UAE Constitution. The Law setting up DIFC provides powers of law-making and supervision to its appointed authority and although it does not discuss its latent arbitral jurisdiction, it does contain important features in respect of arbitration and enforcement of awards. Article 65(1) of the Regulatory DIFC Law states that: “a person who makes an agreement in the course of carrying on a financial service in breach of the financial services prohibition or the collective investment prohibitions shall not be entitled to enforce such agreement against any party to the agreement”. In combination with the Law’s strict money laundering, regulatory and auditing requirements, it is evident that although Dubai laws do not generally apply within DIFC the overall public policy and, to a large degree, arbitrability requirements that apply in the UAE are fully in force in DIFC. It is important to emphasize that the UAE’s international obligations (treaties and customary law) apply without exception to DIFC as it does not enjoy statehood, only a distinct legal personality in terms of contractual capacity and liabilities. This means that DIFC courts and authorities are obliged to enforce Dubai’s treaty obligations.

The 2008 DIFC Arbitration Law establishes a semi-delocalised system of arbitration, whose jurisdiction is circumscribed on the basis of an agreement between the parties, whether in written, electronic, or other format. We choose to call it delocalized because the *lex arbitri* is at its infancy and the parties rely on the DIFC Court for assistance, which itself is a new institution. The idea is that arbitrations are to take place with as little *lex arbitri* as possible and that awards made there or abroad, will find a venue of fast and effective enforcement. The DIFC Arbitration Law has been predicated on the UNCITRAL Model Law. Two types of laws apply in respect of awards whose claimants seek enforcement. On the one hand, Article 42(1) of the DIFC Arbitration Law stipulates that all awards, irrespective of where they were rendered, shall be recognized within DIFC and enforced subject to the usual caveats under the New York Convention and the UNCITRAL Model Law. The second situation concerns the status of awards recognized by DIFC. According to Article 42(4) of the

2008 Arbitration Law, any awards recognized by the DIFC Court “may be enforced outside the DIFC in accordance with the Judicial Authority Law and recognition under this Law includes ratification for the purposes of Article 7 of the Judicial Authority Law”. What this means in practice is that DIFC-recognized awards are ipso facto recognized and enforced in the UAE and by implication also in all other nations with whom the UAE has entered into multilateral or bilateral treaties to that effect. Thus, the New York and the Riyadh conventions apply in full with respect to DIFC awards. More importantly, all DIFC-recognized awards automatically become Dubai-recognized awards.

In practice, it has become evident that the DIFC Court is itself a strong contender of jurisdictional supremacy and parties are not averse to conferring jurisdictional authority upon it. In *Injazat Capital Ltd and Injazat Technology Fund BSC v Denton Wilde Sapte & Co*, the parties entered into a contract which allowed for disputes to be referred to LCIA arbitration in London. Injazat sued Denton Wilde Sapte (WDS) before the DIFC Court and DWS applied to dismiss or stay the court action on the ground that the claim was to be heard in arbitration. The DIFC Court refused to entertain this claim, arguing that where the DIFC courts possessed the jurisdiction to hear a case, they had no power to dismiss it, or to stay it for arbitration, unless the arbitration had its seat in the DIFC. Had the parties agreed to submit their dispute to arbitration elsewhere it would not have enjoyed jurisdiction. This decision highlights the position of the DIFC Court against its “competitors” and the fact that it will not deny itself a broad exercise of jurisdiction. However, when there is a potential conflict between itself and DIFC arbitration it will happily relinquish its own authority. This of course makes ample business sense, not only in order to reinforce the credibility of DIFC arbitration, but also because DIFC awards, as already explained, are easily recognized and enforced everywhere.

1.7.1 The Bahrain Centre for Dispute Resolution and Challenges against Recognition

It was not the original intention of this author to assess the status of the BCDR because its existence does not pose any jurisdictional challenges nor does it give rise to particular enforcement concerns. The reason is rather simple. The BCDR is not a free zone as is the case with DIFC, nor does it possess a distinct legal personality from that of the kingdom of Bahrain, given that its budget and management entail a significant input from the central

government. As a result, the BCDR is yet another arbitral institution, albeit with significant government backing, its purpose being to attract arbitral business to Bahrain. It is mentioned in this context because often in the literature it is compared to DIFC. This notion should certainly be dispelled. Awards emanating from the BCDR should be treated just like any other arbitral awards issued in Bahrain or elsewhere. Nonetheless, what is original about the BCDR is that parties to a dispute that would ordinarily be heard by the regular courts of Bahrain may choose to submit their dispute by agreement to arbitration under the BCDR. This entitlement only applies in respect of commercial claims the value of which exceed BHD 500.000 (close to \$US 1.3 million). This includes:

- a) Disputes among financial institutions licensed according to the provisions of the Law of the Central Bank of Bahrain or between these institutions and other institutions, companies, and individuals;
- b) International Commercial Disputes. The dispute shall be deemed international if the location of one of the disputant parties or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the location most closely connected with the dispute is outside the Kingdom.

Moreover, in accordance with Article 25 of Decree No 30, once an award has been issued the parties cannot challenge it before the courts of Bahrain if the intention of the parties is to seek enforcement abroad and provided that the parties have agreed in writing that: a foreign law is the governing law; that they will not challenge the award before Bahraini courts and; any challenge will be made before a competent foreign court or entity. This has led several commentators to proclaim the BCDR is an “arbitration free zone”.

Parties may naturally choose the jurisdiction of an arbitral tribunal in such cases, particularly if they feel that an award has a higher likelihood of being enforced in more countries abroad as a result of the New York and the Riyadh conventions, as opposed to a local court judgment. Furthermore, the added attraction of minimal local court interference may render BCDR awards attractive for those who fear that disputes with local parties may give rise to bias on the part of local courts, particularly if the local party would have made attempts to circumvent proceedings in order to allow as much court intervention as possible.

Some degree of criticism has been levelled against the BCDR's lack of Shari'a rules within its various instruments. Levi-Tawil argues that the absence of an Islamic character augments the perceived discrepancy between an Islamic legal order and the international arbitration legal order. She is of the opinion that Islamic law is flexible and adaptive enough to accommodate international arbitration, in which case arbitration can then try to align itself with Islam's immutable principles. As things stand, and the BCDR is evidence of this, Muslims and non-Muslims try artificially to keep Islam outside the realm of arbitration.

1.8 The Gulf as a Place of Enforcement of Awards Predicated on the Proceeds of Money Laundering

It has recently come to the attention of regulators and other government officials that those involved in organised crime are using the devices of international commercial arbitration in order to launder their illicit proceeds. Money laundering is a composite crime that requires a predicate criminal conduct, such as drug trafficking, the proceeds of which are then layered into the regular economy without the authorities being able to trace their origin. There exists a significant international effort to avert money laundering and among the many entities involved in setting out a pragmatic and legal framework is the Financial Action Task Force (FATF), which is situated within the Organisation for Economic Cooperation and Development (OECD). The typical activities through which organised crime achieves the laundering of illicit proceeds has been through the purchase of real estate, investment in shares and bonds and the funding of political parties and other entities. However, since the early 2000s, following the terrorist events of 9/11, money laundering has come to the forefront because of the manner in which terrorists are able to secure funds to finance their operation. As a result, it became necessary to formulate rules and policies that would prevent terrorist organisations from transferring money to their cells around the world. The absence of a regulatory system dedicated specifically to terrorist financing necessarily meant that domestic and international authorities relied on the much more elaborate money laundering regulations.

Criminal enterprises, however, are generally one step ahead of the authorities and as a result in the last decade it has been reported that instead of focusing on the aforementioned purchases to launder money, there has been a turn to arbitration. The New York Convention

is an ideal tool for criminal syndicates because it allows them to go to arbitration over a non-existent dispute and obtain an award which is equivalent to a regular court judgment without the intervention of the local courts and then have that award enforced throughout the globe. The award itself serves to legitimise the money awarded to the winning party in the form of an official document that is not susceptible to significant challenges, particularly since the losing party will not lodge any of the usual challenges that are meant to prevent an award from being enforced. The only way, therefore, that such an award risks being rejected is if the courts of enforcement at their own initiative challenge it on grounds of public policy or lack of arbitrability. However, this eventuality is unlikely because the parties would have fabricated the subject matter of the dispute in such a way as to avoid risking a possible proprio motu challenge by the courts of the enforcing State.

There are several ways by which this operation may be set up. One possible scenario is for the parties to write a contract over a non-existent relationship in respect of which they trigger the arbitration clause and appoint an arbitrator that is aware of the fraud and the purpose of the arbitration. Of course, the parties are less likely to be quizzed over the award if, instead of choosing a random or unknown person as an arbitrator, they opt for an established name to whom they have no intention of revealing their illicit aims. Such an award is unlikely to be contested and the dispute will typically involve a subject matter for which no onsite visits are necessary by the arbitrators. Another possible avenue concerning the use of arbitration as a means of money laundering is by soliciting the services of a third party arbitration funder, whether legitimate or otherwise, the payment for which will then be filtered in the award. Finally, it is well known that in countries where the outcome of a mediation agreement only possesses a contractual character, as opposed to that of a judicial judgment, the parties may well achieve the status of a judgment by appointing an arbitrator to transpose the mediation agreement into an arbitral award. This practice is also pursued in sensitive cases involving State entities who find it embarrassing to pass a mediation agreement before parliament and their people, choosing instead to present an arbitral award over which they can say that they had no choice.

It is certainly hard, if not impossible, to quantify the scale of the problem worldwide. What is certain, however, is that fraudulent arbitral awards are sought to be enforced in jurisdictions with sound banking and financial systems with the Gulf nations being principal targets. From the point of view of this section and the thesis more generally it is pertinent to

assess the modalities in place in Bahrain and the UAE through which these nations can claim to prevent arbitral award-based money laundering. Unlike Europe's gate-keeping system whereby the legal profession is responsible for averting the entry into the legitimate economy of illicit proceeds, few such safeguards exist in the legal systems of the Gulf.

The UAE has adopted a significant amount of legal instruments to tackle money laundering and the illicit proceeds of crime from entering its legitimate economy. More specifically, the UAE Criminal Code has been reinforced and supplemented by the adoption of anti-money laundering directives of the UAE Central Bank, as well as by the promulgation of the UAE Anti-Money Laundering law (AML) which was issued on 22 January 2002. The AML contains relatively similar provisions to the UK Proceeds of Crime Act 2002 with five offences, namely concealment, arrangements and acquisition, use and possession, failure to disclose and tipping off. Unlike the gate-keeping requirements established under the UK Proceeds of Crime Act, the UAE instrument does not set out an objective test whereby on the ground of a reasonable suspicion the legal or other profession could tip off the authorities. Article 20 of the AML simply serves to absolve of any responsibility, criminal or otherwise, all legal entities and their employees arising from any confidentiality obligations in the event that they furnish the authorities with relevant information of money laundering offences. This is no doubt a weak system that allows not only the legal and financial professions but also arbitrators to be complacent about their clients or duties. It is true however that several circulars have been issued in recent years to the professions in the front lines, particularly lawyers and notaries.

There is, however, no guidance given to lawyers or notaries public, allowing them to conduct the "objective test" mentioned above and instead resolution No.1 of 2009 issued by the Insurance Authority contains reference to the three stages of money laundering and provides for an objective test approach. Resolution No. 1 of 2009 defines the three stages of money laundering and provides in Articles 12 and 13 for an objective test approach with examples of when there should be increased suspicion on behalf of insurance companies, such as a life insurance policy with a high premium fully paid in advance, cancelling a life insurance policy shortly after its execution, insuring goods by opening an account through immediate payment, large insurance premiums, or other. The Emirates Securities and Commodities Authority (ESCA), has issued resolution No 17/r of 2010 which also refers to an objective test approach. Article 9 of this resolution gives examples of objective test scenarios such as

where there is a substantial increase in cash deposits without a clear reason in a short span of time, numerous cash deposits that are below the suspicion threshold (AED 40,000), and large telegraphic transfers of funds to be paid in cash in a foreign country.

Nonetheless, these regulations do not address the problem of enforcement of awards with a view to laundering illicit proceeds. What is at the heart of the problem – and this is perhaps the institutional difference between Gulf States and traditional Western financial centres – is the establishment of mechanisms directed exclusively at arbitral mechanisms and against those involved in said mechanisms. This involves lawyers, arbitrators, the courts and government authorities against which realistic standards and tests should be set, appropriate to arbitral proceedings. A serious problem which Bahrain and the UAE are still to fully appreciate is the degree to which an arbitrator is under a duty to disclose irregularities he detects in the course of arbitral proceedings. Given the confidential nature of arbitration, the confidentiality extends not only to the parties but also to the arbitrator. Under the current legal regime of Bahrain and the UAE it would seem that anti-money laundering legislation would prevail over the requirement for confidentiality, albeit this is not wholly clear in practice. This would certainly be the case in England and the USA because there the legislation is unambiguous and direct. The Gulf nations have a long way to go before they can oblige arbitrators, under threat of criminal sanctions, to disclose any irregularities they come across in the ordinary course of their judicial function.

If the UAE and Bahrain are unable to enforce strict standards against arbitral awards seeking to further illicit gains, corporate clients will inevitably choose those jurisdictions that are serious about money laundering. It may perhaps seem profitable in the short run to tolerate such activities, particularly given how difficult it is to trace them, not to mention the high law enforcement cost, albeit in the long run it will tarnish a nation's business reputation.

1.9 Is the Arbitral Legislation of the UAE and Bahrain a Legal Transplant or the Result of Autonomous Development?

In the course of this chapter it has become evident that both the UAE and Bahrain have borrowed a large corpus of their arbitration legislation from foreign, and particularly non-Arab, sources. However, this hardly constitutes wholesale legal transplant in the same manner that new States incorporate into their legal systems verbatim the laws of other developed nations without consideration of the law's original context and modalities of

operation. This type of legal transplant is irresponsible and is certainly resisted in contemporary legislative drafting. This does not mean that good laws cannot serve as a benchmark for other nations. Rather, even good laws need to be contextualized, adapted to local exigencies, tailored to local finances (especially in terms of implementation) and be made compatible with existing laws and institutions. The adoption of the UNCITRAL Model Law is usually cited as an example of an innocuous legal transplant because States are free to adapt it and in any event its purpose is to harmonize arbitral proceedings and enforcement of awards worldwide. Be this as it may, the wholesale adoption of the UNCITRAL Model Law by a developing country without judicial or governmental experience in arbitration and without a strong economy risks putting its people in harm. Foreign investors may try to manipulate this inexperience in order to gain undue advantages. In the case of the UAE and Bahrain the cautious adoption of domestic legislation predicated on the Model Law and the various global and regional enforcement conventions has been at a pace that has allowed them to control the process of arbitration.

Moreover, it has given them the opportunity of participating in the global arbitral system while at the same time building up legal systems that are as able to attract profit from arbitration in the same manner as their western counterparts. Indeed, few western nations are inclined to set up arbitration free zones – as opposed to tax heavens – because this would upset their financial centers and their law firms operating there. Hence, the fact that Dubai and Bahrain have been able to compete with their western rivals for the prize of arbitrations as well as the enforcement of arbitral awards is a testament to the adaptability and the effectiveness of their laws. As regards the enforcement branch in the two nations, it is significant to note that enforcement of arbitral awards is not necessarily a profitable exercise, particularly if the claimants seek to enforce against persons with assets in the country of enforcement. Indeed, one of the most significant problems in international arbitration is the frustration of enforcement by the courts of developing nations on grounds that are wholly outside the New York Convention. The fact, therefore, that the legal systems of the UAE and Bahrain have turned this into a profitable exercise is perhaps evidence of the fact that the national authorities believed that their reliability as international financial and arbitration centers would only come about if they were seen to meticulously enforce foreign arbitral awards. Again, although there is no empirical evidence to back up this assertion, there is no doubt that their strong enforcement practices brought an abundance of legal service providers

to the region. In the following chapters it will be demonstrated that the arbitration law and practice of Bahrain and the UAE is consistent, predictable and arbitration-friendly, despite certain complexities and particularities. Yet, the overall conclusion that we would like to convey through this section is that the arbitral regimes of the two nations, while part of a global system of rules, are circumscribed by ideas, notions and practices that are wholly local. In short, they have been adapted to suit local needs and it is hoped that in the near future the emergence of the Gulf States as powerful financial actors will give rise to an Arab, or at least a Gulf, position on international commercial arbitration.

CHAPTER 2

GROUNDS FOR NON-ENFORCEMENT: INCAPACITY, LACK OF NOTICE, EXCESS OF JURISDICTION AND INAPPROPRIATE COMPOSITION

2.1 Introduction

The first chapter dealt with some of the more general and fundamental issues of arbitration and the enforcement of foreign awards in the UAE and Bahrain. It also touched upon the significance of Islamic law and its tradition in the formation of an enforcement culture. This discussion is carried through in the present chapter but is by necessity rather limited. This chapter will begin to explore and assess the modalities under which the UAE and Bahrain discharge their obligation under the New York Convention to recognise and enforce foreign arbitral awards. Although the focus of the chapter is on the practice of these two nations, which includes their laws and jurisprudence, given the scarcity of other material and the proclamations made by both the UAE and Bahrain according to which they aspire to become leading enforcement jurisdictions, we have made some necessary references to jurisprudence emanating from the courts of other nations. As already mentioned in chapter 1a, one of the principal methodological assumptions of the thesis is that where a particular issue is not specifically dealt by the courts or laws of the UAE and Bahrain, it is assumed that it is governed by the relevant transnational jurisprudence to which neither nation has raised any objections.

The chapter tries to draw together the common and differentiated features between the UAE and Bahrain, albeit as will be seen in the course of the chapter, there are very few, if any, differences between the two legal systems as regards their approach to the particular themes of enforcement discussed herein. The reason for this should mainly be attributed to the fact that both have adapted in their domestic law the UNCITRAL Model Law and as a result it would create an oddity were their courts to produce diverse rulings on the same subject matter. Moreover, there is a clear trend in both nations in favour of becoming as arbitration-friendly as possible, despite the fact that some isolated judgments can hardly be reconciled with this objective. It should be stressed that it is difficult to find an underlying Islamic-based policy as the root of the attitude of Bahrain and UAE institutions to enforcement, save perhaps for public policy constraints, which are not however explored in this chapter.

This chapter discusses only some of the reasons offered under the Model Law and the New York Convention according to which the parties may challenge the enforcement of foreign arbitral awards. These include claims of incapacity, whether by a legal person or a natural person to take part in arbitral proceedings or to enter into an arbitration clause or submission agreement; the standards relating to due process guarantees in the course of arbitration with particular reference to proper standards of notification that are required for

the attendance of parties or in order to submit or receive evidence or other material; excesses in the tribunal's jurisdictional power, especially as regards its examination of issues that go beyond what was agreed in the arbitration clause, as well as precluding the parties from fully presenting their claims before it, and; claims connected to the inappropriate composition of arbitral tribunals, with an emphasis on the procedures required to appoint arbitrators when the parties have failed to agree. A special subsection is also devoted to the issue of arbitrator bias and the possible challenges thereto. Other chapters will deal with certain other claims relating to non-enforcement, such as arbitrability and public policy.

It should be stated from the outset that although the starting point for this discussion should be the New York Convention and the UNCITRAL Model Law, we have chosen to focus on the domestic legislation of the two countries under consideration in this thesis, as well as, more importantly, on their respective jurisprudence. In this respect, it was thought as wholly artificial to discuss the aforementioned challenges in isolation of some fundamental themes underlying arbitration in the UAE and Bahrain. Among these, particularly, is the issue of the validity of the arbitration clause and the submission agreement in the Arab world and the Gulf more specifically. As a result, some theoretical and jurisprudential issues relating to the arbitration clause and contracts in the two nations are explored in order to paint a more wholesome picture of the challenges themselves.

2.2 Traditional Enforcement Obstacles in the Arab World and Islamic Jurisprudence

Despite the fact that arbitration has been the major vehicle for investment and the boom in international commerce since the early 1960s, its application has been problematic in certain parts of the world. This has necessarily curtailed the degree to which foreign arbitral awards are enforced from one country to another. The dominant criticism in the literature concerning the investment and commercial relations of developing nations, even industrialised ones such as Egypt, is that arbitration, at least in its contemporary form, is the product of post-colonial rule and is designed in such a way as to cater for the commercial interests of the wealthy West over its poorer counterparts.⁶¹ There is certainly some truth to this criticism, particularly

⁶¹ A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press, 2001); M. Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint* (1989) *Journal of International Arbitration* 20.

since the very practice of arbitration and its attendant processes (i.e. the drafting and insertion of arbitration clauses in contracts, the establishment of arbitral forums such as the International Chamber of Commerce etc) is largely the product of Western corporate law firms. These have been responsible for pushing the boundaries of dispute settlement and in the case at hand they saw arbitration as a product they could sell to their large corporate clients after identifying an attractive gap in the market. This gap related to the risks associated with investments and commercial undertakings with private entities or sovereign actors from nations whose legal systems were viewed as archaic, inadequate, corrupt or simply biased in favour of domestic actors.

The Arab world was among the first to condemn arbitral proceedings to which it had originally succumbed to, as far back as the 1950s, and as a result was a vocal advocate against the enforcement of foreign arbitral awards. Its negative experiences in this respect should not be underestimated. In a string of arbitral awards the arbitrators chose to completely disregard the express wishes of the parties as regards their choice of law clause, which was a mix of Islamic law and general public international law. For whatever reasons, the arbitrators in these cases held that the appropriate governing law was international law or general principles of law on the ground that Islamic law was at times in conflict with it and that in any event it was rather indeterminate and did not adequately suit business interests.⁶² Such awards today would no doubt provide serious grounds for annulment or at the very least the winning party would find it very hard to enforce them in Muslim jurisdictions because they offend Muslim public policy. Thus, Arab nations largely dismissed arbitration as a whole and did not concern themselves too much with the question of enforcement given that this was necessarily the last part of a much larger process.⁶³

Of course, the issue of Islamic law as a governing law, whether in the context of the normal jurisdiction of ordinary courts or as the governing law in arbitral proceedings

⁶² *Petroleum Development (Trucial Coasts) Ltd v. Sheikh of Abu Dhabi* (1951) 18 ILR 144, per Lord Asquith at 149; *Ruler of Qatar v. Int'l Marine Oil Co. Ltd* (1953) 20 ILR 534, per Bucknill J at 545. In the *Abu Dhabi* case, Lord Asquith held that: "This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments".

⁶³ By way of illustration, following the award in *Kingdom of Saudi Arabia v. ARAMCO* (1963) 27 ILR 117, where it was held once again that Islamic law was not the governing law of the contract, the Saudi government ceremoniously closed the doors to arbitration by passing Resolution 58 by which it prohibited all government entities from concluding arbitration clauses or *compromis* with third entities. Council of Ministers Resolution No. 58 of 03/02/1383 H (25/06/1963).

continues to be a vexed one. In the *Beximco* case the English Court of Appeals dismissed the propriety of Islamic law as the governing law of the contract, arguing that the concept of governing law – especially for the purposes of the 1980 Rome Convention on the Law Applicable to Contractual Obligations - refers to legal systems, as would be the case with the legal system of England, Egypt or Bahrain. Islamic law, it was opined, did not constitute a legal system despite its entrenchment in the Quran and its place as the supreme and validating law in most Muslim nations.⁶⁴ Although Islamic law is grossly misunderstood,⁶⁵ not to mention misapplied,⁶⁶ by western courts and thus a degree of bias is evident, by-and-large the indeterminate character of Islamic law is hardly an odd statement.⁶⁷ I will dwell on this point because it is relevant to our discussion on enforcement.

Islamic law is as diverse as the schools that purport to offer its most definitive interpretation. Each of these schools lays claim to authenticity and thus when a choice of law clause refers to Islamic law in general terms, the courts are unable to distinguish the precise ambit of the law (i.e. essentially which school is to prevail over another). Moreover, Islamic law is construed and applied differently even among nations that espouse its superior character over and above all other legislation. By way of illustration, there is a discrepancy as to whether commercial agency agreements are indeed arbitrable in Arab nations of equal jurisprudential leanings. The UAE Federal Supreme Court has ruled that parties are incapable of enforcing a clause in commercial agency agreements that expressly provides for foreign arbitration.⁶⁸ To be sure, there are cogent reasons for preventing arbitration in the context of

⁶⁴ See *Beximco Pharmaceuticals v Shamil Bank of Bahrain EC*, [2004] 1 W L R 1784. The choice of law clause stipulated that contract was to be construed in accordance with English law “subject to the principles of *Sharia*”.

⁶⁵ There is a significant body of case law in the USA emanating from State courts which tend to show an explicit bias against not only Islamic law, but also against the secular law of Muslim nations. By way of example, in *Rhodes v ITT Sheraton Corp.*, No. CIV.A. 97-4530-B, 1999 WL 26874 (Mass. Super. 1999). the court determined that Saudi Arabia was not an adequate alternative forum in which the female plaintiff could litigate her claim for damages resulting from a diving injury incurred at a Saudi Arabia Sheraton hotel. Among the reasons proffered by the court was the likelihood that the plaintiff would be stymied by “systemic prejudices,” including “biases against women and non-Muslims”.

⁶⁶ Rather amazingly, in *Jivraj v Hashwani* [2010] EWCA Civ 712, the Court of Appeals held that a *compromis* providing that all arbitrators must be Ismailis was contrary to the Employment Equality (Religion and Belief) Regulations 2003. No doubt, the court felt that arbitrators did not enjoy a judicial status but were rather constrained by their agreement of appointment under contractual grounds. Moreover, it wrongly assumed that the right to party autonomy, including the right of the parties to appoint arbitrators of their choice, must be in conformity with the *lex arbitri*'s employment laws.

⁶⁷ See F.M. Kutty, ‘The Sharia Factor in International Commercial Arbitration’ in (2006) 28 *Loyola LA Int'l and Comp. L Rev.* 565.

⁶⁸ Cited in I Bantekas, *The Foundations of Arbitrability in International Commercial Arbitration* (2008) 27 *Australian Yearbook of International Law* 193, p 204.

commercial agencies, particularly since it is deemed that the local distributor is at a significant disadvantage as compared to the mother company that may well turn out to be a large multinational corporation. As a result, the UAE Commercial Agencies Law No 18 of 1981 (as amended by Federal Law No 14 of 1988 and by Federal Law 13 of 17 June 2006) provides that only UAE courts have jurisdiction over commercial agency disputes.⁶⁹

The situation is rather different in another neighbouring Gulf nation, Bahrain, where a 1998 amendment to the kingdom's Commercial Agency Law abolished the requirement that local agents be subject to the jurisdiction of local courts. Additionally, whereas western legal systems, whether of the civil or common law persuasion, tend towards some continuity or precedent, such a precedent is wholly absent in traditional Islam on the ground that man's fallibility necessarily excludes any consideration of rendering infallible judgments in respect of all future disputes.⁷⁰ This line of thinking certainly pervades jurisdictions such as Saudi Arabia, this being evident in the work of the Diwan Almazalim.⁷¹

The mistrust towards foreign arbitral awards is rather a vicious cycle. The more a nation closes its doors to its nationals opting out of the local judiciary and the more it refuses to recognise and enforce foreign arbitral awards, the more it restricts its commercial activities with other nations and commercial actors. The UAE and Bahrain have certainly shown the way forward by choosing to openly enforce all foreign arbitral awards – subject to logical public policy rules - despite the short term reputational and financial loss this entailed.⁷² It was rightly shared that in the long run the two kingdoms had much to benefit from this openness. Openness in enforcement of foreign awards has naturally been coupled with a liberal construction of Islamic principles in respect of issues that are considered non-negotiable in other nations, such as the prohibition in the imposition of interest (*riba*). Whereas Bahrain recognises the imposition of commercial interest and therefore allows the enforcement of awards the subject matter of which was principally concerned with interest,

⁶⁹ See also chapter 3 for a more comprehensive discussion of arbitrability.

⁷⁰ N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964), pp. 29–35.

⁷¹ A Baamir, I Bantekas, *Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice* (2009) 25 *Arb Int* 239, p 253. Although it should be stressed that in April 2012 the Saudi government adopted a new Arbitration Act, the impact of which is unknown. This Act is beyond the purview of this work however.

⁷² This trend, no doubt, began with the enforcement of an arbitral award in the UK following the case of *Kuwait Minister of Public Works v Sir Frederick Snow and Partners* [1984] All ER 733. This involved a dispute from the construction of an airport. The award was in Kuwait's favour but at the time, in 1973, neither Kuwait nor the UK were parties to the New York Convention. Both countries acceded a few years later and so Kuwait was able to enforce the award. This provided the necessary impetus for convincing Arab nations about the benefits of arbitration.

the Saudi authorities take a much stricter view of the matter.⁷³ As a result, it is not uncommon for Saudi nationals or aliens conducting their commercial affairs in that country to make every possible effort to circumvent its restrictive laws. One largely efficient way of doing so has proven the practice of formulating appropriate arbitration clauses that exclude Saudi law from the *lex arbitri* and the governing law of the contract.⁷⁴ Of course, there are no guarantees that the country of enforcement, in this instance Saudi Arabia, will necessarily be inclined to enforce such an award on grounds of public policy, albeit the parties may just as well be content with enforcing it in other jurisdictions.

By-and-large the kingdoms (or emirates) under consideration in this dissertation now seem to be significant partners in the business of international arbitration, including as systems adhering fully to the rule of law, particularly as regards enforcement of foreign arbitral awards.⁷⁵ I argue that this is hardly a radical departure from their Quranic traditions. On the contrary, this is a return to such traditions, where arbitration finds direct expression. For one thing, Prophet Mohamed personally encouraged the use of arbitration in several types of frequent disputes, including in family and commercial matters.⁷⁶ Secondly, it is a fundamental building block of Islamic jurisprudence that agreements and promises undertaken must be fulfilled. This is equivalent to the principle of *pacta sunt servanda* in western legal thinking, which is considered an *ab initio* rule of domestic and international law.⁷⁷ Given that a foreign arbitral award is based on the assumption of a contractual obligation it is only natural to assume, and this is in fact the case, that the losing party is under a religious obligation to enforce the award from the point of view of Islamic law. This means that the losing party must not artificially hinder enforcement by claiming procedural or other grounds that seek to frustrate the recognition of the award. Thus, I argue that the spirit of the Prophet's injunction on Muslims to observe contractual sanctity is not discharged by merely agreeing to comply with the terms of an award that has already been enforced. Rather,

⁷³ See Diwan Almazalim decision No 19/28 (1979). A much fuller analysis on the arbitrability of interest will be offered in the section dealing with the concept of arbitrability.

⁷⁴ See *Islamic Investment Company of the Gulf (Bahamas) Ltd. v Symphony Gems NV and Others*, [2002] All ER 171. An excellent analysis is provided also by N.B. Turck, Resolution of Disputes in Saudi Arabia in (1991) 6 *Arab LQ* 3.

⁷⁵ See C.N. Brower and J.K. Sharpe, 'International Arbitration and the Islamic World: the Third Phase' in (2003) 97 *American Journal of International Law* 643. Equally, JDM Lew, The Recognition and Enforcement of Arbitration Agreements and Awards in the Middle East (1985) 1 *Arb Int* 161.

⁷⁶ Quran, verse 4:35. See also verse 4:58.

⁷⁷ Qur'an, 5:1.

this obligation is effectively discharged by not frustrating the other party's effort to go through the various enforcement stages in the country of enforcement.

2.3 Exceptions to Liberal Enforcement in the UAE and Bahrain

As will be observed in the following sections of this chapter, the practice of Bahrain and UAE is to construe their obligations under the 1958 New York Convention rather liberally and certainly in light of a pro-commerce policy. This is true not only with regard to the judgments of the local courts but also in respect of the recent laws that were adopted therein. However, there are some notable exceptions to this rule, which seem to rely on formalism rather than substance. The most notorious among these is certainly *International Bechtel v Department of Civil Aviation of Dubai*,⁷⁸ in which the Dubai Court of Cassation famously ruled that the failure by an arbitrator to elicit an oath was a violation of Dubai's public policy and constituted a serious procedural infringement that prevented enforcement of an arbitral award. This decision does not conform to the spirit of the New York Convention and is clearly an excessive intervention by the courts in the autonomy of private parties to resolve their dispute through arbitration. It was rightly criticised by international commentators who saw it as a blot on the status of Dubai as a centre of international trade and commerce.⁷⁹

The rationale of the *Bechtel* judgment was certainly reversed by the Fujairah Federal Court of First Instance in a judgment enforcing two awards, one on the merits and the other on costs, issued by a sole arbitrator in London under the Rules of the London Maritime Arbitration Association following an application for enforcement by the award creditor under the New York Convention.⁸⁰ The Court refused to review the merits of an award issued pursuant to English law in the UK out of respect for the New York Convention. It refused to attach any significance to the claim that the award had been rendered *in absentia* of the losing party, thereby demonstrating an implicit disinclination against formalism.

⁷⁸ *International Bechtel v Department of Civil Aviation of Dubai*, Case No 503/2003, judgment (15 May 2005). See also *International Bechtel v Department of Civil Aviation of Dubai*, 360 F Supp 2d 136 (DDC, 2005).

⁷⁹ the Dubai Court of First Instance, Case No 531/2011, judgment (18 May 2011) refused recognition and enforcement of an award issued by the Singapore International Arbitration Centre on the basis that the award concerned was not ratified in the country of origin and could therefore not be executed under Articles 235 and 236 of the UAE Civil Procedure Code. Although the application of the Civil Procedure Code to international arbitration and foreign awards has been superseded by the 2009 Arbitration Law, something acknowledged by the Court of First Instance, it made only lukewarm references to the New York Convention and the obligations of the UAE thereto. At the time of writing this judgment was under appeal.

⁸⁰ Fujairah Federal Court of First Instance, Case No 35/2010, judgment (27 April 2010).

In a similar judgment, in *Maxtel International FZE v Airmec Dubai LLC*, the Court of First Instance of Dubai enforced two awards (one on the merits and the other on costs) issued by a sole arbitrator in London under the DIFC Rules and involving two Dubai-based companies, following an application for enforcement under the New York Convention. Unlike previous decisions it discarded Articles 235 and 236 of the UAE Code of Civil Procedure in respect of formalistic claims such as oath-taking, holding that:

the court's supervisory role when looking to recognise and enforce a foreign arbitral award is strictly to ensure that it does not conflict with the Federal Decree under which the UAE acceded to the New York Convention on the recognition and enforcement of foreign arbitral awards and satisfied the requirements of Articles IV and V of the Decree in terms of being duly authenticated.⁸¹

Although these judgments were issued by lower courts they are no doubt indicative of a trend that is not wholly unknown elsewhere; that is, of national courts refusing to enforce awards against local private or public corporations on the basis of formalistic grounds. The higher courts of the UAE, especially, have tried to mitigate this trend as much as possible, but foreign lawyers working in the region express a degree of uncertainty in the light of judgments that seem to obstruct the letter and spirit of the New York Convention.⁸² In the expressed opinion of this author these exceptional judgements are isolated and have no precedential value and in any event the reasoning behind them is usually reversed in subsequent cases.

2.4 Grounds for Refusal to Enforce under the UAE and Bahraini Legal Regimes

Given the modelling of the relevant arbitral laws around the UNCITRAL Model Law it comes as no surprise that they closely reflect the provisions of the Model Law. Article 36 of the Bahraini International Arbitration Act specifies that recognition or enforcement of an arbitral award may be refused only on the basis of the following grounds:

1.1 At the request of the party against whom it was invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof as follows:

⁸¹ *Maxtel International FZE v Airmec Dubai LLC*, Dubai Court of First Instance, Case No 268, judgment (12 January 2011).

⁸² See also the judgment by the Dubai Supreme Court in *A v B* [2010] Rev Arb 354.

- a) A party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or
- b) The party against whom the award was invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- e) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

2. If the court finds the following:

- a) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the State of Bahrain; or
- b) The recognition or enforcement of the award would be contrary to the public policy of the State of Bahrain.

3. If an application for setting aside or suspension of an award has been made to a court ... the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

A first reading of the relevant provision in the 2009 UAE Arbitration Law suggests that the grounds for refusal to recognise and enforce are far narrower than those enumerated in the

Bahraini Act. Although this issue has not been satisfactorily addressed in the sparse literature or in any case law, it is the contention of this author that this suggestion is erroneous. Article 58 of the UAE Arbitration Law reads as follows:

1. The enforcement application of an arbitral award may only be accepted if the time period for requesting setting aside has expired.
2. The enforcement of the arbitral award pursuant to this law may only be ordered after verifying the following:
 - a) The enforcement of the award is not contrary to the public policy of the State.
 - b) It was properly notified to the party against whom the award was rendered.

It is improbable that the UAE legislator failed to take into consideration other grounds, particularly the validity of the award or the nature of the arbitral process. It may be that these issues are to be dealt with in respect of applications for setting aside, as stipulated in Article 53 of the Law. Alternatively, it may just as well be the case that the grounds for setting aside an award are the same as those relating to public policy.⁸³ Either way, the grounds for setting aside in Article 53 should be considered as being inherent in any considerations of enforcement of foreign arbitral awards in the UAE. Hence, such awards may be refused recognition or be set aside as follows:

1. If the arbitration agreement is inexistent or void or if it is possible that it is null or extinguished due to the expiry of its term;
2. If a party to the arbitration agreement was, at the time of its conclusion, under some incapacity or lack of capacity pursuant to the law governing its capacity;

⁸³ The leading arbitration jurisdictions interpret the grounds for setting aside of awards in conformity with the corresponding New York Convention grounds for refusal of enforcement. It is therefore unnecessary to draw any distinction between the concept of public policy under the setting aside and enforcement regimes, as the extent of the court's scrutiny of international arbitration awards is the same regardless where the award is made. See *AJU v AJT* [2011] SGCA 41, decided by the Singapore Court of Appeal. GB Born, *International Commercial Arbitration* (Kluwer, 2009), pp 2552.

3. If any party to arbitration was unable to present its defence as it was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or due to any other reason beyond its control;
 4. If the award failed to apply the law agreed upon by the parties to govern the subject-matter of the dispute;
 5. If the constitution of the arbitral tribunal or the appointment of the arbitrators was in conflict with the law or the agreement of the parties;
 6. If the award settled matters not subject to, or falling beyond the scope of the arbitration agreement. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be annulled;
 7. If the award is null or the arbitral proceedings' nullity affected the award;
 8. If the award was set aside in the country of origin;
- b) The court may upon its own initiative set aside the arbitral award if the latter is in conflict with the public policy of the State.

It is obvious that the list of reasons through which an award may be said aside under Article 53 of the UAE Law are similar to those for non-recognition and non-enforcement of arbitral awards under Article 36 of the Bahraini International Arbitration Act. As a result, it makes sense to argue that said reasons apply also as a matter of public policy, at least, when considering recognition and enforcement. This is also the hypothesis of this author and on this basis both this chapter and the next will assume that these common grounds suffice to refuse recognition and enforcement to foreign arbitral awards in the UAE and Bahrain.

It should also be stated from the outset that although the relevant articles of the UAE Civil Procedure Code (i.e. those related to arbitration) have been effectively suspended following the promulgation of the 2009 Law, from the point of view of UAE jurisprudence they are still very much in force. Essentially, given that the principles underlying relevant

judgments rendered by UAE courts prior to the passage of the 2009 Law exist also in this Law, it is natural that the judgments in which they are contained continue to be in force and bind future courts and tribunals. Moreover, although the focus of the thesis and the ensuing chapters is on foreign arbitral awards and international arbitration in general, we shall be discussing and making extensive reference to jurisprudence that emanates from judgments considering domestic arbitral awards. Such references will be undertaken only where no other judgment on international awards exists and where the principles enunciated would apply *mutatis mutandis* in the case of foreign arbitral awards. This is an important point to remember because of its methodological value in the present context. Moreover, although this author aims to concentrate on the evolving law of the UAE and Bahrain, some references to international arbitral practice is inevitable, for no other reason but in order to ascertain whether the practice of these two nations lives up to their promise of establishing progressive and arbitration-friendly legal regimes, particularly in the sphere of enforcement of foreign arbitral awards.

2.4.1 The Issue of Capacity

Capacity is usually viewed as a simple matter that is resolved by reference to the personal law of the parties. Incapacity is also viewed as a rare phenomenon in international commercial contracts and subsequently in the field of arbitration. Yet, Article V(1)(a) of the New York Convention lists incapacity as one among possible reasons for denying recognition to a foreign arbitral award.⁸⁴ In general, capacity to enter into an arbitration clause presupposes capacity to enter into a contract. Hence, arbitration is available to all those who enjoy the right to contract freely, which at first glance excludes minors and those lacking the requisite mental faculties. The list, however, is potentially broader, given that some nations forbid contractual autonomy to women or those deprived of their freedom by reason of a penal judgment. Moreover, it is unclear whether all legal persons throughout the world enjoy the right to enter into a contract and if so which entity within the company has the authority to bind the legal person. Finally, among others, in some jurisdictions such as England a bankrupt person cannot enter into an arbitration agreement by which to bind his estate,⁸⁵

⁸⁴ See also Article 36(1)(a) of the UNCITRAL Model Law.

⁸⁵ See *Re Milnes and Robertson* (1854) 15 CB 451, where it was held that although the bankrupt may not submit his estate to arbitration, he may nonetheless bind himself to arbitration.

although the trustee with the permission of the creditors or the court may refer to arbitration any debts, claims or liabilities between the bankrupt and any person that may have incurred liability to the bankrupt.⁸⁶

One should also distinguish between substantive and procedural capacity. The former refers to the power of legal and physical persons to dispose of their entitlements by means of contract whereas the latter refers to the modalities by which this is to be achieved. By way of illustration, the Dubai Court of Cassation has held that arbitration agreements concluded by an agent of the principal without a special power of attorney are null; albeit only the principal may invoke said nullity, not the other party to the contract.⁸⁷

The Bahraini Arbitration Act is silent on the capacity of both physical and legal persons. From the point of view of domestic arbitration, Article 233(4) of the Code of Civil Procedure stipulates that arbitration is only permissible to those competent to dispose of their rights.⁸⁸ Moreover, the Code of Civil Procedure distinguishes between Muslims and non-Muslims, thus subjecting all non-Bahraini Muslims, whether residents or aliens, to the law governing Bahraini Muslims. All other persons are governed by their own personal law, but principally the law of the country of which they are nationals.⁸⁹ This is an unsatisfactory result from the point of view of foreign parties to an award that is sought to be enforced in Bahrain because it fails to consider the difference between nationality and residence (or domicile). Residence, particularly where it is effective, is considered superior to nationality for the purposes of establishing jurisdiction in private disputes as well as for the purposes of diplomatic protection.⁹⁰ This is particularly the case where the party has effectively given up his initial nationality without having formally adopted a second one in his new country of residence. In such cases, it is suggested that Bahraini courts should look to effective

⁸⁶ MJ Mustill, SC Boyd, *Commercial Arbitration* (Butterworths, 2nd edition, 1999), pp 152-53.

⁸⁷ Dubai Court of Cassation, Case No 209/2004, judgment (20 March 2005); Dubai Court of Cassation, case No 222/2005, judgment (22 January 2006).

⁸⁸ This was also the case with Article 203(4) of the UAE Federal Code of Civil Procedure. Article 13 of the 2009 UAE Arbitration Law states that arbitration agreements may be concluded by natural or juristic persons having the capacity to dispose of their rights. See also Dubai Court of Cassation case No 220/2004, judgment (17 January 2005).

⁸⁹ Article 21(1) Bahraini Code of Civil Procedure.

⁹⁰ In *Liechtenstein v Guatemala* [Nottebohm case] Second Phase, judgment, (1955) *ICJ Reports* 4, a German man had lived in Guatemala close to two decades but had never acquired the nationality of that country. Instead, he managed to acquire the nationality of Liechtenstein, although he had no links with that nation, other than his brother's residence and some infrequent visits thereto. The ICJ held that although it is the prerogative of each nation to determine the criteria for granting nationality, the recognition of nationality and its effects in international affairs is governed by international law. The Court determined that nationality under international law is recognised where it is effective and based on significant residency, which was certainly not the case with Nottebohm's Liechtenstein nationality.

nationality or residence in order to determine the applicable law to the question of capacity.⁹¹ Issues are no doubt likely to arise in cases where a party possesses either multiple nationalities or multiple domiciles. The latter is not merely a theoretical possibility and in such cases the courts of the UAE and Bahrain could follow the practice of their European counterparts and decide each jurisdictional issue on its distinct merits.⁹² Hence, for example, whether or not the person possessed capacity to enter into an arbitration agreement on behalf of his company may be decided on the basis of the law where the company is based, whereas in respect of torts the applicable law may be that of the country where the respondent habitually resides, which may be different from the seat of the company of which the respondent is the director. Significantly, given the assumed arbitration-friendly approach of UAE and Bahraini courts, they could give preference to the law of the country that gives significant capacity to the party under consideration to enter into contractual relations and arbitration agreements.

Bahraini courts are empowered to assess not only whether the person possessed capacity under his personal law, but also whether this foreign law “is contrary to Bahraini public policy and good morals”.⁹³ A strict application of this assessment may create problems with respect to the practices of other Muslim nations. By way of illustration, would an award in which a woman was excluded under an alleged application of the Shari’a be enforceable? Whereas women may not enter into contracts in Saudi Arabia they are fully competent of doing so in Bahrain. In such a case Bahraini public policy is permissible, albeit the foreign interpretation of the Shari’a brings about opposite results. The choice for the Bahrain courts is a difficult one because it may bring them into conflict with other Muslim nations. The matter therefore, in theory at least, remains unsettled.

As far as legal persons are concerned, as well as State agencies, Bahraini law does not impose a capacity impediment upon them from the point of view of entering into contracts or indeed arbitration agreements. The law of course is silent in respect of joint venture

⁹¹ Residency is the key consideration in the Brussels I Regulation, Council Regulation EC 44/2001, [2001] OJ L/12/1, and in fact domicile has been considered “the point on which the rules on jurisdiction hinge”. Jenard-Moller Report [1990] OJ C189/65, para 13. In *Bank of Dubai Ltd v Abbas*, [1997] ILPR 308, 311-312, the Court of Appeal held that a person is to be regarded a resident in the UK if this is “for him a settled or usual place of abode”. This was construed to mean “some degree of permanence or continuity” and as such a person is not considered resident in the UK if he simply owns a house there.

⁹² In *Grupo Torras SA v Sheikh Fahad Mohammed al Sabah* [1995] 1 Lloyd’s Reports 374, the respondent was resident in both the Bahamas and England, having divided his time more or less equally between the two nations. The Court held that for the purposes of Article 2 of the Brussels I Regulation he was considered as being domiciled in England because of his substantial connection thereto.

⁹³ Article 22 Bahraini Code of Civil Procedure.

agreements (JVA) where one of the legal or physical persons does not enjoy contractual or arbitral capacity under his personal laws or the law of the seat or country of incorporation. It is suggested that in such cases, given Bahrain's reliance on the UNCITRAL Model Law, that its courts would take an arbitration-friendly approach and simply dismiss the incapable party without frustrating the terms of the contract or the arbitration clause for the others. This would constitute an exemplary application of the separability principle in respect of capacity. The law is also silent as to who possess the capacity to bind the legal person. The Dubai Court of Cassation has held that under Articles 235 and 237 of the Commercial Companies Act representation to enter into contracts and arbitration clauses binding upon the company is vested on the company's statutory representative, a position which ordinarily coincides with that of the company's manager or director.⁹⁴

It has also been suggested that under UAE law the so-called group of companies doctrine,⁹⁵ or similar concepts, the purpose of which is to introduce into the arbitral proceedings otherwise third parties that are closely connected with the company that is a party to the dispute, does not exist. The corporate veil is unsusceptible to fracture under the current company law regime. However, legal experts opine that this regime does not prevent a tribunal from deciding that a corporate affiliate is bound by an arbitration agreement entered into by the parent company on a case-by-case basis, depending on the particular circumstances of each case.⁹⁶

2.4.2.1 The Meaning of Proper Notice in Commercial Arbitration

Article 9 of the UAE Arbitration Law stipulates that:

1. Unless otherwise agreed by the parties, any letter or communication shall be delivered either to the addressee personally or at his place of business, his habitual residence or mailing

⁹⁴ Dubai Court of Cassation case No 220/2007, judgment (17 January 2005); Dubai Court of Cassation case No 462/2002 (2 March 2003); Dubai Court of Cassation case No 537/1999 (23 April 2000).

⁹⁵ See L Wilske, L Shore, JM Ahrens, *The Group of Companies Doctrine: Where is it Heading?* (2006) 17 *American Review of International Arbitration* 73. The leading case is still *Dow Chemical France v ISOVER Saint Gobain (France)*, ICC Case No 4131/1982 (Interim Award), cited in (1983) 110 *Journal du Droit International* 899.

⁹⁶ See H Al Mulla, G Blake, *Commercial Arbitration: United Arab Emirates*, *Global Arbitration Review*, available at: <<http://www.globalarbitrationreview.com/know-how/topics/61/jurisdictions/33/united-arab-emirates/>>, response to Question 11.

address known by both parties or designated in the arbitration agreement or in the document organising the relationship subject to arbitration.

2. If none of these can be found after making a reasonable inquiry, a communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter.

The requirement to provide proper notice goes to the heart of arbitral proceedings and constitutes a fundamental principle of law; namely it encompasses the right to a fair trial⁹⁷ and that of equality of parties in judicial or arbitral proceedings⁹⁸ which is roughly equivalent to due process rights.⁹⁹ In one form or another it is a fundamental principle under Islamic law and a general principle of law applicable to arbitral proceedings. This may be established twofold. On the one hand, a variety of international instruments set out the parameters for proper notification. Chief among these is Article 36(1) (a) (ii) of the UNCITRAL Model Law which clearly states that recognition or enforcement of a foreign arbitral award may be denied at the request of a party to the case as long as it can furnish evidence that it was not provided with proper notice of the arbitral proceedings or the appointment of the arbitrator, or where said party demonstrates that it was unable to present its case. This is a verbatim reproduction of Article V (1) (b) of the New York Convention.¹⁰⁰

The foremost criterion in the determination of due process is the lack of due notice. Failure to meet this requirement may right result in non-enforcement. Due process has in practice been interpreted rather narrowly with national courts focusing on grave instances of

⁹⁷ The right to a fair trial is guaranteed in all international human rights instruments (e.g. Article 6 of the European Convention on Human Rights) and very little research has been undertaken in order to ascertain a possible correlation with arbitration. Interestingly, in *Sumukan Limited v Commonwealth Secretariat* [2007] EWCA Civ 243, the Court of Appeal held that an agreement in an arbitration clause to exclude an appeal to a court on a point of law under section 69 of the Arbitration Act 1996 (the exclusion agreement) did not breach the right to a fair trial as provided by Article 6 of the ECHR. See also *Osmo Suovaniemi and Others v Finland*, Application No 31737/1996, Decision of 23 February 1999 and *X v Germany*, Application No 1197/1961, Decision of 5 March 1962, where the European Court and Commission of Human Rights stressed that the waiver of one's right to judicial proceedings in favour of arbitration is consistent with the right to a fair trial.

⁹⁸ Article 18 of the Bahraini International Arbitration Act stipulates that the "parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". See Article 25 of the UAE Arbitration Law, which encompasses an equivalent meaning.

⁹⁹ In case No 351/2005, judgment (1 July 2006), the Dubai Court of Cassation held that depriving a litigant from his right to review and reply timely to documents distorts the parties' right to equal treatment and constitutes a violation of due process rules.

¹⁰⁰ Originally incorporated in Article 2(b) of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.

proper notice, such as the absence of notice altogether or its dispatch following the rendering of the award.¹⁰¹ As a result, despite the fact that lack of proper notice is commonly used to oppose the enforcement of an award, the courts are generally disinclined to dismiss an award unless the violation is severe.¹⁰² This does not of course mean that national courts are always disinclined from entertaining less severe due process violations.¹⁰³ Some Arab commentators have attempted to find a nexus between due process violations and public policy.¹⁰⁴

Lack of proper or adequate notice is a ground for terminating the proceedings in the relevant instruments of UAE and Bahrain. We have already made reference to the mandatory nature of compliance with the time limits set by the institutional rules of the tribunal or by the tribunal itself in Article 23(1) of the Bahraini International Arbitration Act. This basic rule is further elaborated in Article 24(2) and (3) of the Act as follows:

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property and documents.

All statements, documents or other information supplied to the tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

¹⁰¹ See H Dahlberg, M Ohrstrom, Proper Notification: A Crucial Element of Arbitral Proceedings (2010) 27 *Journal of International Arbitration* 539, p 540 who cites a case decided by the Swedish Supreme Court, Case No Ö 13-09, judgment (16 April 2010), where the respondent had changed his address prior to the triggering of arbitral proceedings by the plaintiff and failed to notify him. The plaintiff served at the last known address and the respondent did not attend the proceedings and an award was rendered against him. The Swedish Supreme Court refused to enforce the award on the ground of insufficient notice. It held that although Article V(1)(b) of the New York Convention does not specify the meaning of “proper notice”, a high threshold test should nonetheless be applied, especially as regards the initiation of arbitral proceedings. The judgment is available in English at: <http://www.arbitration.sccinstitute.com/files/1023107/Ö%2013-09_eng.pdf>. In *Belintertrans v TransEurope-Inform*, the Federal Arbitrazh Court of the North-West Region of Russia denied recognition and enforcement of the award because of improper notice to the respondent. What is notable in this case is that notice was sent to the address stipulated in the contract, but the respondent argued that the person who signed in confirmation of receipt of the notice was not the respondent’s employee.

¹⁰² See *Presse Office SA (France) v Centro Editorial Hoy SA (Mexico)*, (1979) Yearbook of Commercial Arbitration IV, p 301; *SpA Nosegno e Morando (Italy) v Bohne Friedrich and Co (Germany)*, (1979) Yearbook of Commercial Arbitration IV, p 279; *Lanifici Walter Banci SaS v Bobby Brooks Inc*, Italian Court of Cassation (1981) Yearbook of Commercial Arbitration VI, p 233.

¹⁰³ *Sesostris SAE v Transportes Navales SA*, 727 F Supp 737 (D Mass, 1989).

¹⁰⁴ J Ahmed, Enforcement of Foreign Judgments in some Arab Countries: Legal Provisions and Court Precedents, Focus on Bahrain (1999) 14 *Arab LQ* 169.

Article 25(1) then puts forward the basic obligation of the claimant in arbitral proceedings with a view to avoiding surprise claims that would distort the parties' right to a fair trial and equality of arms. The provision reads as follows:

Unless otherwise agreed by the parties, if, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with Article 23(1), the arbitral tribunal shall terminate the proceedings.

It clearly follows that if the tribunal may terminate proceedings on the basis that the claimant failed to respect his due process obligations, an award rendered in violation of such obligations will not be enforced in Bahrain and the UAE.¹⁰⁵ Given the scarcity of material on due process rights in the jurisprudence of the courts of Bahrain and the UAE the following sections will necessary focus on legal developments adopted in the courts of other nations.

2.4.2.2 The Standard of Proper Notice

In order for inadequate notice to constitute a ground for due process violation the notice must fail to comply with the requirements set by the parties or the arbitral rules chosen by them. In case of a conflict between the relevant laws of the *lex arbitri* and the chosen institutional rules, the latter prevail.¹⁰⁶ As a result, it is irrelevant whether said institutional rules provide for strict and narrow notice deadlines that would otherwise violate due process rights in the *lex arbitri* or the country of enforcement, given that party autonomy takes precedence in this case because the relevant rules are not of a compulsory nature.¹⁰⁷

It is not improbable, however, for an arbitral tribunal to take the view that despite the choice of institutional rules in the circumstances of a particular case it would defeat the objectives of justice were the respondent to adhere to the institutional time frames. A poignant application may arise where the plaintiff attempts to surprise the respondent by

¹⁰⁵ The relevant provision in the UAE Arbitration Law is Article 33.

¹⁰⁶ See *Generica Ltd v Pharmaceuticals Basic Inc and Malden Mills v Hilaturas Lourdes SA*, 125 F 3d 1123 (7th Cir, 1997).

¹⁰⁷ Article 23(1) of the Bahraini International Arbitration Act, for example, makes it clear that "within the period of time agreed by the parties or determined by the arbitral tribunal" the claimant shall state the facts supporting his case and the defendant shall state his defence in respect of these particulars, "unless the parties have otherwise agreed as to the required elements of such statements".

filing numerous claims and submitting thousands of pages of documents having prepared well in advance of making his claims. If the institutional deadline is very limited for the respondent to mount an effective defence and he subsequently approaches the arbitrators for an extension, it is submitted that the extension must be granted because it is in the interests of justice.¹⁰⁸

Proper notice also encompasses the disclosure of the arbitrator's name. In the case of *Danish Buyer v German Seller*,¹⁰⁹ an award was refused enforcement on the basis of due process, namely because the name of the arbitrator was not disclosed in the notice issued to the respondent.

2.4.2.3 Violation of Due Process due to Inability to Present One's Case

This ground is not explicitly mentioned in the UAE instrument,¹¹⁰ as opposed to the Bahraini Act.¹¹¹ The limited data afforded by the *travaux* do not provide any concrete clues as to whether this ground was intentionally excluded. It is suggested by this author that the general conception of due process, party equality and procedural fairness constitute concepts that cannot easily be enumerated in an instrument of general nature, as is the case with arbitral laws constructed on the basis of the UNCITRAL Model Law. This is especially the case if one considers that recent works identify a significant number of areas falling within due process in arbitration.¹¹² Yet, Islamic law has been interpreted since classical times as encompassing a sufficient body of rules regulating *sulh*, such that allow *kadis* and arbitrators to enforce a broad code of due process that is largely based on the equality of the parties.¹¹³ This is certainly broad enough to cover the majority of conduct falling within due process, including no doubt inability to present one's case. In the case of the UAE one should

¹⁰⁸ Ambushes and rouses are common in arbitral battles and arbitrators must always seek to balance the due process rights of the parties. This means that although the language of the notice is not generally viewed as a detrimental factor in the quality of the award, there are nonetheless circumstances where, as in the aforementioned scenario, the respondent may find himself with thousands of pages of material in a language he does not understand with little time to prepare.

¹⁰⁹ *Danish Buyer v German Seller* [1979] 4 YBCA 258, pp 259-60.

¹¹⁰ Implicitly, however, one could certainly read it into Article 53(a)(3) of the 2009 UAE Law ("unable to present its defence ... due to any other reason beyond its control").

¹¹¹ We have already mentioned that it is explicitly incorporated in Article 36(1.1)(b) of the Bahraini International Arbitration Act.

¹¹² See MS Kurkela, S Turunen, *Due Process in International Commercial Arbitration* (2nd edition, 2010, Oxford University Press).

¹¹³ See N Majeed, Good Faith and Due Process: Lessons from the Shari'a (2004) 20 *Arb Int* 97.

not hesitate to look back to the arbitration provisions of the now superseded Code of Civil Procedure (CPC) with a view to ascertaining principles that could not have possibly been abolished with the passing of the 2009 Law. Specifically, Article 212 of the CPC explicitly denied the enforcement of arbitral awards where due process violations were demonstrated, including the denial of opportunity to present one's case. This principle, along with all the others that make up the relevant group of challenges, was endorsed in 2009 by the Dubai Court of Cassation.¹¹⁴ It cannot possibly be claimed that the new law abolished this consistent and principled line of jurisprudence that finds expression in all developed legal systems. Therefore, in the context of this thesis it is assumed that all due process violations *lato sensu* are applicable in both Bahrain and the UAE, all of which give rise to a legitimate defence against enforcement of awards rendered in violation of these principles.

Inability to present one's case encompasses situations where despite adequate notice afforded to the other party, said party is in some way unable to attend the proceedings or meet relevant deadlines on account of a reason that is beyond his reasonable control.¹¹⁵ This may include *force majeure* or situations where although the party is in fact able to appear he was not given the opportunity to present his case.¹¹⁶ It will not always be easy to assess the degree to which such inability is the result of personal fault.¹¹⁷ Moreover, if one is to set a benchmark or an ascertainable standard, it is obvious that this must take into account the harm to the other party to the case. Traditionally, in international arbitration fair hearing claims are assessed on the basis of their private nature, not in accordance with the laws of any particular nation or legal system.¹¹⁸ This is consistent with the principle of party autonomy

¹¹⁴ Dubai Court of Cassation case No 270/2008, judgment (24 March 2009) and case No 32/2009, judgment (29 March 2009).

¹¹⁵ In *Consortio Rive SA v Briggs of Cancun Inc*, 134 F Supp 2d 789 (ED La, 2001), the respondent invoked Article V(1)(b) of the New York Convention, claiming that the arbitral award rendered in Mexico should not be enforced because the criminal courts of Mexico had initiated proceedings against his representative, thereby making him unable to attend the relevant arbitral proceedings for fear of arrest. Ultimately, the court did not accept this claim as a valid reason for non-enforcement.

¹¹⁶ See, for instance, *Generica Ltd v Pharmaceutical Basics Inc*, supra note 46.

¹¹⁷ See *Profil (Hungary) v Technofrigo (Italy)*, Italian Court of Cassation, Civil Department, Case No 12873, judgment (30 May 2006). E Bergsten, S Kröll (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer, 2011), pp 472-73.

¹¹⁸ *Parsons and Whittemore Overseas Co Inc v Societe Generale de l'Industrie de Papier (rakta) and Bank of America*, 508 F 2d 969 (2nd Cir, 1974) where the Court of Appeals held that the arbitral tribunal did not violate United States' constitutional standards of due process by refusing to reschedule a hearing because one witness had a prior speaking engagement. The witness provided the arbitrators with an affidavit containing most of his proposed testimony, and therefore the petitioner could not claim that it was unable to present evidence.; *Hebei Import and Export Corp v Polytek Engineering Co Ltd*, FACV No 10/1998, judgment (9 February 1999), [1999] 2 HKC 205, decided by the Hong Kong SAR Court of Final Appeal. The Hong Kong Court noted the "principle that a party to an arbitration who wishes to rely on a non-compliance with the rules governing an

which grants the parties to arbitral proceedings significant latitude in deciding all procedural matters. Although this seems like a permissive rule, in fact it is not. The parties to an agreement leading to arbitration must not force each other into accepting terms and conditions that are clearly not in their interest. This is particularly true where one party is substantially stronger than the other, financially, politically or otherwise. In such cases the tribunal must either act *proprio motu* or entertain an examination of the relevant claims of the weaker party. In any event, the equality of parties to an agreement and before judicial authorities is an entrenched principle in Islamic law.

It is instructive that recently the Hong Kong Court of Appeals in *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* decided a case where it was claimed that an arbitral tribunal had violated due process rights under Article 34(2) of the UNCITRAL Model Law through poor case management. The Court indicated that it was concerned with the “structural integrity of the arbitration proceedings”. After reviewing several commentaries dealing with Article 34 the Court, without deciding on how serious or egregious the conduct must be before a violation could be established, emphasised that the conduct complained of “must be sufficiently serious or egregious so that one could say that a party has been denied due process”. It went on to say that a party that was afforded a reasonable opportunity to present its case would “rarely be able to establish that he has been denied due process”.¹¹⁹ This is a pretty sensible standard that UAE and Bahraini courts would be well advised to adopt in their own decisions because it does not arbitrarily and without good reason frustrate solid arbitral proceedings.

2.4.3 Excess of Jurisdiction

The relevant provisions of the UAE and Bahraini legislation stipulate that an award will be denied enforcement if the tribunal decided matters not falling within the submission agreement or arbitral clause, unless the excess part can be separated from the whole without injury to the remainder.¹²⁰ There are numerous legal avenues by which to view excesses of

arbitration shall do so promptly and shall not proceed with the arbitration as if there had been no compliance, keeping the point up his sleeve for later use”, and held that the failure to raise objections to the arbitral tribunal justified enforcement of the award. It went on to say that the failure to raise the point before the Beijing Court would probably be an additional ground to enforce the award.

¹¹⁹ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd*, Case No 136/2011, judgment (9 May 2012).

¹²⁰ This will certainly encompass situations where the arbitrator failed to consider conditions precedent appended by the parties to the arbitration clause. The Dubai Court of Cassation, case No 124/2008, judgment (16 September 2008) ruled that contracting parties can subordinate their arbitration to so-called conditions precedent, which have to be fulfilled prior to a referral to arbitration. Failure to fulfil the conditions precedent

jurisdiction by arbitral tribunals.¹²¹ On the one hand, it constitutes a violation of procedural rules, such as due process, procedural fairness and party equality that is incumbent upon the arbitrators by operation of institutional rules as well as by the *lex arbitri*.¹²² As a procedural rule, it is clearly mandatory, as opposed to voluntary, and thus the parties may not freely waive it. On the other hand, it is evidently also a substantive rule, emanating principally from the law of contract, whereby the wishes of a party to a contract bind those third parties that voluntarily assume rights and duties from said contract. Moreover, the arbitrators' authority to pass judgment on the merits of a case is not unlimited. Although it is not the place of this thesis to distinguish between the two rival theories dealing with the legal status of arbitrators, either as judges (and therefore liable under public law) or as contract-appointed persons that do not enjoy the immunities of judges but are liable under the law of contract, it is clear that in both cases the arbitrator is bound by the terms of the parties' contract. Excess of substantive jurisdiction is no doubt a wholly different matter from the authority of the arbitrator to decide certain matters that are undefined in the submission agreement and on which the parties have failed to reach any concrete agreement. Hence, if the parties have failed to clarify the governing law the tribunal may decide – although certainly not arbitrarily – the appropriate law in the circumstances of the case.¹²³

There exists very little, if any, jurisprudence from the courts of Bahrain and the UAE on the proper meaning and scope of excess jurisdiction displayed by arbitral tribunals. A significant and growing body of case law is emerging in the industrialised world which seeks

is ruled to be a breach of the *pacta sunt servanda* principle and accordingly a submission for arbitration should be rejected where the relevant condition remains unperformed.

¹²¹ Many of these naturally fail. In *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER 315, Colman J. refused to sustain the respondent's challenge who claimed that the tribunal had exceeded its mandate by quantifying the claimant's loss according to findings made in separate arbitration proceedings (regarding a subsale contract between the claimant and a third party, which was decided by the same tribunal), which neither claimant nor respondent had raised or submitted as evidence in their arbitration. Colman J. dismissed this argument, reasoning that a tribunal acts within its mandate so long as it relies on evidence which is *relevant* to the resolution of the *dispute submitted for determination* by the parties, even if such evidence had *not* been raised by either party. Similarly, *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33, decided by the Singapore Court of Appeal.

¹²² In *Ferrara v AG 1824* the Brussels Court of Appeal was asked to stay an arbitral award arguing that because the panel lacked impartiality the losing party was denied his fair trial guarantees under Article 6 of the ECHR. The Court of Appeals held that Article 6 does indeed apply to arbitral proceedings. However, it stressed that "the public policy character of the guarantees contained in Article 6(1) does not preclude parties to a dispute from waiving these guarantees by freely deciding not to submit the dispute to a court established by law, but rather to submit it to an arbitration tribunal, set up according to their agreement." It went on to say that Article 6 was applicable in the instant case because the arbitrators had obtained their powers as a result of the parties' will it is up to the arbitrators to "exhaust their own exclusive powers to judge and to ensure by themselves, under their own responsibility, the conditions of a fair trial, in accordance with the general and fundamental principles of our law and, as far as necessary, with the provisions of the ECHR".

¹²³ See, for example, Article 28(2) Bahraini International Arbitration Act to this effect.

on the one hand to limit excesses of power by arbitral tribunals while avoiding any claims of arbitration-hostility. This middle ground is certainly not easy as the recent UK Supreme Court ruling in *Dallah Real Estate v the Government of Pakistan*¹²⁴ illustrates. There, the Supreme Court clarified the extent of the review to be undertaken by English courts when faced with a jurisdictional challenge to a foreign arbitral award. In *Dallah*, as well as in subsequent decisions, it was held that a mere limited review of the award by the court is not sufficient in cases where a party challenges the tribunal's jurisdiction. Rather, a full investigation illuminating all the facts pertinent to jurisdiction is required.¹²⁵ In fact, a full investigation by the court is necessary even when the award was issued by the tribunal in a foreign seat,¹²⁶ in which case the award and the jurisdiction may be consonant with the *lex arbitri*. This is certainly a radical departure in terms of judicial intervention by the courts of the enforcement State and as such it has been queried whether the status of England as a jurisdiction for enforcing foreign awards may be harmed as a result of such decisions.¹²⁷ Of course, the UK Supreme Court is not alone in such radical departures. We have already discussed exceptional judgments that are anything but enforcement-friendly adopted particularly by the courts of the UAE, with the *Bechtel* case being a lucid example. This reinforces the argument posited in chapter 1a that even the most efficient of legal systems may at times produce inconsistent, yet isolated, results.

In order to assess the scope of the subject matter of the dispute in the UAE and Bahrain, given the lack of case law or other guidance on the matter, it is important that we examine the arbitration agreement and the *compromis* itself. This will give us an idea as to how the law allows the parties to submit disputes to arbitral tribunals and what the power of said tribunals is in relation to the dispute before them.

2.4.3.1 The Scope of the Arbitration Agreement in Assessing Jurisdictional Excess

¹²⁴ *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

¹²⁵ *Ibid*, para 160, where it was held that "the starting point ... must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made".

¹²⁶ *Ibid*, paras 27-29.

¹²⁷ C Caher, Early Impact of *Dallah* on the English Courts, *Commercial Dispute Resolution* (25 February 2011), available at: <<http://www.cdr-news.com/arbitration-and-adr/112-articles/996-early-impact-of-dallah-on-the-english-courts>>.

Not long ago, it was widely known that Arab nations refused to recognise the validity of arbitration clauses in general contracts on the ground that they referred to a future event that was not susceptible to quantification and as such was considered speculative. It was this so-called speculative character of arbitration clauses that was considered as being contrary to fundamental tenets of Islamic law and as a result said clauses were largely void in most Muslim jurisdictions.¹²⁸ As a response, only submission agreements were allowed because they were deemed as satisfying existing needs, rather than catering for speculative events. This stance created numerous problems, not least that non-Muslim parties to contracts undertaken in Muslim nations were forced to submit future disputes to local courts. This state of affairs was quickly abandoned by the more progressive nations of the Gulf, particularly the UAE and Bahrain. Article 203(1) of the UAE Federal CCP explicitly allows arbitration clauses, stipulating that “the contracting parties may provide in a contract or in a later agreement, that all disputes which might arise between them from the performance of a contract will be referred to one or several arbitrators”. This is further reflected in Article 11 of the 2009 Arbitration Law. In fact, the Dubai Court of Cassation has made it abundantly clear that the validity of the arbitration clause depends on the intention of the parties to incorporate it as part of their main contract.¹²⁹ This is of course consistent with Article 11(2) of the 2009 Arbitration Law, which goes even further by suggesting that that arbitration clause may even exist in a document that is not of a contractual nature, as long as this document (and the arbitration clause) is clearly referred to in the main contract.¹³⁰ It goes without saying, of course, that submission agreements are an equally valid contractual model for submitting disputes to commercial arbitration.¹³¹

The legal landscape is more or less similar in respect of Bahrain. Arbitration clauses are permissible both in the context of domestic arbitration,¹³² as well as in international arbitrations.¹³³ Moreover, Bahraini law and jurisprudence accepts as valid those arbitration

¹²⁸ See G Sayen, *Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia* (1987) 9 *U Pa J Int'l Bus L* 211, pp 218, 231ff.

¹²⁹ Dubai Court of Cassation, Civil Cassation, case No 100/2004, judgment (9 January 2005); Dubai Court of Cassation, Commercial Cassation, case No 174/2005, judgment (19 December 2005).

¹³⁰ Article 11(3) UAE 2009 Arbitration Law. The Dubai Court of Cassation in case No174/2005, Commercial Cassation, judgment (19 March 2005), held that if the contract wherein the arbitration clause is contained contains addendums these must also be signed by the parties together with the main contract, otherwise the arbitration clause is ineffective. In this manner the possibility of separability is clearly denied to the arbitration clause by the introduction of a formality.

¹³¹ Dubai Court of Cassation, Commercial Cassation, case No 39/2005, judgment (16 April 2005).

¹³² Article 233 Bahraini Code of Commercial and Civil Procedure.

¹³³ Article 7(1) Bahraini 1994 International Arbitration Act.

clauses that do not set out the precise subject matter of the dispute, but refer generally to disputes arising out of the parties' contract.¹³⁴ This is no doubt consistent with the practice of industrialised nations and of the *lex mercatoria*, given that it is impossible for the parties to know in advance what disputes may arise in the course of an evolving commercial or other relationship. Of course, it is taken for granted that broad arbitration clauses which the parties later employ to refer to arbitration disputes that are not susceptible to arbitration will be found void by the courts and any awards rendered as a result will not be enforced.¹³⁵ In fact, the Court of Cassation has held that even if the respondent to an award that was rendered on the basis of an arbitration clause which referred to arbitration a non-arbitrable dispute did not dispute the validity of the award, the courts are under a duty to set aside or refuse to enforce said award.¹³⁶

It is evident from this analysis that both the UAE and Bahrain accept that the parties may refer all arbitrable disputes arising from their contracts to arbitration, whether domestically or abroad, their awards being subsequently enforceable before the courts of the two nations. If they choose to specify the subject matter of the dispute to the arbitral body, or if they fail to reach agreement as to said subject matter, it seems that the tribunal would not be in excess of its jurisdiction (as this arises from the arbitration clause) if it were to elucidate and complement the gaps left by the parties' disagreement. Such "initiative" would clearly fall within the kompetenz-kompetenz power of the arbitral tribunal if it were looking ahead towards the parties' enforcement of the award in the UAE and Bahrain. The tribunal would only be deemed as having exceeded its jurisdiction if it decided to invite third parties and expand the subject matter of the dispute in such a way as to clearly violate the explicit and implicit wishes of the parties to the original contract.¹³⁷ Equally, the parties are free to withdraw from the effects of the arbitration clause and submit their dispute to the regular courts.¹³⁸ What remains to be investigated is whether the arbitration clause survives a null or

¹³⁴ Bahrain Court of Cassation, case No 143/2009, judgment (5 March 2000).

¹³⁵ Bahrain Court of Cassation, case No 165/2005, judgment (3 October 2005).

¹³⁶ Bahrain Court of Cassation, case No 156/2004, judgment (4 July 2005).

¹³⁷ Crucially, the Bahraini Court of Cassation in case No 223/2002, judgment (12 May 2003) held that arbitration clauses are not relevant to public policy. Rather, they are an expression of the wishes of the parties and should be treated only as such.

¹³⁸ In case No 111/2005, judgment (17 October 2005) the Bahraini Court of Cassation upheld a decision by the Court of Appeals which had deemed the Court of First Instance to entertain a suit even though the parties had originally intended their disputes to be settled by arbitration. The rationale was that arbitration was an exceptional measure from which the parties may withdraw, in which case recourse to ordinary courts is legitimate.

void contract in both nations, which essentially gives rise to the question of separability and its recognition in Bahrain and the UAE.

Notwithstanding this discussion, the DIFC Court of First Instance (CFI) recently adopted a judgment that does not accord with the letter or spirit of the New York Convention.¹³⁹ In this case, the respondent applied for a stay of judicial proceedings before the DIFC courts on the ground that the parties had already entered into an arbitration clause by which to settle their disputes. The CFI refused to entertain this claim, arguing that where the DIFC Courts had the jurisdiction to hear a case, they had no power to dismiss it, or to stay it for arbitration, unless the arbitration had its seat in the DIFC. This is a clear violation of Article II (3) of the New York Convention and it is evident that the CFI has misconceived the authority of DIFC legislation¹⁴⁰ over and above the UAE's treaty obligations, particularly the New York Convention. It is a principle of international law that a country cannot invoke its internal law in order to violate its international obligations¹⁴¹ and in any event not only do incorporated treaties possess the status of domestic law,¹⁴² but moreover it is a general principle of law that legislation is drafted in a manner consistent with treaty obligations.¹⁴³

2.4.3.2 The Relation of the Arbitration Clause to Contract Annulment

In a recent case before the Bahrain Court of Cassation the parties had entered into an arbitration clause as part of their franchise contract which encompassed any dispute arising from the execution of the agreement. The petitioner initiated arbitral proceedings requesting the termination of the franchise agreement and the restitution of the amount paid. The respondent contested the award on the ground that the arbitrators had gone ahead to settle a dispute which did not result from the execution of the parties' agreement. In essence, it was argued that a request for termination and restitution of the price for failure or impossibility to execute the contract is a dispute related to the execution and implementation of the contract. The Court of Cassation held that a dispute relating to the termination or nullity of a contract

¹³⁹ *Injazat Capital Ltd and Injazat Technology Fund BSC v Denton Wilde Sapte & Co*, Case No CFI 019/2010, judgment (6 March 2012).

¹⁴⁰ In this case, Article 13 of the DIFC Arbitration Law No 1/2008.

¹⁴¹ Article 3 ICL Articles on Responsibility of States for Internationally Wrongful Acts. This is a principle recognised also in the sphere of customary international law.

¹⁴² *The Parlement Belge* (1880) 5 PD 197, although in this case the treaty under question had only been ratified and not transformed into English law. Hence, the Court of Appeal held that it did not have any force in the realm.

¹⁴³ *Salomon v Commissioners of Custom and Excise* [1967] 2 QB 116.

may not be referred to arbitration. It found that the arbitration agreement was restricted to disputes related to its execution and consequently did not extend to the termination and annulment of the agreement itself. This was justified because it was not the intention of the parties, particularly in light of the fact that the ruling did not exceed the explicit terms of that agreement and in any event the signature of the respondent on the submission to arbitration, the presentation of its defence and the filing of a cross-action before the arbitral tribunal were deemed insignificant and did not constitute conferral of jurisdiction on the arbitral tribunal to examine the dispute referred thereto by the petitioner.¹⁴⁴

This is a significant judgment with no known equivalent in the UAE. Nonetheless, it is the contention of this author that it makes good legal sense and should certainly be followed in the region which does not generally have solid jurisprudence on standard contractual terms such as “arising from” with which the courts and the parties provide clear indications as to what types of disputes are included or excluded from arbitral consideration.

2.4.3.3 Separability in the UAE and Bahrain

The doctrine of separability is a fundamental tenet in the operation of international commercial arbitration. It posits that even if the main contract wherein the arbitration clause is contained is found to be null, void or inoperable, the arbitration clause continues to survive. This practically means that any of the parties may trigger the operation of the arbitration clause and refer a dispute arising from the contract to arbitration.¹⁴⁵ That the tribunal may subsequently decide that no enforceable rights or duties arise from this null or void contract is a different matter, but it may also decide that one of the parties is responsible for the contract’s nullity and as a result it is liable to compensate the other party. It is difficult, if not impossible, to determine the outcome of an arbitral process in which the main contract has been rendered null or void.

The autonomous nature of the arbitration clause vis-a-vis the main contract has long been recognised in the law of Bahrain and the UAE.¹⁴⁶ Article 11(4) of the 2009 UAE Arbitration Law explicitly recognises the principle of separability. It reads in part that “the

¹⁴⁴ Bahrain Court of Cassation, case No 156/2004, judgment (4 July 2005).

¹⁴⁵ Established under English law in *Heyman v Darwins* [1942] 1 All ER 337. See SJ Ware, *Arbitration Law’s Separability Doctrine after Buckeye Check Cashing Inc v Cardegna*, (2007) 8 *Nevada Law Journal* 107

¹⁴⁶ The Dubai Court of Cassation in case No 254/2002, judgment (19 May 2005) explicitly endorses the principle of separability in domestic arbitration. The judgment should be seen as an endorsement also in respect of foreign arbitral awards and proceedings.

arbitral clause shall survive the nullity, rescission or termination of the contract, provided such clause is valid per se".¹⁴⁷ The Dubai Court of Cassation has ruled that although the autonomous nature of the arbitration clause is fundamental in the operation of the law of contract and that of arbitration, it survives only where said clause is not null itself.¹⁴⁸

It remains to be seen whether a foreign award sought to be enforced in the UAE and Bahrain may be challenged by a party or the local courts on the ground that the arbitration clause was null or void and which the arbitrators failed to detect or rule upon. The UAE and Bahraini courts of enforcement would have to assess such a claim by reference to the governing law of the arbitration clause.¹⁴⁹ There is some disagreement as to which law this actually is in the absence of agreement between the parties. The courts of certain jurisdictions assert that absent designation by the parties the governing law of the arbitration clause is the law of seat,¹⁵⁰ whereas others contend that the proper law is the governing law of the main contract.¹⁵¹ In any event, it is clear that the Bahraini and UAE enforcement courts cannot decide such matters on the basis of their own law, if the parties did not designate this law either as the governing law of their contract or that of the arbitration clause.¹⁵² The principle of separability must be given the greatest possible effect and should not be frustrated by reference to the law of the country of enforcement when the parties did not have this law in mind when going about drafting their contract.¹⁵³

¹⁴⁷ The UAE Federal CCP, on the other hand, does not deal with separability, but it would be far-fetched to deny the autonomy of the arbitration clause to domestic arbitral awards.

¹⁴⁸ Dubai Court of Cassation, case No 164/2008, judgment (12 October 2008).

¹⁴⁹ Although not related to international awards, Article 203(5) of the UAE Federal CCP that if a party to an agreement containing an arbitral clause brings a case to the regular courts and the other party does not raise an objection, the arbitration clause will be deemed as being void. This is probably a very broad assumption, particularly since one or all parties waive their right to arbitration only with respect to the specific dispute and not all future disputes that may arise from the operation of their mutual contract. This is consonant, at least implicitly, with the jurisprudence of UAE courts whereby the effect of an agreement to arbitrate is the stay of legal action before regular courts. See Abu Dhabi Federal Court of Cassation, Civil Cassation, case No 421/2007, judgment (14 May 2007) and Dubai Court of Cassation, Labour Cassation, case No 152/2004, judgment (27 February 2005).

¹⁵⁰ *C v D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239 (CA).

¹⁵¹ *Peterson Farms Inc v C & M Farming Ltd* [2004] All ER (D) 50, effectively overturning *Roussel-Uclaf v GD Searle & Co* [1978] 1 Lloyd's Rep 225.

¹⁵² See I Bantekas, *The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy* (2010) 27 *Journal of International Arbitration* 1.

¹⁵³ This seems to be the implicit position in the UAE at least, given the absence of credible judicial information for Bahrain. The Dubai Court of Cassation in case No219/2008, Commercial Cassation judgment (9 March 2009) held that in the context of a multipartite contract the arbitration clause works for all parties if simply one of them invokes. This ruling clearly suggests a trend towards giving the greatest possible latitude to the arbitration clause.

2.4.4 Inappropriate Composition of the Arbitral Tribunal

According to the majority of Islamic law scholars, the seal of approval for arbitration by the Prophet finds expression in the Quran itself.

God doth command you to render back your trusts to those whom they are due; And when ye judge between people, that ye judge with justice; Verily how excellent is the teaching which He giveth you! For God is He who heareth and seeth all things.¹⁵⁴

Although there exists fierce disagreement between the various schools, particularly as to whether arbitration is merely a form of conciliation or whether an arbitrator possesses the attributes of a *kadi* (judge), this verse is generally taken to mean that awards rendered by those appointed by the parties to settle a dispute (arbitrators) are binding. It is also taken to mean that in order for an arbitration to be valid, an odd number must be appointed by the parties in accordance with their wishes.

In the practice of international commercial arbitration the composition of an arbitral tribunal is determined by the parties, this being reflected in the arbitration clause or a subsequent submission agreement.¹⁵⁵ The parties are responsible for appointing arbitrators of their choice and in case they cannot agree as to the person of the odd arbitrator – which is usually the norm – the party-appointed arbitrators ultimately choose that person.¹⁵⁶ A challenge of inappropriate composition, therefore, goes to the very heart of the contractual wishes of the parties and concerns the appointment of those arbitrators whom one of the parties had not consented to. As will be seen in this section, however, inappropriate composition also involves challenges against the appointment of arbitrators in the absence of a clear statement by the parties in their contractual arrangements, in which and in order to salvage the arbitration clause the choice of arbitrators is predicated on the institutional rules of the chosen arbitral institution.¹⁵⁷ In the Islamic context there are further theoretical – and to

¹⁵⁴ Qur'an 4:58.

¹⁵⁵ In traditional Islamic law the submission agreement requires the names of the arbitrators, as well as the subject matter of the dispute, among others. See Sayen, *supra* note 68, p 211.

¹⁵⁶ See A Redfern, M Hunter et al, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 4th edition, 2004), pp 221-230.

¹⁵⁷ See R Bishop, L Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Arbitration*, (1998) 14 *Arb Int* 395.

a large degree also practical – issues that need to be addressed and which concern a tribunal’s legitimate composition.

Primary among these is the requirement in certain Muslim nations, such as Saudi Arabia, that arbitrators in domestic arbitrations be Muslim men.¹⁵⁸ Of course, where this mandatory rule exists it is forced upon the parties, especially foreign parties, and although in theory they could raise the defence of inappropriate composition at the enforcement phase before their own courts on the ground that they had no choice, in theory such a claim would fail. The reason is that although their choice was restricted, they did in fact possess a valid choice and in any event they chose to submit their dispute to the particular rules which provided for Muslim male arbitrators. I say in theory, because in practice this rather impossible defence has found application in the heart of the industrialised world. In *Jivraj v Hashwani*, reference to which was made in the beginning of this chapter, the English Court of Appeal held that a submission agreement by which the parties assented to the appointment of Ismaili arbitrators only was contrary to the country’s equality and anti-discrimination laws.¹⁵⁹ This is a rather odd judgment that runs against the logic of arbitration and party autonomy. It is taken for granted that arbitration involves a degree of discrimination, but this is a type of discrimination in the private sphere which does not offend public policy.¹⁶⁰ Therefore, it is the opinion of this author that the particular judgment by the court of appeals is flawed and should not be followed in the future.

The progressive arbitration legislation of the UAE and Bahrain does not restrict parties as to the choice of arbitrators. Indeed, even in the context of domestic arbitration, Article 206(1) of the UAE CCP does not require that arbitrators be Muslim or male. Neither the UAE 2009 Law nor the Bahraini International Arbitration Act requires any nationality, sex or religious credentials for the appointment of arbitrators. Where the parties fail to agree on a procedure for the appointment of arbitrators, Article 11(3)-(4) of the Bahraini Act states that:

¹⁵⁸ Saudi Implementing Rules for Arbitration, Royal Decree No. M/7/2021, of 08/09/1405 H (1985), reprinted in *Umm Alqura Gazette*, No. 3069 of 10/10/1405 H (1985), Article 3. It should of course be stressed that the traditional rationale for the requirement of Muslim arbitrators lay in the assumption that since Muslims would settle disputes among themselves and among non-Muslims on the basis of Islamic law, it is impossible that a non-Muslim could be more proficient in this law than a Muslim. This principle has no application in the modern era because parties are not restricted as to their choice of law, with Islamic law being an infrequent choice, not to mention judgments such as *Beximco* which deem it too indeterminate to constitute an appropriate choice of law.

¹⁵⁹ *Jivraj v Hashwani* [2010] EWCA Civ 712.

¹⁶⁰ In fact, Article 11(1) of the Bahraini International Arbitration Act stipulates that “no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

3.1 In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in Article 6.

3.2 In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in Article 6.

4. Where under an appointment procedure agreed upon by the parties,

4.1 a party fails to act as required under such procedure, or,

4.2 the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure,

4.3 a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Article 18 of the UAE Law more or less provides for the same type of procedure. As a result, it is fair to say that the two laws are underlined by the same rationale. The Dubai Court of Cassation has held that the parties through their arbitration clause or subsequent *compromis* possess the authority to appoint arbitrators of their choice. However, if neither the clause or the *compromis* specify who the arbitrators are and how they are to be appointed, then it befalls on the institutional rules of the arbitral institution of their choice to make the selection for them. In the case at hand the parties had opted for ICC arbitration and hence it was the ICC institutional rules that would determine the method of choice of the arbitrators.¹⁶¹ In this manner the losing party is not allowed to raise a defence as to the tribunal's inappropriate composition with a view to achieving non-enforcement of the award rendered. Again, this is a sensible ruling, albeit clearly everything depends on the wording of the arbitration clause and

¹⁶¹ Dubai Court of Cassation, case No 227/2006, judgment (18 December 2006).

the extent to which the parties are willing to contend the tribunal's composition up until the stage of enforcement.

Exceptionally, where the arbitral clause refers a dispute to the Abu Dhabi Commercial Conciliation and Arbitration Centre and the parties have failed to appoint their arbitrators, it befalls upon the Director-General of the Centre to appoint them following discussion and consultation with the parties.¹⁶²

Where one or several arbitrators refrain from completing their mission, suspend their undertakings or are in any other manner precluded or challenged, and the parties have not come to any agreement as to their replacements, it is the court with original jurisdiction over the dispute that possesses the authority to appoint said replacements.¹⁶³ This is also the case in Article 17 of the DIFC Rules, which like the legislation in UAE and Bahrain, is based on the UNCITRAL Model Law. When this situation arises the civil court assumes jurisdiction only upon request by one of the parties. This of course refers to domestic arbitrations but is worth mentioning in order to demonstrate the arbitration-friendly legislation and jurisprudence of the UAE in this regard. It remains somewhat unclear what avenues are available to the parties where the civil courts appoint arbitrators in the absence of an agreement by the parties. The Bahraini Court of Cassation has taken the view that where the civil courts undertake the task of appointment as a matter of urgency the parties do not have recourse to a challenge at a later stage if they accepted the appointment in the first place. In the event, however, that any one of the parties challenges the validity of the arbitration clause and the civil courts have appointed one or more arbitrators, this decision is subject to an appeal.¹⁶⁴ Again, this is a sensible decision given that the parties may challenge at any time the validity of the arbitration clause and any judgments passed while the parties continue the challenge said clauses are certainly open to appeals.

¹⁶² Abu Dhabi Federal Court of Cassation, Civil Cassation, case No 206/2005, judgment (27 December 2005).

¹⁶³ Abu Dhabi Federal Court of Cassation, Civil Cassation, case No 308/2005, judgment (21 March 2005). This is also the situation in Bahrain as decided by the Bahraini Court of Cassation in case No 95/97, judgment (21 December 1997). In the case at hand, the Court took the exceptional measure of appointing a legal person, an arbitral institution, as arbitrator, rather than a natural person. This is certainly unusual and under normal circumstances such an appointment would have been considered inappropriate, albeit none of the parties to the dispute challenged the Court's decision. It is of course taken for granted that the arbitral institution would decide the case through the appointment of a natural person on the basis of its institutional rules. See also Article 20 of the DIFC Rules on failure or impossibility to act on the part of the appointed arbitrator.

¹⁶⁴ Bahrain Court of Cassation, case No 277/2005, judgment (19 December 2005).

The following subsection will look at a particular facet of inappropriate composition that does come up from time to time in the enforcement of arbitral awards in the Gulf region, namely that of bias on the part of a member of the arbitral panel.

2.4.4.1 Challenges of Bias against Arbitrators

Challenges of bias are common in commercial arbitration.¹⁶⁵ Article 12(2) of the Bahraini International Arbitration Act stipulates that an arbitrator may be challenged “only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties”. This challenge is available even in respect of party-appointed arbitrators if the appointing party becomes aware of such a circumstance after the appointment has been made. In the practice of arbitration, those usually appointed as arbitrators act in this capacity a significant amount of times and if they are lawyers they may have clients or other affiliations that pose a conflict with the parties in a particular case. These direct and indirect links with the opposite parties usually give rise to sharp contentions. Article 12(2) gives no clear solution to such dilemmas. We are not aware of a case of this nature in the UAE or Bahrain, so reference will be made to an Omani case, which is closer to these two nations in legal culture. In *Sultan Centre L.L.C. v Zaher ben Hamad al-Harethi*, one of the parties to the arbitration challenged the appointment of both arbitrators on the ground that they worked for the same company. The tribunal rejected this challenge, firstly because the request was made more than fifteen days after the party became aware of this fact and secondly because the arbitrators themselves had informed the parties early in the proceedings.¹⁶⁶

It follows therefore that if the parties had challenged the arbitrators within the proper time limits a case such as this would have been ripe for a judgment in favour of inappropriate composition and would have given rise to a refusal to recognise and enforce the relevant award. Anecdotally, it seems that the courts of the UAE and Bahrain may be prone to

¹⁶⁵ See *Commonwealth Coatings Corp v Continental Casualty Co* 393 US 145 (1968), at 150, where the US Supreme Court noted that “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias”.

¹⁶⁶ *Sultan Centre LLC v Zaher ben Hamad al-Hareth*, Muscat Court of First Instance, case No 147/99, judgment (25 September 1999). General jurisprudence suggests however that the bias must be severe and should of itself be able to prejudice the outcome of the case. In *Andros Compania Maritima SA v Marc Rich and Co AG*, 579 F 2d 691 (2nd Cir, 1978), the Second Circuit refused to overturn an award for which the claimant alleged a “close personal and professional relationship” between the arbitrator and the other party on the sole ground that said arbitrator had served together with the other party on nineteen arbitration panels.

accepting broad claims of arbitrator bias if these originate from a party that is a national of these two nations. One should not, however, assume that said courts are themselves biased. This is the result of the residual effect of the poor arbitral awards rendered against Arab nations in the 1950s and 1960s. No doubt, local courts should resist from showing sympathy to local parties, even if such expressions of sympathy are rare it should be said.

CHAPTER 3

LACK OF ARBITRABILITY AS A GROUND FOR NON-ENFORCEMENT

3.1 Introduction

In the previous chapter we analysed several grounds under which the courts of Bahrain and the UAE have refused to recognise and enforce foreign arbitral awards. These grounds were closely modelled around the terms of the New York Convention as well as the UNCITRAL Model Law. Although the implementing State may well dictate what lack of proper notice means, it is difficult to envisage situations where the *lex arbitri* or the country of enforcement will impose significantly different standards from those applicable in international instruments or from the *lex mercatoria* of arbitration, particularly as developed by the courts and legislatures of developed nations. Arbitrability, on the other hand, is not defined and its particular terms have never been elaborated in international instruments. Much like the concept of public policy, which will be discussed in chapter 5, it is not susceptible to generalisations in international instruments for the reason that its content can only be derived from the dictates of local laws and exigencies. This is exactly why certain subject matters are susceptible to arbitral resolution in some countries and not in others.

It is beyond the purview of this chapter to explain the range of local sensitivities and policies that underlie the politics of arbitrability. What we intend to do in this chapter is to analyse the general conception of arbitrability before we go on to explain this notion in the specific framework of Islamic law. This particular analysis will shed some light as to whether Bahrain and the UAE are following the dictates of Sharia on the settlement of business disputes. Of course, this would necessitate that a single rule exists under Islamic law, such that encompasses within its ambit all types of commercial and other disputes. Whether or not the legislatures and the courts of the two nations under consideration follow Islamic arbitrability rules is a matter of contention. The fundamental argument in this chapter is that although Bahrain and the UAE follow Islamic law as the principal source of their legislation they have tacitly distinguished rules and injunctions therein that prohibit particular conduct and have attempted to reinstate said conduct after eliminating its attendant vices. Thus, while adhering to the spirit of Islamic law, the legislatures of the two nations have consciously abstained from prohibiting the conduct *per se*. This has been undertaken in a manner that

recognises the value of the prohibition while at the same time reflecting on the realities of contemporary business life. By way of illustration, the rationale for the prohibition of usury (*riba*) is that, among others, it exacerbates the human passion of greed and culminates in the strong taking perpetual advantage of the weak. The aim is therefore the elimination of the passion's inducement. The introduction of a regulated and generally low-interest imposition under UAE law, coupled with the choice of opting for Islamic financing, has to a considerable degree eliminated the vices of usury while at the same time responding to the need to compete with foreign banks and financial institutions.

The chapter also discusses the statutory arbitrability landscape of the two nations and comments on the power of arbitral tribunals to decide on matters of arbitrability as opposed to referring this matter to the jurisdiction of regular courts. The chapter concludes by examining the arbitrability framework of the DIFC, despite the fact that very little concrete practice exists in this field. Nonetheless, this author has undertaken a thorough and comprehensive survey in order to discern arbitrability rules in DIFC legislation.

3.2 The General Conception of Arbitrability

Arbitrability refers to the appropriateness of arbitration as a method of resolving particular disputes. Whether or not a particular dispute is susceptible to arbitral resolution is determined by reference to the *lex arbitri* and the law of the country of enforcement.¹⁶⁷ As a result, the ambit and content of arbitrability is based on the dictates of national law. There is no transnational or international rule on arbitrability and this is perfectly natural because even if such a rule existed it would be extinguished in practical terms on account of the fact that it would have to be validated by the dictates of the jurisdiction where the award is rendered or sought to be enforced. This of course does not mean that there do not exist international trends on arbitrability and that States do not make mutual concessions at the bilateral or multilateral level in order to limit the range of disputes that can only be brought before national courts, as opposed to private dispute settlement. A prime example concerns disputes related to the private dimension of anti-trust disputes. Despite some logical hesitation by the courts of industrialised nations because of the public character of anti-trust conduct, the US Supreme did not hesitate to proclaim that the private aspects of anti-trust disputes between

¹⁶⁷ See I Bantekas, *The Foundations of Arbitrability in International Commercial Arbitration* (2008) 27 *Australian Yearbook of International Law* 193.

rival companies may be lawfully subjected to arbitral proceedings, assuming of course that a valid arbitration clause or submission agreement exists between the parties concerned.¹⁶⁸ This line of thinking soon became entrenched in European legal thinking and is now considered good law and has spread to other areas that have otherwise been perceived as falling exclusively within a broader public regulatory framework, such as patent¹⁶⁹ and labour disputes,¹⁷⁰ among others.

Arbitrability relates to subject-matter. Its rationale lies in the traditional and exclusive regulatory function of the State, which imposed upon it and its courts the obligation to deal with disputes encompassing a public interest or a public element. This is no doubt a wise policy for if private parties were to resolve such disputes among themselves the function of the State would be redundant. In the case of anti-trust or insolvency for example, it would be absurd for the relevant parties to settle outstanding matters among themselves because they have every incentive of abusing the process and absolving themselves from any wrongdoing in breach of the legitimate expectations of their creditors. This is especially the case given the confidential nature of arbitration, in which event no one would ever know how the parties settled the dispute which caused damage to the public interest (e.g. soaring prices in the case of an abuse of dominant position or monopolistic practices). As a result, it is evidently in the public interest to retain certain disputes within the public domain and resolve them through the regular jurisdiction of ordinary courts.

Nonetheless, there are obvious drawbacks to this approach. On the one hand, disputes are multifaceted and encompass dimensions that have a limited public interest and which can be settled among the rival parties without jeopardising the rights of others. This relates to the private dimension of disputes otherwise encompassing a public interest, which the courts and the legislator have opted to subject to arbitration as long as their results do not interfere or in any way disrupt the parallel proceedings brought by the legitimate organs of the State. On the other hand, the State retains an interest in allowing the parties concerned to settle said

¹⁶⁸ See especially the celebrated case of *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, which did not come about in isolation. Its ground had adequately been prepared by the US Supreme Court in *Scherk v Alberto-Culver* 417 US 506 (1974).

¹⁶⁹ DW Plant, Arbitrability of Intellectual Property Issues in the United States (1994) 5 *American Review of International Arbitration* 11; MA Smith et al, Arbitration of Patent Infringement and Validity Issues Worldwide (2006) 19 *Harvard Journal of Law and Technology* 299.

¹⁷⁰ TE Carbonneau, Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States, in LA Mistelis, SL Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer, 2009), p 143. See particularly *Alliance Bernstein Investment Research and Management v Schaffran* 445 F 3d 121 (2nd Cir 2006).

disputes privately because it decreases the costs of justice and thus allows it to divert its own scarce resources to the criminal or administrative aspect of the investigation in the case at hand.

To put things in a more practical perspective, the following should be noted as general principles: a) disputes related to investments – based on the definition of investment in a BIT- are always arbitrable, even if they concern matters, such as taxation;¹⁷¹ b) even if an award is rubber-stamped according to the laws of the *lex arbitri*, it does not necessarily follow that said award will pass the arbitrability test of the country of enforcement; c) arbitrability generally extends to all subject matters that are susceptible to conciliation;¹⁷² d) although there is a trend to remove arbitrability barriers in order to make arbitration consistent throughout the world,¹⁷³ less developed nations will always seek to protect their weaker trading and commercial classes against perceived threats or power imbalances emanating from their richer – and usually foreign – counterparts and trading partners; e) the legal sources of arbitrability are invariably found in local statutes, decrees and other types of domestic legislation. However, because arbitrability relates to a large degree with public policy,¹⁷⁴ which is not immutable and is subject to constant changes, a significant source for the determination of arbitrability is the local judiciary.

Of course, the courts cannot render a particular subject matter non-arbitrable without the existence of a statute; at least in industrialised nations. Nonetheless, and this is crucial to the focus of this thesis, nations in which Islam is the primary source of legislation cannot claim that a statute supersedes an injunction in the Qur'an or the *hadith* or other secondary sources of Islamic law. Given the various schools and the vastness of their secondary sources

¹⁷¹ See especially *Ecuador v Occidental Exploration & Production Co. (OEPC)*, [2006] EWHC 345 (Comm), where it was held that discriminatory tax against a foreign investor gives rise to claims of creeping expropriation, which is a matter of public international law and does not fall within the exclusive jurisdiction of States. If therefore the investor and the host State have entered into a contract with an arbitration clause or are otherwise encompassed under the terms of a BIT they can validly settle said tax issue through arbitral proceedings. See also for a similar result, *Encana v Republic of Ecuador*, Award (6 February 2006), (2006) 45 ILM 895. WW Park, Arbitrability and Tax, in Mistelis and Brekoulakis, *supra* note 4, pp179-205

¹⁷² In accordance with s 1 of the 1999 Swedish Arbitration Act, “disputes concerning matters in respect of which the parties may reach a settlement” may be submitted to arbitration. Equally, under Article 1 of the Saudi Implementing Rules to the country’s Arbitration Act [Royal Decree No. M/7/2021, of 08/09/1405 H (1985), reprinted in *Umm Alqura Gazette*, No 3069 of 10/1405 H (1985), recourse to arbitration is prohibited in relation to disputes for which conciliation is not permitted.

¹⁷³ *Allied-Bruce Terminix Companies v Dobson* (1995) 513 U.S. 265, where pre-dispute arbitration clauses were found to be permissible by the US Supreme Court in relation to consumer contracts.

¹⁷⁴ See, however, SL Brekoulakis, On Arbitrability: Persisting Misconceptions and New Areas of Concern, in Mistelis and Brekoulakis, *supra* note 4, p 19, 21ff, who while acknowledging the prescriptions of national laws whereby there exists a clear link between arbitrability and public policy, he finds this nexus as constantly diminishing.

it becomes evident that the courts may be swayed in certain cases to accept that a particular matter that has otherwise been settled by statute is in fact non-arbitrable by operation of a religious ruling. This renders arbitrability a very indeterminate business that defeats the concept of legitimate expectations. The following sections seek to illuminate the standard position in Islamic law, if one actually exists, and then to provide the particular situation in the UAE and Bahrain.

3.3 Islamic Arbitrability

From a purely methodological perspective, Islamic arbitrability rules would be derived from the sources of Islam, namely the Qur'an, *hadith* and secondary sources of reasoning and interpretation, including *ijtihad*, where relevant. If any rules were found to exist under this scheme, they would have to be validated against the practice of Muslim nations. If said practice was found to contradict the primary and secondary sources of Islam then the conclusion drawn would be that Islamic arbitrability rules have become defunct or obsolete, having been taken over either by secular rules or by a process of re-interpretation of the original religious rules. In any event, we could no longer talk of Islamic arbitrability as such – unless of course one does so through a legal history lens – but of national arbitrability rules where one could trace remnants or influences from religious rules. The view of this author, as will become evident in the course of this chapter, is that although Islamic law continues to play a significant role in the shaping of commercial dispute resolution in the Muslim world certain ancient prescriptions have given way to modern business trends that have been incorporated in the laws and regulations of most Muslim nations. These have sidelined some of the ancient rules in favour of more flexible and business-oriented ones, without necessarily injuring the spirit of the ancient injunctions. As a result, arbitrability has become needs-based rather than religious-based, which in turn has necessarily given rise to heated debates as to whether the substantive dimension of such rules (e.g. banking interest) applies at all.

The general rule on arbitrability in Islamic law is that arbitration is permitted in cases where a dispute may be resolved by conciliation. This is a rather problematic formulation because in the Arabic language the terms “conciliation” and “mediation” are more or less tautosimous and translated as “*sulh*”. Moreover, this injunction was traditionally meant to apply to personal disputes (including those arising from criminal conduct) and the few known commercial disputes of the Prophet's time. The complexity of contemporary business

transactions and the pace of technological development are insusceptible to this broad and indeterminate rule. The second point of departure concerns the various prohibitions found in Islamic law, which naturally are not susceptible to private dispute resolution because they are prohibited in the first place. These are far too many to enumerate, so we shall limit ourselves to those that are of particular interest to this thesis. Chief among these are the prohibition of fraudulent agreements,¹⁷⁵ the imposition of usury or interest,¹⁷⁶ speculative contracts and generally all business transactions the aim of which are to cause unlawful injury to one of the parties or a third person, or which concern other prohibited conduct such as alcohol¹⁷⁷ or gaming-related.¹⁷⁸ Of course, the overriding consideration is that all agreements must be honoured,¹⁷⁹ as long of course as these are *muamalat* agreements in the first place. The rationale behind these prohibitions is evident. Prophet Mohamed as a messenger of the Almighty Allah wanted to create an ideal society out of the social ruins of the Arab society he inherited, which was based on profit-making and human indulgence. It is clear that the four aforementioned prohibitions concern conduct which if left to human nature has the tendency to culminate and nurture the vice of greed. By removing this element from contractual and business relationships he was in fact humanising commerce, implanting therein a social and ethical dimension, which was crucially absent before his advent.

So clearly, the jurisprudential question is whether the principal consideration of Prophet Mohamed specifically, and of Islamic law more generally, is to divest commerce of the greed factor or to impose these prohibitions irrespectively. The question is crucial because if the object of attack is greed, it follows that if this can be eliminated by other means, the

¹⁷⁵ There is some discussion of this in *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] 2 WLR 126, but particularly in *Westland Helicopters Ltd v Arab Organisation for Industrialisation (AOI), UAE, Kingdom of Saudi Arabia, State of Qatar, Egypt and Arab-British Helicopter Company*, (International Chamber of Commerce arbitration award of 5 March 1984), 80 ILR 600. Equally, in *United Arab Emirates v Westland Helicopters*, judgment of Swiss Federal Tribunal (19 April 1994).

¹⁷⁶ Qur'an 2:275, stating that "those who devour usury will not stand except as stands one whom the Evil one with his touch hath driven to madness".

¹⁷⁷ Qur'an 4:43, 5:90.

¹⁷⁸ Non-Muslim courts have expressed their opinion on Islamic public policy, even if not in very precise terms. In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, the parties had gone to arbitration over a contract that envisaged illicit payments to a Qatari official in exchange for business favours. An award was rendered in that case but its enforcement in England was refused on several grounds, among which was that it violated the public policy of Qatar. A different conclusion was reached in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others* [1999] 3 WLR 811, whose facts were not very different from *Lemenda*. In this case, however, the court effectively held that fraud and bribery in a contract to be executed in Kuwait, did not offend that country's public policy and could therefore be considered arbitrable under the laws of England.

¹⁷⁹ Qur'an 5:1.

substantive conduct need not be prohibited or eliminated.¹⁸⁰ Thus, if the introduction of banking interest is controlled in such a way as to not give rise to greed, it will be permitted. Equally, if the uncertainty (*gharar*) is of minor importance (*gharar yasir*), as opposed to severe (*gharar fahish*) it may be acceptable and thus be lawfully subjected to arbitration.

Unfortunately, there is no clear line of jurisprudence which supports this contention, not because such currents are lacking in Islamic legal thought, but because it is unwise to express such ideas in the form of jurisprudential or theological writings. They would open up heated debates with no determinate outcome and would be rejected outright by hardliners. The chosen method is tacit defiance reflected in legislative work, court judgments and a general supportive attitude and policy. This has been the case for example throughout the Gulf nations, Arab North Africa and the rising economies of south East Asia, particularly Indonesia and Malaysia. There, governments have a two-tier track system whereby merchants and consumers are free to choose what best suits their religious views and have introduced parallel banking and insurance systems¹⁸¹ on the basis of either Islamic finance (and *takaful* in the case of insurance)¹⁸² and regular conventional banking premised on the charging of interest in respect of lending transactions.¹⁸³ Even where interest has been allowed, it is not unregulated but is otherwise susceptible to several limitations. By way of illustration, Articles 76 and 77 of the UAE Federal Commercial Transactions Law No 18 of 1993 allows lenders to charge their clients simple interest, the ceiling of which must not exceed a rate of 12 per cent. The Federal Supreme Court of Abu Dhabi has had a chance to review and assess the compatibility of this law with the UAE federal constitution and has come to the conclusion that economic necessity in a contemporary complex and largely internationalised business

¹⁸⁰ See MA El-Gamal, *An Economic Explication of the Prohibition of Riba in Classical Islamic Jurisprudence* (Rice University Press, 2001); MSA Khan, *The Mohammedan Laws against Usury and How They Are Evaded*, (1929) 11 *Journal of Comparative Legislation and International Law* 233.

¹⁸¹ The opinion has been expressed that convention insurance constitutes a prohibited transaction under Islamic law, and disputes arising therefrom are not arbitrable, because said insurance is essentially a gambling contract because of the element of uncertainty (*gharar*). Moreover, because it requires the payment of premiums calculated on the payment of several factors it also encompasses an element of *riba*. It is the opinion of this author that the level of uncertainty in conventional insurance is very small (*yasir*).

¹⁸² *Takaful* is essentially cooperative risk-sharing by using charitable donations, as opposed to commercial capital, in order to eliminate *gharar* and *riba* that are intrinsic in the operation of conventional insurance. See K Kassar, A Clark-Fisher et al, *What's Takaful: A Guide to Islamic Insurance* (BISC Group, 2008). It should be stressed that the majority of insurance license applications in the Gulf are *takaful*-based. AIG *Takaful*, for example, was set up in Bahrain in 2006 and is licensed by the Central Bank of Bahrain.

¹⁸³ As a result, the parties have a choice of arbitral institution on the basis of the legal tier they wish to base their business upon. Hence, those opting for Islamic finance or *sharia* law more generally in the UAE may resort to the International Islamic Centre for Reconciliation and Commercial Arbitration (IICRCA). The Centre is based in Dubai.

environment necessitates the charging of interest by financial institutions.¹⁸⁴ The same result was reached also by the same Federal Supreme Court in the form of a judgment,¹⁸⁵ which demonstrates a clear trend towards legitimising the charging of interest and confirming its compatibility with fundamental tenets of Islamic law – or at least reconciling it with the latter – which in turn gives rise to the arbitrability of disputes involving interest-based commercial and financial activities.¹⁸⁶ Even Saudi practice seems to be going down this path – not so much the *riba* prohibitions but in liberalising their arbitrability policy - as is suggested by recent scholarship.¹⁸⁷

Islamic finance differs from conventional banking in that the lender assumes the risk of the project as much as the debtor, whereas in conventional banking the lender does not partake in the risk – unless of course the debtor becomes insolvent – but instead makes a profit by charging interest for the loan.¹⁸⁸ In practice, the Islamic financing model may yield much higher dividends for the lender because of his greater participation in the project's profits.¹⁸⁹ Thus, although this type of financing eliminates a narrow dimension of greed derived from usury, it fails to eliminate its broader dimension. No doubt, however, because Islamic banking requires the taking of serious business decisions by the bank its assessment of projects is by necessity very thorough and transparent. It is therefore the contention of this author that the two systems meet at various points of their operations and this largely explains why the UAE and Bahrain, as well as other Muslim nations, have decided to allow *riba*-based lending and therefore subject relevant transactions to private dispute settlement.

¹⁸⁴ Federal Supreme Court of Abu Dhabi, Interpretative Decision No 14/9 (28 June 1981).

¹⁸⁵ Federal Supreme Court of Abu Dhabi, case No 245/2000, judgment (7 May 2000).

¹⁸⁶ See H Tamimi, Interest under the UAE Law and as Applied by the Courts of Abu Dhabi, (2002) 17 *Arab L Q* 50.

¹⁸⁷ See A Baamir, *Sharia Law in Commercial and Banking Arbitration* (Ashgate, 2010), where the author cites Diwan Almazalim Decision No 19/28 of 1399 H (1979), in which the Diwan went ahead and enforced a foreign arbitral award containing interest-based claims, albeit it severed such claims from the remainder of the award. In practice, parties routinely circumvent Saudi arbitrability restrictions on interest-based transactions by subjecting their arbitration clause to a foreign law and by bypassing Saudi *lex arbitri*. See *Islamic Investment Company of the Gulf (Bahamas) Ltd. v Symphony Gems NV and Others*, [2002] All ER 171. Of course, even so there is no guarantee that the *Diwan* would enforce such an arbitral award. Anecdotal evidence in Saudi Arabia suggests that in private many traders and others seek loans with interest, whether domestically or abroad, because they are easier to obtain on account of the fact that less guarantees and risk-assessment is required.

¹⁸⁸ See MM Metwally, Differences between the Financial Characteristics of Interest-Free Banks and Conventional Banks, (1997) 97 *European Business Review* 92.

¹⁸⁹ See AM Venardos, *Islamic Banking and Finance in South-East Asia: Its Development and Future* (World Scientific Publishing Co, 2005); C Henry, R Wilson (eds), *The Politics of Islamic Finance* (Edinburgh University Press, 2004), who discuss several Muslim legal systems and generally suggest that existing Islamic finance systems are beginning to adopt policies of economic liberalism on the basis, however, of Islamic values and beliefs.

It would seem that prohibited conduct is not susceptible to arbitration and I am talking particularly of alcohol and gaming (*maysir*) activities. These cannot be reconciled with the spirit of Islamic law and the human vice inherent therein cannot be removed from these activities.¹⁹⁰ Of course, the parties could well conceal the principal activity and portray a different subject in respect of their dispute. However, there is no guarantee that said award will be enforced in the UAE and Bahrain, especially if one of the parties – usually the losing one – were to object at the enforcement stage.

3.4 Statutory Arbitrability in the UAE and Bahrain

Statutory arbitrability in the UAE is structured around pragmatic grounds. Both the CCP (Article 203(4)) and the 2009 Arbitration Act (Article 14) allows parties to subject to arbitration matters which are ordinarily susceptible to conciliation.¹⁹¹ Again, this is a broad formulation the deciphering of which is achieved through a thorough examination of statutes. Much like throughout the Arab world, disputes arising from commercial agency and distributorship agreements are subject to the exclusive jurisdiction of UAE courts.¹⁹² European jurisprudence has recently started to accept the permissibility of arbitration in order to resolve disputes arising from such agreements¹⁹³ and this is a trend that should be followed closely by the UAE, especially where it is demonstrated that the parties to said agreements are at a relative parity.¹⁹⁴ In Bahrain the situation is different. The Bahraini Commercial Agency Act No 23 of 1975 grants jurisdiction to local courts in respect of any dispute between the commercial agent and the principal, as well as over disputes arising between the agent and the relevant Ministry. However, this jurisdictional ambit seems to concern only

¹⁹⁰ Some of course have cited verses from the Qur'an whereby alcohol is not perceived as inherently evil and as containing certain positive attributes. See particularly verse 2:219, which was a later addition to the Qur'an, and which says that alcohol contains some good and some evil, but the evil is greater than the good.

¹⁹¹ See Article 41 of the DIFC Arbitration law, which relates to questions of arbitrability. Article 733 of the UAE Civil Code contains a rather significant list of issues which the parties may not submit to conciliation, thus rendering them non-arbitrable.

¹⁹² Article 6 of the Federal Commercial Agency Law No 18 (1981). See also Federal Law No 13 (17 June 2006).

¹⁹³ See, for example, the Belgian Court of Cassation judgment in *Colvi v Interdica*, case No JC04AF2 (15 October 2004).

¹⁹⁴ This is particularly so because other Middle East nations are following suit despite long traditions to the contrary. In a judgment rendered by the 5th Chamber of the Lebanese Supreme Court, a distinction was made between the reference of commercial agency disputes to arbitration by means of an arbitration clause and a submission agreement. It is only when said disputes are submitted to arbitration through a *compromis* that they are arbitrable. Judgment No 4/2005 (11 January 2005). See on this matter, S Kröll, *The Arbitrability of Disputes Arising from Commercial Representation*, in Mistelis and Brekoulakis, *supra* note 4, pp 317-51.

domestic agency agreements and one should not read into this a requirement of exclusive local court jurisdiction over commercial agency disputes where the principal is non-Bahraini. A 1998 amendment to the kingdom's Commercial Agency Law abolished the requirement that local agents are subject to the jurisdiction of local courts.

Labour disputes are equally barred from being resolved by means of arbitration.¹⁹⁵ The same is true in respect of collective labour disputes, which are to be referred to the Supreme Arbitration Board as appointed by the Ministry of Labour and Social Affairs. Indeed, the Labour Relationship Organisation Act No 8 (1980) established a Higher Commission of Arbitration with jurisdiction over collective labour disputes. The Committee is empowered to offer a binding judgment after all other ADR means have been exhausted, including mediation and conciliation. The situation is more or less similar in Bahrain where the Court of Cassation has ruled that all rights and entitlements of an employee arising from his termination of employment are subject to the jurisdiction of ordinary courts, even if the parties have entered into an arbitration agreement. This is because this relationship is considered as being governed by mandatory rules.¹⁹⁶

The parties are not entitled to subject to arbitration attachment and enforcement procedures, unless they have decided otherwise.¹⁹⁷ Crucially, disputes arising from the Emirates Securities and Commodities Authority (ESCA) must be arbitrated at the first instance if the parties have entered into a valid arbitration clause or submission agreement.¹⁹⁸ Unlike other industrial nations,¹⁹⁹ the UAE allows for corporate disputes to be resolved by means of arbitration without limitation as to subject matter.

Landlord and tenant disputes in Dubai must be referred to a rent committee. The courts enforce the decisions of the rent committee. The Dubai Property Court is an arm of the Dubai Court of First Instance, which now has exclusive jurisdiction to deal with property disputes in the Emirate of Dubai where the parties have agreed to the jurisdiction of the Dubai courts to settle disputes. The Dubai Real Estate Regulatory Agency (RERA), a specialist arm of the Dubai government's Land Department, regulates the real estate market in Dubai and can mediate disputes referred to it between developers and purchasers.

¹⁹⁵ Federal Labour Law No 8 (1980).

¹⁹⁶ Bahrain Court of Cassation, case No 143/94, judgment (4 December 1994).

¹⁹⁷ Dubai Court of Cassation, case No 204/2005, judgment (2 July 2005).

¹⁹⁸ ESCA Decision No 1/2001, as amended in 2008.

¹⁹⁹ In its Ruling No VAS-15384/11 (30 January 2012), the Supreme Arbitrazh Court of the Russian Federation declared that corporate disputes cannot be referred to arbitration. This will no doubt create serious consequences in respect of existing and future transactions involving shares in Russian companies.

It is presumed that all other disputes are arbitrable, unless they touch upon a matter of public policy. It is the contention of this author that both in the UAE and Bahrain there exists a presumption of arbitrability as long as the relevant subject matter is not susceptible to arbitral resolution by reference to a statute, a prior judgment by the local courts, public policy,²⁰⁰ or is otherwise contrary to an international obligation validly assumed by the two nations.²⁰¹ It should also be admitted that some of these grounds are sufficiently indeterminate to warrant caution on the part of those who seek to enforce arbitral awards in Bahrain and the UAE. By way of illustration, although we have demonstrated that the charging of banking interest is legitimate, some foreign law firms warn their clients that it is not improbable that the local courts may at some point find this practice problematic and decide not to enforce a foreign award that concerns the payment of interest.

The following section will focus on an issue that is not directly connected to arbitrability *per se* but in the thinking of this author it is a crucial dimension in the arbitrability of all disputes. The issue at hand is third party funding that is filtered into arbitral proceedings.

3.5 Third Party Funding and Arbitrability

Third party arbitration funding agreements have become widely available to parties intending to bring or defend a case before an arbitral tribunal. Indeed, the cost of arbitration can at times be prohibitive for claimants and defendants and so financial institutions found a lucrative avenue for making money.²⁰² Third party arrangements involve the payment of all arbitration-related expenses by a person or entity that is not in any way connected to the proceedings. The arrangements themselves vary considerably but the underlying rationale is

²⁰⁰ The Bahraini court of Cassation, case No 79/2005, judgment (24 October 2005) has held that although matters that touch upon public policy and which go against it are not arbitrable, the parties can nonetheless still refer to arbitration all disputes relating to pecuniary rights and interests generated by such public policy matters.

²⁰¹ In the case of Bahrain, it should be stressed, there does exist some minor complexity. The country's 1969 Code of Contracts, and particularly Article 32 thereto, listed a number of disputes that were not susceptible to arbitral resolution. A few years later, however, in 1971, the Bahraini Code of Civil and Commercial Procedure (CCP) was promulgated, Article 1 of which repealed all pre-existing legislation that was not in conformity with its provisions. Without any further guidance on the matter it would seem that the CCP broadened the range of matters that are susceptible to arbitration by abolishing Article 32 of the Contracts Code. Hence, it is presumed that if a particular subject matter may be subject to conciliation proceedings it is ripe for arbitration. See also S Saleh, *International Commercial Arbitration in the Arab Middle East* (Hart, 2nd edition, 2011), pp 112-13.

²⁰² M de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, (2011) 19 *Cardozo Journal of International and Comparative Law* 352.

that the third party funder shares in the risk of the entity he is funding and expects to make a profit from the latter's award or otherwise take a loss in the eventuality that this entity loses the case. Third party funding seems like an ingenious proposition that realises the right of access to justice for those who would otherwise not be able to afford it²⁰³ and at the same time provides employment to the legal and other professions. Yet, it is not without its own share of problems, particularly of an ethical nature. More specifically, it is suggested that the person funding ones litigation through which he expects to make a profit has every incentive to see his protégé win. This means that he will not seek the best result for his client, but the one that provides him with a larger profit.²⁰⁴ By way of illustration, if the parties reached a settlement from which the funder would only receive a small percentage, he will be induced to protract the litigation even though it is clearly not in the best financial and other interests of his client. English and other courts have overcome these ethical barriers under condition that the funder remains impartial and independent from the proceedings and the manner through which his client prepares his case.²⁰⁵

On the basis of the preceding discussion in other sections of this chapter it is evident that third party arbitration funding may cause particular problems for those wishing to enforce arbitral awards in Bahrain and the UAE. Two main issues arise. The first concerns the validity of the award itself, whereas the second concerns the validity of arbitral awards based on disputes arising from third party agreements. The complication is no doubt the fact that the uncertainty in such agreements is significant, as opposed to minor, and as a result they may be construed as being contrary to local public policy. This possibility is particularly acute given that litigation or arbitration funding arrangements are unknown in Islamic legal theory and even *zakat* (almsgiving) was not envisaged to cover such circumstances. The problem is compounded even further by the absence of any express prohibitions or

²⁰³ In *Hamilton v Al Fayed (No 2)* [2002] 3 All ER 641 it was held that "support for litigation furthered the important public policy objective of facilitating access to justice. Providing that such support was not attended by adverse features which would offend against the prohibition of champerty, such support was to be encouraged, not discouraged".

²⁰⁴ Australian courts have resisted this argument, claiming that third party funders "are not creating controversies that did not exist. ... A litigation funder does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law". *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41. A recent independent report on third party funding in Australia is critical of the unregulated nature of this practice. See M Legg, *Litigation Funding in Australia: Identifying and Addressing Conflicts of Interest for Lawyers* (February 2012), available at: <http://www.instituteforlegalreform.com/sites/default/files/Litigation_Funding_in_Australia.pdf>.

²⁰⁵ In 2005, in the case of *Arkin v Borchard Lines Ltd & Others* [2005] EWCA Civ 655, the English Court of Appeal made it clear that litigation funding is a legitimate method of financing litigation.

restrictions on disinterested third party litigation funding in Bahrain and the UAE. This of course is no guarantee that the courts may necessarily consider third party funding to be compatible with public policy or local law more specifically. No doubt, usury legislation will be central in any assessment of the contractual arrangements of third party funding.²⁰⁶ We have already explained that the charging of interest is legitimate but strictly regulated in Bahrain and the UAE and as a result high returns and interest charged by the funder may culminate in public policy objections. Of course, many funding arrangements are confidential and are not even disclosed to the other party to the dispute, albeit a number of entities have decided to make their dealing with funders transparent.²⁰⁷ In the opinion of this author funding agreements will not give rise to questions of indeterminacy and speculation and hence will not be problematic from a contractual point of view. The only serious cause for concern relates to the usury dimensions of the agreement and whether or not they meet the standards set by the governments of the two Gulf nations. It may also be presumed that if the opposing party was aware of the other's funding arrangements, particularly in cases of public declarations, and yet continued with the case without taking any legal or other action, that party has waived its right to make subsequent claims. Of course, there is always the danger that the courts will not look at the wishes of the parties but only at the public policy dimension of the agreement.

3.6 Who Decides Issues of Arbitrability

The kompetenz-kompetenz principle which permeates the relevant statutes of Bahrain²⁰⁸ and the UAE²⁰⁹ clearly suggest that in case of dispute as to whether an international arbitration taking place on their territory is in fact arbitrable is to be decided by the tribunal itself. This is

²⁰⁶ In *Matter of Strategies, LLC v Ferreira*, 28 Misc. 3d 1204[A], 2010 N.Y. Slip Op. 51159 (N.Y. Co. 2010), a New York court dealt with an arbitration to enforce payment of a non-recourse advance with a pending legal matter as collateral. The court held that: "The instant transaction, by contrast [to a loan], is an ownership in proceeds for a claim, contingent on the actual existence of any proceeds. Had respondents been unsuccessful in negotiating a settlement or winning a judgment, petitioner would have no contractual right to payment." The court in *Strategies, LLC* found that, based on this reasoning, the usury laws did not apply.

²⁰⁷ In the course of the investment dispute in *Oxus Gold v Uzbekistan*, the claimant made a declaration (1 March 2012) for the purposes of transparency and declared its funding arrangements with a financier covering the costs of arbitral proceedings. The declaration and the terms of the agreement are available at: <http://online.hemscottir.com/servlet/HsPublic?context=ir.access&ir_option=RNS_NEWS&item=931851136975129&ir_client_id=4252>.

²⁰⁸ Bahraini International Arbitration Act, Article 16(1).

²⁰⁹ UAE 2009 Federal Arbitration Law, Article 23(1).

a logical rule that is based on the express terms of the UNCITRAL Model Law²¹⁰ and arbitral practice more generally.²¹¹ There is no jurisprudence emanating from the courts of the two nations that might provide exceptions to this general rule. It is assumed that the arbitrator is either aware of local statutory arbitrability or in any event that an award dealing with a subject that is not susceptible to arbitration will fail to be enforced therein – although it may well be enforced in third nations that are willing to defy the terms of the *lex arbitri*. Based on the express provisions of the two arbitration statutes, even in the eventuality that the arbitrators defy the *lex arbitri* of the two nations and go ahead although the dispute is clearly non-arbitrable, the challenging party will have to wait until the proceedings are over in order to challenge the award before the courts.²¹²

Recent practice in the USA suggests that the parties to an ongoing arbitration may approach a local court, outside the seat of the arbitration, in order to seek a preliminary injunction pending the results of an arbitral decision. Although the arbitrator is empowered to make the injunction himself and enforce it through the regular channels of the *lex arbitri*, it is accepted that in exceptional circumstances and in order to secure the assets of a party to the proceedings, going directly to the courts of the country where the assets are located may be more expedient, especially where the pending arbitration is in no way prejudiced.²¹³ Although this is largely unrelated to the power of the tribunal to decide on matters pertinent to arbitrability, it demonstrates that even when a statutory provision is explicit in favour of arbitral authority, ordinary courts may decide to circumvent such provisions.

3.7 Arbitrability under the DIFC Rules

The DIFC Arbitration law is rather cryptic when it comes to determining questions of arbitrability. Article 44(1)(b)(vi) simply states that an award will not be enforced or

²¹⁰ UNCITRAL Model Law, Article 23.

²¹¹ In *Republic of Argentina v BG Group PLC*, No. 11-7021, 2012 WL 119558 (D.C. Cir. 17 January 2012) the court made reference to the 1976 version of the UNCITRAL Model Law which “grants the arbitrator the power to determine issues of arbitrability”, ultimately sustaining this rule. There is a consistent line of jurisprudence which supports this practice. See *Contec Corp v Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005), holding that language stating that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement” reserved the question of arbitrability for the arbitrator.

²¹² See HR Al-Khalifa, *State Court Intervention in Arbitration in Bahrain*, (2011) 26 *ICSID Review* 147

²¹³ *Bahrain Telecommunications Co v Discoverytel and Others*, 476 F Supp 2d 176 (D Conn, 2007). The parties in this case had initially entered into a contract containing an arbitration clause but tacitly waived arbitration by suing each other before the courts of Bahrain, before eventually deciding to refer their dispute to arbitration in London.

recognised if “the subject matter of the dispute would not have been capable of settlement by arbitration under the laws of the DIFC”. Given that the DIFC is a relatively new entity that has not promulgated a significant amount of laws and given also that it will apply Bahraini law in the absence of its own – although under no compulsion to do so - one assumes that Bahraini arbitrability laws apply. In practical terms, this will probably be the same, but since the aforementioned provision in the DIFC Arbitration Law does not associate arbitrability with Bahraini laws but only with DIFC laws this might well connote a desire to liberate the DIFC from some of the constraints under the laws of Bahrain. This is especially true given the purpose behind the establishment of DIFC and so it is the contention of this author that Bahraini legislators consciously bypassed Bahraini legislation relating to arbitrability, thus allowing significant latitude to the parties.²¹⁴

Evidence of this may be gleaned indirectly through an examination of relevant DIFC legislation. For one thing DIFC is not bound to apply Bahraini law. On the other hand, its own legislation is predicated on party autonomy and does not impose any limitations thereto. By way of illustration, DIFC Contract Law No 6/2004 makes no mention to the ability of parties to refer particular matters to arbitration, thus avoiding any references to arbitrability. Article 12 of the Contract law goes on to say, however, that:

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such usage would be unreasonable.

What this means is that there is always a presumption in favour of arbitrability, especially if a particular trade usage or *lex mercatoria* demonstrates a pattern of arbitral resolution in that industry. Given that all traders, manufacturers and others now routinely enter into arbitration clauses in their contracts it is unlikely that the DIFC courts²¹⁵ will find a trade usage to which arbitration is alien. The DIFC Companies Law No 2/2009, on the other hand, while making

²¹⁴ This liberal and arbitrability-friendly approach is consistent with the scant literature. See SR Luttrell, *The Arbitration Law of the Dubai International Finance Centre (2008)* 3 *Journal of International Commercial Law and Technology* 170, p 174.

²¹⁵ Reference to DIFC courts is made in relation to the current judicial architecture as provided for under DIFC Court Law No 10/2004.

no reference to arbitration, leaves two possibilities open. Firstly, it seems to allow the shareholders to decide the particularities for the drafting of the company's articles of association without much limitation.²¹⁶ Nonetheless, Article 29(1), which concerns shareholders' and members' right to object to variation, suggests that any dispute arising therefrom "may apply to the Court to have the variation cancelled and, if such an application is made, the variation has no effect unless and until it is confirmed by the Court". It is clear thus that in variation disputes the parties do not have the choice of taking their dispute to arbitration but must instead apply to the DIFC Court.²¹⁷ It is unclear however whether the general entitlement of the shareholders to draft their articles of association in any manner they wish also encompasses the right to bypass DIFC courts in favour of arbitration. This is a serious omission by the legislator and one which may create some problems in the future. It is suggested by this author that the general presumption in favour of arbitrability should prevail unless the clear and unambiguous consent of one or more shareholders or other actors that have not ratified the articles is in doubt.²¹⁸ It seems that provisions in DIFC legislation that refer explicitly to the courts are not meant to divest the parties of their right to arbitrate disputes falling within the ambit of particular laws. Rather, the aim is to subject certain actions with a public character to the exclusive jurisdiction of the courts. This, for example, is evident in Article 43 of the DIFC General Partnership Law No 11/2004, which subjects all matters relating to the dissolution of partnerships to the jurisdiction of regular courts. It is considered that although the dissolution of general partnerships may be agreed between the parties the actual dissolution must be ratified by the attendant public authority because such act is in the public interest. As a result, one must distinguish in DIFC laws the general freedom of parties to subject all disputes to arbitration from the specific express exceptions to this freedom.

²¹⁶ DIFC Companies Law No 2/2009, Articles 12-16.

²¹⁷ Similarly, there are no express provisions in the laws of Bahrain and the UAE with respect to whether corporate disputes may be lawfully subject to the jurisdiction of arbitral tribunals. It seems that unless there exists a public policy issue (e.g. mass lay-offs or fraudulent insolvency) the parties, principally the shareholders, are free to settle disputes by reference to arbitration. It is assumed that the rules of association contain relevant arbitration clauses or otherwise that the parties will agree on a submission agreement in the absence of an arbitration clause.

²¹⁸ This conclusion is reinforced by the fact that paragraph 6 of Schedule 2 of DIFC Insolvency Law No 2/2009 provides the administrative receiver with power to "refer to arbitration any question affecting the company". No doubt, this requires a submission agreement between himself as administrator and other parties, or alternatively if the articles of association provide for arbitration he may simply trigger the arbitration clause against existing shareholders.

In a survey of all DIFC laws and regulations conducted by this author the term arbitration comes up only in Schedule 2 of the DIFC Insolvency Law and none of these instruments explicitly states that DIFC courts possess exclusive jurisdiction over disputes falling within their ambit. Thus, it is opined that arbitrability is indeed of a general and broad nature, subject to very few express limitations in the statutes and then again only in respect of functions and purposes that serve a clear public interest and which need to be transparent and in the public domain. At the same time it should be acknowledged that there is some uncertainty as to the correct interpretation of DIFC laws and the precise relationship of arbitration to these laws. Indeed, the notions of arbitrability and public policy are always among the most indeterminate legal terms in the lexicon of lawyers.

CHAPTER 4

GROUNDS FOR NON-ENFORCEMENT: NULLITY OF AWARD AND APPLICATION OF IMPROPER LAW

4.1 Introduction

Previous chapters have focused on other circumstances that render foreign arbitral awards non-enforceable in the UAE and Bahrain, notably incapacity, lack of proper notice, excess of jurisdiction, inappropriate composition and lack of arbitrability. This chapter, as suggested by its very title, intends to concentrate on two areas that generally go unnoticed on their own because they are either typically subsumed within other categories (e.g. award nullity is usually viewed from the lens of other defects pertinent to the award)²¹⁹ or as something which is necessarily faulty but at the same time it would be wrong to consider it as a defect

²¹⁹ See N Rubins, *The Enforcement and Annulment of International Arbitral Awards in Indonesia* (2005) 20 *American University International Law Review* 359.

that negates the entire arbitration process. The latter comment refers to a refusal to recognise a foreign award because the tribunal applied a substantive law that was different to that designated by the parties in the arbitration clause or the submission agreement, or where the tribunal is deemed to have gotten the governing law of the contract wrong.²²⁰

Once again, we have decided not to embroil ourselves with the international jurisprudence available on these two issues, but rather concentrate on the law of the UAE and Bahrain, chiefly because this matter has received some attention. The only limitation is that the courts of the two nations have not had the chance to assess relevant claims and as a result we are forced to employ judgments that may provide some clarity through indirect means. As will become evident, even the statutes of the two nations under consideration fail to provide much guidance in respect of these two grounds for non-enforcement and in the case of Bahrain in particular whose relevant statute makes no reference to the application of improper law this author is forced to enter his personal assessment of the matter by reason of analogy and the dictates of justice and reason.

The other important dimension of this chapter is our extensive discussion of the concept of *ijtihad* in the context of arbitration. In particular, we consider the possibility of an arbitral award made by a highly reputable Muslim scholar in which he is unable to discern the governing law of the contract and hence engages in an original construction of the available Islamic law. We assess whether such an interpretation may constitute *ijtihad* and if so whether this award may be set aside or refused recognition and enforcement in the courts of the UAE and Bahrain. In the knowledge of this author this is the first time that *ijtihad* is linked to arbitration and particularly as regards non-enforcement of foreign awards on the basis that the arbitrator failed to apply the law chosen by the parties.

4.2 Nullity in Bahrain and the UAE

The concept of award nullity is a broad term encompassing a number of issues, both substantive and procedural in nature. Award nullity generally refers to the validity of the award in the *lex arbitri*, which is distinct from the nullity of the award in the country of enforcement by reason of any of the grounds set out in the New York Convention. The former type of nullity is not regulated in the New York Convention because quite obviously it is not an integral aspect of the enforcement procedure which is the *raison d'être* of the

²²⁰ See generally, MJ Mustill, SC Boyd, *Commercial Arbitration* (Butterworths, 2nd edition, 1989), pp 68-72.

Convention. For all intents and purposes, however, courts and commentators assimilate the grounds for non-enforcement to the grounds for nullity, although there is no express transnational rule that prohibits countries from adding more grounds to this list.

It should be stated from the outset that the concept has never really been clarified in the jurisprudence of the UAE and Bahrain and although it is sparsely stipulated in the laws of the two nations it is not exactly clear what it refers to. The Bahraini International Arbitration Act does not even mention award nullity as a ground upon which to refuse foreign arbitral awards or even as a consideration for setting aside.²²¹ On the other hand, Article 53(a)(2) of the UAE Federal Arbitration Law states that an arbitral award may be set aside:

- If the award settled matters not subject to, or falling beyond the scope of the arbitration agreement. However, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be annulled;
- If the award is null or the arbitral proceedings' nullity affected the award.

The UAE thus seems to distinguish between separable null awards and awards considered null as a result of a particular defect in the award itself or a defect in the proceedings, thus recognising both substantive and procedural nullity. The fact that these distinctions are not made in the Bahraini Act should not lead one to believe that they are not present in the law of this nation. Rather, because its respective law was drafted as far back as 1994 they either skipped the attention of the drafters or in any event the drafters believed these to be an inherent part of award nullity. By way of illustration, Article 31 of the Bahraini law discusses the form and content of arbitration awards, clearly suggesting that if for whatever reason one of the stipulated grounds is missing then the award shall be considered null and void and as a result the award will fail to be recognised and enforced therein.

It should be immediately recognised that award nullity is not removed from the realm of contract law for the obvious reason that the award itself is premised on the contractual desire of the parties to have an arbitrator decide their dispute in a binding manner. The award therefore is the product of contract and is naturally subject to the rules of contract law, both permissive and obligatory. This is also the case within the context of Islamic law generally and Islamic contract law specifically. Of course, one has to be careful in making assumptions

²²¹ See particularly Article 36 of the Bahraini International Arbitration Act.

about, and imputing, interpretations to classical Islamic contract law notions as they were not meant to deal directly with the situations at hand. This is particularly the case because the doctrine of separability was unknown prior to the advent of contemporary arbitration and this is true of classical Islam. Hence, in classical Islamic contract law the fact that a contract was null because of procedural or other defects would have automatically rendered the appointment of arbitrators or their award null. Quite obviously this is not the situation today because the doctrine of separability has resolved these matters in favour of arbitration.²²² So, the fact that the main contract may be void under Islamic law by reason of public policy (such as *gharar*) does not necessarily mean that a submission to arbitration via an arbitration clause is equally null and void.²²³ It is thereafter up to the arbitrators to ensure that the award rendered, particularly if the parties wish to enforce in the UAE or Bahrain, is compatible with any provisions that would render it unenforceable, particularly in terms of nullity requirements. In practice, the doctrine of separability is so well entrenched in both the legal systems of the UAE and Bahrain that litigants find hosting arbitral tribunals on their territory will not prejudice or in any way harm their ultimate award because the *lex arbitri* of the two nations will generally be resilient to petty claims of nullity.²²⁴

If as already mentioned nullity refers to the quality of the contract, as a starting basis in assessing the quality of the award, it follows that an otherwise valid award from a procedural perspective may be rendered null by reason of the fact that the contract which triggered arbitral jurisdiction is in some measure defective, such as to render it null or void. This type of nullity is well recognised in international arbitration law and practice and is duly given credence in the respective laws of Bahrain and the UAE. Given that we have already examined the formal validity of the contract wherein the arbitration clause exists, we shall not endeavour a replication of this extensive discussion. Instead, we shall confine ourselves to a

²²² For a discussion of separability in the recent judicial and legislative practice of the UAE and Bahrain see chapter 2.4.3.3.

²²³ The issue of public policy and its effect on arbitral awards and their enforcement has been extensively discussed in chapter 5.

²²⁴ See S R Luttrell, *The Changing Lex Arbitri of the UAE*, (2009) 23 *Arab LQ* 1. There are of course situations where this is not in fact the case. By way of illustration, it has been sustained in the past in the UAE by the Dubai Court of Cassation, Case No 201/2001, judgment (24 November 2001) that arbitration clauses printed in standard contracts in the form of small print or in the back of invoices were null and certainly not enforceable. In a 1994 judgment the Dubai Court of Cassation, judgment (25 June 1994) ruled that an arbitration agreement was null one the persons whose signatures appeared on the submission agreement did not possess power of attorney such that covers the submission agreement. Although litigants should be weary of such formalities in the drafting of their contracts and submissions agreements, it may be queried whether in present times the courts of the UAE and Bahrain would rely on such formalities to invalidate an arbitral award, although the *Bechtel* case provides an alarming reminder.

brief overview of those instances where a defective contract has an impact on the validity of an arbitral award. Examples include a prohibited contract, such as those dealing with illicit activities under the laws of one or more nation, as would be the case with illicit arms sales or narcotics and equally the purchase of an insurance package whose terms could be described as highly speculative in a country where such practice is forbidden. Questions of arbitrability are also encompassed within the concept of null contracts, as would be the case with a contract settling a particular dispute through arbitration, despite the fact that the subject matter of said dispute was not in fact susceptible to resolution by arbitral means.

No doubt, questions of arbitrability concern a particular aspect of the contract, namely the arbitration clause, for which we have already made an extensive discussion.²²⁵ It is here where central issues of contract nullity affect the award, even though these may have been known to the parties in advance and to their respective legal teams. As has already been explained, the courts of Bahrain and the UAE are rather sensitive when it comes to such procedural defects in the arbitration clause and are keen to remedy them by considering the award null. An illustrative example typically includes the incapacity of one of the parties to partake in the drafting and signing of the arbitration clause on account of his personal law, or on account of statutory restrictions in law where the award was made.²²⁶ Of course, when the arbitration clause is fundamentally faulty which renders it null it is difficult, if not impossible, to make space for the application of separability, as would otherwise be the case in respect of a null or void contract.²²⁷

In the majority of cases the defect will concern the award itself, in conjunction with the main contract or the arbitration clause. In all these cases the award must be viewed as part of a much larger process which starts from the moment the arbitration clause is triggered by one of the parties until such time as the award is rendered and certified. Under this light the parties must be careful in adhering to particular procedural formalities. The laws of the UAE and Bahrain pay particular attention to these formalities and as has already been explained their higher courts are rather alert and sensitive to particular violations. By way of illustration, the lack of proper or adequate notification of the proceedings by one party to

²²⁵ See chapters 2.4.3.1 and 2.4.3.2.

²²⁶ See chapter 2.4.1 on the question of capacity.

²²⁷ The Dubai Cassation Court has long upheld the doctrine of separability, except where the annulment of the main contract relates to the arbitration clause itself. See case No 164/2008, judgment (12 October 2008).

another will lead in the nullity of the award.²²⁸ Equally, if the award deals with a dispute or parts of a dispute that were not contemplated by, or not falling within the terms of the submission to arbitration, or contain decisions on matters beyond the scope of the submission to arbitration, will ultimately render the award void, unless of course separability kicks in.²²⁹ Moreover, if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place, the award will be rendered null in both the UAE and Bahrain.²³⁰

In some cases it is unclear whether the mandatory provisions found in arbitral legislation necessarily lead to the annulment of the award where they are violated. A point at hand is Article 42 of the UAE Federal Arbitration Law, which recounts the formalities of the award once rendered. In the opinion of this author, if the parties intend to enforce a foreign award in the UAE it is imperative that they make known to the arbitrators this provision and ensure that they comply with its prescriptions, lest they risk possible annulment proceedings by the losing party. As a result, it is submitted that the requirements stipulated in Article 42 are mandatory and any failure to comply entails the nullity of the award, unless of course the court of enforcement determines by reason of an expansive construction that the defect is not of such nature as to render the award null, or that the defect may be rectified.²³¹ The conditions are as follows:

- a) The award shall be made in writing and in arbitral proceedings with more than one arbitrator, the award should be rendered by the majority of all members. If the opinions of the arbitrators were different so as the majority is not met, the president of the arbitral tribunal shall record the award and dissenting opinions.
- b) The award shall be signed by the arbitrators and any omitted signature by one or more arbitrators shall be stated. The award is deemed to be valid if signed by the majority of the arbitrators.

²²⁸ See chapters 2.4.2.1 and 2.4.2.2 for an extensive analysis of the proper standard of notification in the jurisprudence of the UAE and Bahrain and in Islamic law more generally.

²²⁹ For a detailed account of jurisdictional excess by the arbitral tribunal, see chapter 2.4.3.

²³⁰ See Article 36(1)(d) of the Bahraini International Arbitration Act and chapter 2.4.4, which discusses inappropriate arbitral composition in the laws of the two nations.

²³¹ This is probably the case with paragraph (d) of Article 42, as will be demonstrated immediately.

- c) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or if the rule of law applicable on the arbitral proceedings does not require that reasons be stated.
- d) The award shall state the names of the parties in dispute, their addresses, the name of the arbitrators and their nationality, the place and date of issuance of the arbitral award, a copy of the arbitration agreement, a summary of the parties' claims, statements and documents, the finding of the award and its reasons when required.

It is evident that these are formal, mandatory, requirements, which can however be remedied by permission of the court of enforcement, as would be the case for example, by submitting the parties' claims where this document was originally omitted by mistake. It should be noted that UAE courts have set out a number of reasons as to the practical significance of these requirements and why they are warranted in the law. By way of illustration, the Dubai Court of Cassation has explained that it is important for the enforcement court to be aware of the award's supporting reasons²³², its findings, as well as the date and place of issuance because it provides it with the necessary information to discern the formal validity of the award and hence dispel any claims to the contrary.²³³ Equally, the requirement that the arbitrators place their signature on the award is not a mere formality, but it serves as proof not only that the award was actually rendered, but that it was made by those who signed it. Hence, in case of doubt as to the existence of the award, particularly where it is not of an institutional nature, the court of enforcement may have recourse to the arbitrators in order to ensure that it was actually made by them.²³⁴

Other procedural defects cannot however subsequently be rectified by corrective action, not even by an expansive judicial construction because the law does not allow for any such remedial action. This would certainly be the case with the requirement in Article 44(1) of the UAE Federal Law which requires that the arbitral tribunal issue the final award settling

²³² The award need not state the actual reasons upon which its determination was based only if this was explicitly stipulated by the parties and hence the arbitral tribunal complied with their request. The same is also true where the *lex arbitri* did not require any reasoning to be supplied by the tribunal. This has been accepted in the jurisprudence of the Dubai Court of Cassation, particularly case No 39/2005, judgment (16 April 2005). Another exception concerns interim awards. The Bahraini Court of Cassation has ruled that interim awards are not susceptible to challenges by the parties and not only do they not need to be reasoned but the arbitrators may at any time revoke said interim awards. See case No 65/92, judgment (6 December 1992).

²³³ As a result, the Court of Cassation has held that it is imperative that the arbitrators place their signatures clearly in the reasoning of the award as well as on the dispositive, lest the award is considered void. Case No 233/2007, judgment (13 January 2008).

²³⁴ Dubai Court of Cassation, case No 218/2006, judgment (17 October 2006).

the dispute within the period of time agreed upon by the parties. It stipulates that failing such agreement, the award shall be issued within six months from the date of the first hearing. In all cases, the arbitral tribunal may extend this period of time, provided said extension does not exceed six months, unless the parties agree on a longer time period. Failure to adhere to the time limits give rise to an entitlement to ask the court for an extension,²³⁵ but there is the danger that the award may ultimately be rendered null and void by the court of enforcement. No doubt, such rules are rather more flexible in advanced arbitral jurisdictions such as London, New York and Hong Kong because most of these formalities are susceptible to remedial action without prejudice to any of the parties and hence the courts therein do not see these defects as posing serious impediments, such that would necessitate the annulment of the award as a whole.

This is certainly the correct attitude because any claims made on the grounds listed in Article 42 of the UAE Federal Law by which the losing party seeks the annulment of the award are mere delay tactics and a means of frustrating an otherwise impeccable award. The courts in the UAE and Bahrain should be very hesitant to annul an award on such formal grounds and should always apply of test of remedial action as follows: if the defect can be remedied without prejudice to any of the parties in such a way that satisfies their original intention to settle their dispute by resource to arbitration, then the court should allow the winning party to remedy the particular defect.²³⁶ There is certainly some significant evidence that such practice is followed by the higher courts of Bahrain. In a case concerning a challenge against a domestic arbitral award, the losing party challenged the award on the basis that one of the arbitrators had failed to sign it. This was a formal requirement in Article 239 of the Bahraini Code of Civil Procedure and if the court followed the letter of the law it would have to rule that said defect was sufficient in and of itself to render the award null and void. Nonetheless, the Bahraini Court of Cassation took the much applauded position that because the award was quite clearly rendered by the majority of the arbitrators and was moreover signed by other arbitrators and the chairman it could not possibly be claimed that it

²³⁵ Article 44(2) of the UAE Federal Arbitration Act.

²³⁶ In a recent judgment, the Fujairah Federal Court of First Instance held that an award duly certified and issued in the UK could be enforced in the UAE without further requirements because both States were parties to the New York Convention. See case No 35/2010, judgment (27 April 2010).

was null simply because one of the arbitrators had failed to sign it. This was, after all, something which could be remedied.²³⁷

4.3.1 Failure to Apply the Law Stipulated in the Arbitration Clause

Failure by the arbitral tribunal to apply the law stipulated by the parties in the arbitration clause or the submission document serves to nullify the award, quite simply because it has acted *ultra vires* and has not respected party autonomy. The parties are not restricted to the law which they can request the arbitrators to apply. This may be the law of one or several nations, general international law, customary international law, *lex mercatoria*, recourse to justice and fairness and others.²³⁸ The tribunal is required to uphold the wishes of the parties and apply only that substantive law that they have designated. This is not only a cardinal rule of international commercial arbitration, but also a fundamental premise of the law of contract and party autonomy thereto.

The UAE Federal Arbitration Act specifies in Article 53(4) that a foreign arbitral award may be refused recognition where “it failed to apply the law agreed upon by the parties to govern the subject matter of the dispute”. This clearly echoes international development and provides some legal certainty to litigants, even to the winning party who will be weary of an award that is defective in this manner because of the potential challenges posited by the losing party. It is therefore in the interests of both parties to ensure that the arbitrators apply the substantive law stipulated in the arbitration clause and submission agreement. The Bahraini International Arbitration Law is less clear in its articulation of a similar rule. In fact, failure to apply the parties’ chosen substantive law is not an explicit ground for the refusal of recognition. The closest one can come to such a conclusion is through the operation of Article 36(1)(c) which as already mentioned states that an award will not be enforced if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration. Although this provision does not specifically stipulate that failure to apply the parties’ chosen law leads to the award’s automatic annulment in Bahrain, a purposive construction supports

²³⁷ Bahraini Court of Cassation, case No 59/2005, judgment (24 October 2005). Unfortunately, this judgment has not been given much prominence, which would in turn have demonstrated that the courts in the UAE and Bahrain are willing to forego minor defects in benefit of the parties’ wishes and in pursuit of arbitration-friendly policies. Perhaps, the lack of exposure of this case may be explained by the fact that it concerned a domestic arbitral award. Even so, we have stated from the outset in this thesis that unless expressly provided the principles enunciated in domestic arbitration are no different to international arbitral awards.

²³⁸ See Article 42 ICSID Convention; Article 33(1) of the UNCITRAL Arbitration Rules, among others.

the conclusion that the determination of a dispute without taking into consideration the law chosen by the parties is contrary to the arbitration clause and the submission agreement.

No doubt, there are exceptions to the general rule, which in the opinion of this author the courts in Bahrain and the UAE will not object to, despite the fact that there does not exist any supporting case law at the present time. We are referring of course to situations where an arbitration clause is defective in and of itself or otherwise inoperable, or not wholly clear as to the law to be applied. For example, an arbitration clause may dictate that the governing law of the contract is *lex mercatoria* in the field of Islamic insurance. Yet, when the arbitral tribunal requests the parties to furnish evidence of such practice the parties' legal teams are unable to discover any *lex mercatoria* in this field. It would be unwise of the tribunal to declare that there is no law applicable to the dispute at hand as it is in a position to satisfy the wishes of the parties to resolve their dispute through arbitration with reference to *takaful* and related concepts. As a result, the tribunal may decide that justice is better served by reference to the *takaful* laws and regulations of their respective nations, even though these laws were never listed by the parties to the dispute. This "alternative" law is no doubt a matter of interpretation by the tribunal, but it would defy reason for it to be sustained in cases where both parties are opposed to the discovery of new law by the tribunal. The general practice of courts and arbitral tribunals is to apply several tests or criteria in circumstances where the parties have not designated a governing law or where this is not clear at all. By way of illustration, English courts have accepted that if there is an English arbitration clause this is sufficient weight in favour of the governing law being that of England.²³⁹

This is of course much different to the nationalisation arbitration cases of the 1950s – 1970s where the arbitrators held that even though the governing law of the contracts between the Arab nations and their foreign investors stipulated the application of international law to the extent of its compatibility with Islamic law, the proper law to be applied was in fact international law and not Islamic law.²⁴⁰ If these awards were submitted for enforcement before the courts of Bahrain and the UAE today it is beyond doubt that they would be rejected on the ground that the arbitrators refused to respect the governing law of the contract as this was set out in the appropriate clause. These days are now far and gone. Nonetheless,

²³⁹ *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1970] 2 Lloyd's Reports 99.

²⁴⁰ See, for example, *Petroleum Development (Trucial Coasts) Ltd v. Sheikh of Abu Dhabi* (1951) 18 ILR 144, per Lord Asquith at 149; *Ruler of Qatar v. Int'l Marine Oil Co. Ltd* (1953) 20 ILR 534, per Bucknill J at 545; *LIAMCO v. Libyan Arab Republic* (1981) 62 ILR 140; *Kingdom of Saudi Arabia v. ARAMCO* (1963) 27 ILR 117. See also C Greenwood, *State Contracts in International Law: The Libyan Oil Arbitrations*, (1983) 53 *British Yearbook of International Law* 157.

the *Beximco* judgment is a stark reminder as to how Islamic law is viewed by the courts in the western world, which brings into doubt whether it is truly advisable for parties to a contract to stipulate any part of Islamic law as the governing law of their contract.²⁴¹ It will be recalled that the English Court of Appeal in the *Beximco* case held that under the 1980 Rome Convention on the Law Applicable to Contractual Obligations only national legal systems can be designated as laws governing a contract, a requirement which the *Sharia* does not satisfy. The parties in that case had designated the *Sharia* as the governing law of their mutual contract. Although there is a lack of empirical evidence as to whether in contemporary practice Muslim parties to large commercial contracts stipulate Islamic law as the governing law of their contract despite being aware of the *Beximco* judgment, which is not merely an isolated decision. Anecdotal evidence that is available to this author suggests that this is not in fact the case. Rather, although Islamic law plays a significant part in contract negotiations, contract development and construction among Muslims and non-Muslims, the governing law of the contract is usually a combination of a Muslim legal system and other foreign laws. This is consistent with typical *lex mercatoria* in most fields of business and commerce and no doubt the legal profession will have advised clients to keep some separation between their religious convictions and contract formation.

4.3.2 *Ijtihad* as New Law?

Ijtihad is relatively unknown to the western legal audience. In brief, it is a recognised source of interpretation of Islamic law, but it does not resemble the other secondary sources which rely on analogy (*qiyas*) and communal consensus (*ijma*). The common characteristic of *qiyas* and *ijma* is their adoption and corroboration by the community of Muslim scholars, whether at local or ecumenical level. Hence, they are community – albeit the most educated parts thereof – sources of law. *Ijtihad*, on the other hand, is also a secondary source of Islamic law, but lacks the fundamental ingredient inherent in *qiyas* and *ijma*; that of broad community consensus. In fact, *ijtihad* represents legal reasoning adopted by a single scholar in order to give answers to recurring problems for which no other source can deliver a direct solution. The problem, however, with *ijtihad* is that it can lead to legal anarchy because each scholar – there is of course the primary question as to who qualifies as an *ijtihad* scholar – may have a different interpretation to a particular problem, thus leading to a process of fragmentation.

²⁴¹ *Beximco Pharmaceuticals v Shamil Bank of Bahrain EC*, [2004] 1 W L R 1784.

The elaboration of the virtues and pitfalls of *ijtihad* is beyond the focus of this thesis,²⁴² but it suffices to say that the very process of *ijtihad* is reminiscent of arbitration, in the sense that a particular dispute arises and the scholar is asked to offer his legal/theological opinion on the matter. In fact, although he is given an implicit and immutable framework to work with (i.e. the Quran and the *sunnah*), if the *ijtihadist* is to provide a contemporary and durable solution to the problem at hand, he is necessarily obliged to circumvent the primary sources, not in the sense of violating them, but by advocating new avenues and ideas that are either absent or by modernising otherwise antiquated notions. A modern-day *ijtihadist* could very well be a Muslim arbitrator who is called by the parties to provide a solution to their dispute (assuming they are both Muslim and have designated Islamic law and/or Muslim legal systems as the contract's governing law). Were this arbitrator to claim that existing interpretations of Islamic law on the particular subject matter are antiquated and have no relevance to the exigencies of the modern Muslim, he would be forced to offer an *ijtihad* if his intention were to offer a just and durable solution to the dispute posed. If his award was innovative and circumvented the typical notions iterated by classic scholarship, then the award may lay claim to an *ijtihad*, which the court of enforcement in the UAE and Bahrain would have to assess whether it constitutes a breach of the substantive law stipulated by the parties in their arbitration clause or submission agreement.

The personal opinion of this author is that since *ijtihad* is a valid convention under Islamic law – no doubt subject to a significant amount of limitations – it does not in any way resemble the arbitrary rejection of the parties' chosen substantive law by some arbitrators. As a result, *ijtihad* is an acceptable form of arbitral intervention among Muslims, designed not only to avoid non-resolution of a dispute but also to provide the most appropriate solution pertinent to the needs of contemporary Muslims. Viewed in this light, *ijtihadi* awards do not violate party autonomy. This is very much a theoretical issue at this point because it has not been contemplated by any court in the Muslim world, let alone the much progressive courts of Bahrain and the UAE. Nonetheless, it should be emphasised that not everyone can lay claim to the production of *ijtihad* and not every innovative decision constitutes *ijtihad*. Rather, two conditions must be satisfied: a) the arbitration in question must be a Muslim scholar of high repute in matters of the Quran and the *sunnah*, and; b) the award rendered must not be in violation of the Quran and the *sunnah*. In this manner the opinion expressed by

²⁴² For a short introduction and an analysis as to whether *ijtihad* is still a valid tool for Muslim scholars, see W B Hallaq, Was the Gate of *Ijtihad* Closed? (1984) 16 *International Journal of Middle East Studies* 3.

the *ijtihad* will become acceptable to the community as a whole and will in time, if not straight away, assume normative status. This is also a species of hybrid Islamic precedent that could be used by the courts of Muslim nations, or at least Gulf nations with similar socio-legal backgrounds.

CHAPTER 5

THE EFFECT OF PUBLIC POLICY ON THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BAHRAIN AND UAE

5.1 Introduction

Public policy or public order is an elusive concept, despite the fact that this author makes an attempt to define it from the point of view of Islamic law and from the perspective of the law of the UAE and Bahrain in the course of this chapter. It not only fluctuates from time to time but it is possible that what is reprehensible in one place to be revered in another. A recent judgment will help illustrate the point. In 2012 the District Court of Cologne held that the circumcision of a 4-year old Muslim boy constituted an unlawful offence of causing actual bodily harm and could not be justified by the consent of the boy's parents.²⁴³ For good reason the decision created an outrage among Jewish and Muslim communities in Germany who practice circumcision as a matter of religious duty. One would have expected that public policy in the Muslim world would have encompassed all those religious elements that are usually associated with Qur'anic prohibitions, such as usury and the charging of commercial

²⁴³ Landgericht Cologne, Docket No 151, Ns 169/11, Judgment of 7 May 2012.

interest, but this is not the case in general terms. No doubt, many of the prohibitions contained in the primary sources of Islam are considered public policy violations, but the laws of the UAE and Bahrain have gone a long way and are no longer opposed to commercial practices that are routinely encountered in the industrialised nations of the West. What is striking about the public policy considerations of the courts in the UAE, and particularly Dubai, is their adherence to procedural irregularities that would otherwise make no difference to the quality of the award in the West. This author attempts to understand the political and legal considerations behind such decisions and assess whether these are the norm or whether they are in fact aberrations to an otherwise well-oiled legal system.

There are various definitions of public policy but the core of the concept encompasses the core of local laws, fundamental notions of justice and morality.²⁴⁴ To be sure, there is general agreement that internationally condemned acts, particularly if they constitute criminal acts, would certainly violate public policy. Within this definition one may also include mandatory rules, although as will become evident not all mandatory rules give rise to public policy claims and most States are disinclined to seek public policy exceptions to each and every mandatory rule. Moreover, it is not clear that a difference exists between public policy and public order, at least as this is understood in Islamic jurisprudence generally and in the law of the UAE and Bahrain more specifically. Public order is referred to as *al-nizam al-amm*, which seems to be more limited as compared to the notion of public policy. Article 235(e) of the UAE Code of Civil Procedure refers specifically to “public order”, whereas other pieces of legislation employ public policy, without there being a clear distinction between the two. For the purposes of this thesis they are viewed as possessing the same meaning. Certain Muslim nations, and even some in the Gulf, employ rather extensive statutory legislation in order to specify what mandatory conduct falls within the rubric of public policy.²⁴⁵ Bahrain does not have any such legislation, whereas UAE statutes are far more elaborate, yet many issues are still largely indeterminate.

The aim of this chapter is to shed some light on the notion of an Islamic public policy and from there to construct a thread that ties together the jurisprudence of the UAE and Bahrain. Along this trail it is important to be critical about the approach of the courts of these nations in their use of public policy and their interpretation of the notion. It is hoped that

²⁴⁴ See D Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards* (2001) 16 *Ohio State Journal on Dispute Resolution* 297.

²⁴⁵ See MKA Al-Siyabi, *A Legal Analysis of the Development of Arbitration in Oman with Special Reference to the Enforcement of International Arbitral Awards*, PhD Thesis University of Hull (2008), pp 241ff.

some of the decisions discussed here will be re-examined by the relevant courts again with a view to making them more compatible with the spirit of the New York Convention without at the same time compromising local standards of morality or public order. Once again, although some Western judgments are cited throughout, it has been the aim of this author to present the relevant issues through the lens of judgments and laws adopted in the Gulf region, with particular emphasis on those of the UAE and Bahrain.

5.2 The Concept of Public Policy under the New York Convention and its Application to the Muslim World

The starting point for this discussion must only be Article V(2)(b) of the New York Convention, which provides that recognition and enforcement of an award may be refused where the competent authority in the country where recognition is sought finds that such recognition and enforcement “would be contrary to the public policy of that country”.²⁴⁶ This definition dispels certain fictitious misconceptions that are fundamental to the discussion of the subject matter of this thesis. The first concerns the classical question as to who’s public policy. There has been a definite attempt in the relevant literature to formulate an argument whereby the notion of public policy in Article V(2)(b) of the Convention refers to “transnational” or “international” public policy, as opposed to local public policy.²⁴⁷ This transnational public policy is certainly narrower than local public policy, albeit it is a lot more precise, as per its supporters. It has been defined by the International Law Association (ILA) as a notion that must be understood in its private international law context, namely:

... That part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. ... It is not to be understood in these Recommendations as referring to a public policy which is common to many States (which is better referred to as “transnational public policy”) or to public policy which is part

²⁴⁶ See also Article 34(2)(b) of the UNCITRAL Model Law, which states that an award may be set aside if its subject matter is not susceptible to resolution by arbitration under the laws of the *lex arbitri* or where it is against the public policy of that country.

²⁴⁷ CN Brower, JK Sharpe, *International Arbitration and the Islamic World: The Third Phase* (2003) 97 *Am J Int'l L* 643, at p 649; see also F Kutty, *The Sharia Factor in International Commercial Arbitration* (2006) 28 *Loy LA Int'l & Comp L Rev* 565. See also the judgment by the Court of Appeal of Milan of 4 December 1992, reported in (1997) XXII Yearbook ICA 725, to this effect.

of public international law. International public policy is generally considered to be narrower in scope than domestic public policy.²⁴⁸

Those who take the view that public policy in the context of the New York Convention is limited to the public policy of the country of enforcement refer principally to the wording of Article V(2)(b), which explicitly mentions “that country”.²⁴⁹ Moreover, the application of this argument by scholars to the particular situation of Muslim nations serves to highlight that it is “their” public policy that is crucial and not the public policy that is prevalent in the conflict of laws that is culturally and socially odourless.²⁵⁰ Of course, this does not mean that Muslim nations cannot change their particular notion of public policy in both time and space and render it in conformity with prevailing international standards. This observation is all the more pertinent given the fact that the New York Convention is tending towards some degree of uniformity and a tendency to place as few obstacles as possible in the enforcement of foreign arbitral awards, at least on the basis of the practice of national courts.²⁵¹ In previous chapters we have already seen the significant efforts of both the UAE and Bahrain in attracting foreign investors through the lure of arbitration and enforcement-friendly jurisdictions. However, it is not at all clear whether public policy is in fact susceptible to broad international harmonisation, despite the advent of globalisation, given the fragmentation of societies along social, cultural, religious, ethnic and other characteristics.²⁵²

The 1983 Riyadh Convention on Judicial Cooperation between States of the Arab League reinforces the argument that Muslim public policy is distinguished by said nations from the public policy of non-Muslim States. Article 37(e) of the Convention stipulates that arbitral awards are not to be recognised and enforced among signatory nations where any part of the award contradicts “the provisions of the Islamic Sharia, the public order or the rules of

²⁴⁸ ILA, New Delhi Conference, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002), para 11.

²⁴⁹ One of the classic cases on the matter took the same view. In *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F 2d 969 (2nd Cir., 1974), it was famously held that enforcement of a foreign award should be denied “only where enforcement would violate the forum State’s most basic notions of morality and justice”.

²⁵⁰ See JD Fry, *Désordre Public International under the New York Convention: Whither Truly International Public Policy*, (2009) 8 *Chinese J Int’l L* 81; M Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East*, (2008) 21 *N Y Int’l L Rev* 1.

²⁵¹ This narrow view of public policy, for example, is exemplified in US judgments, particularly, *in re Arbitration between UBS Warburg LLC v Auerbach, Pollack and Richardson*, 744 N.Y.S.2d 364 (App. Div. 1st Dept. 2002), and *Cavalier Manufacturing Inc v Jackson*, 823 So.2d 1237 (Ala., 2001).

²⁵² The Dubai Court of Cassation in case No 146/2008, judgment (9 November 2008), held that domestic, as opposed to international, public policy is a fundamental criterion at the enforcement stage in respect of foreign arbitral awards and judgments. However, the Court went on to emphasize that public policy is not one of the grounds for setting aside an award, in conformity with Article 216 of the UAE Civil Procedure Code.

conduct of the requested party". It is thus clear that even among Muslim nations the various rules of public policy are respected.

Without specifically mentioning any of them, it is evident that national courts invoking public policy as a ground for refusing recognition of foreign awards, even of liberal industrialised nations, do not make a meal of transnational public policy and at best adopt enforcement-friendly judgments or rely on conduct that is internationally and unequivocally reprehensible, particularly criminal conduct.²⁵³ What this necessarily means is that one should approach the issue of public policy in the New York Convention from a local perspective. Whether a nation wishes to move beyond the national to a transnational or harmonious co-existence is a matter of choice alone. The fact that the particular provision in the New York Convention must be interpreted in good faith and according to the ordinary meaning of the words therein does not negate this argument.²⁵⁴ Rather, it is contended that only when a State party, through its courts, abuses or distorts the meaning of local public policy against the legitimate expectations of a national of another State party that a violation of the Convention exists.

5.3 An Islamic Public Policy?

Having established the local nature of public policy, it is crucial to examine if an Islamic public policy in fact exists. Some recent scholarship takes a rather superficial view of the

²⁵³ In fact, the aforementioned Milan Court of Appeal may be one of the few exceptions. The other concerns the Swiss Federal Tribunal's judgment in *W v F and V* (30 December 1994), (1995) *Bull ASA* 217, which specifically intimated in favour of a "universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognised in all civilised countries". For an opposing view, see *Fougerolle v Procofrance*, judgment by the Paris Court of Appeal (25 May 1990), (1990) *Rev Arb* 892. The Paris Court of Appeal was quite adamant in *European Gas Turbines SA v Westman International Ltd* in its judgment of 30 September 1993), (1994 *Rev Arb* 359, that bribery was not only contrary to French public policy but moreover contravened the ethics of international commerce. It should be noted that at the time it was not a criminal offence for a French company to bribe a foreign official abroad in order to acquire favourable treatment!

²⁵⁴ The Hong Kong Court of Final Appeal stated in *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, that "when a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realisation that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it". Given my aforementioned observation, I disagree that the public policy provision in the New York Convention can be read in such a broad manner.

matter and so will not be mentioned in any detail,²⁵⁵ despite the lack of solid or ample international literature on public policy in the Muslim world. Earlier works by Muslim scholars, although much more focused because of the authors' capacity to read the primary sources, are equally of little relevance today because many of the cultural and religious barriers identified ten and twenty years ago are no longer considered part of public policy, at least in practice.²⁵⁶ El-Ahdab has stated that in Islam "the concept of public policy is based on the respect of the general spirit of the Sharia and its sources and on the principle that individuals must respect their clauses, unless they forbid what is authorised and authorise what is forbidden".²⁵⁷ Saleh has argued that Islamic public policy may be inferred from the surah al-nahl.²⁵⁸

Hence, from a methodological point of view, we are left with limited options in order to come to a meaningful conclusion as to the existence or not – never mind the relevance – of an Islamic public policy.²⁵⁹ The first is to discern it from an analysis of the laws of Muslim nations belonging to the same school. The second requires an assessment of all that which may be deemed prohibited under the primary sources of Islam, namely the Qur'an and the *sunnah*, followed by a close reading of these sources by scholarly interpretative works. The third is to consider that public policy in the Muslim world is equal to, and certainly tantamount, to the notion of arbitrability; hence, that which is arbitrable would also be consistent with public policy.²⁶⁰

All of these approaches contain both concrete advantages and unequivocal pitfalls. An examination of formal laws would require a significant amount of labour on a narrow issue that is beyond the purview of this thesis. Although it would no doubt illuminate our understanding of Muslim public policy, such a research would be limited by the fact that few

²⁵⁵ See particularly, E Levi-Tawil, *East Meets West: Introducing Sharia into the Rules Governing International Arbitrations at the BCDR-AAA*, (2011) 12 *Cardozo J Conflict Resolution* 609, who relies on existing literature and does not delve into the sources of Islamic public policy.

²⁵⁶ See AH El-Ahdab, *Saudi Arabia Accedes to the New York Convention* (1994) 11 *Journal of International Arbitration* 87, p 91, who noted that foreign awards dealing with profit and those decided by non-Muslim arbitrators are un-enforceable. Neither of these observations is true in the present day.

²⁵⁷ AH El-Ahdab, *General Introduction on Arbitration in Arab Countries*, in *International Handbook on Commercial Arbitration* (Kluwer, 1998), Annex I, p 12; see equally AH El-Ahdab, *Enforcement of Arbitral Awards in Arab Countries* (1995) 11 *Arbitration International* 169.

²⁵⁸ S Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Shariah and Statute Law* (Graham and Trottman, 1984), p 473.

²⁵⁹ Among the rare gems one should include the aforementioned works of Wakim, *supra* note 8 and Kutty, *supra* note 5.

²⁶⁰ This certainly seems to be the conclusion of the Dubai Court of Cassation in Case No 180/2011, judgment (12 February 2012), analysed below.

nations, let alone Muslim nations, describe the contours of negative civil conduct; i.e. whether particular conduct is or is not contrary to public policy. As a result, at the end of such an assessment we would only have a partial picture of public policy. Looking at the primary sources of Islam would equally require significant labour but would also produce significant results. The downside is that, despite the obvious examples, it is not obvious that Qur'anic injunctions are wholly consistent with the practice of Muslim nations on the ground and once again the keen researcher would have to distinguish among a plethora of case studies in relation to the degree of strict adherence to the Qur'an and the *sunnah*. Interpretative works would further complicate things because in their majority relevant commentators have little familiarity with business trends and practices and tend to focus on the religious nature of the texts. A consideration of arbitrability as a foundation for public policy is an excellent methodological approach and this author cannot perceive of examples where a subject matter that is not arbitrable may nonetheless escape the public policy hurdle. However, arbitrability statutes and practices are limited in the same manner as statutes related to public policy, in that they are sparse.

Despite the aforementioned limitations, all three of these methodological approaches encompass elements that are useful in our quest for public policy constraints. The remainder of this chapter will make use of all three in varying degrees with a view to clarifying the picture in respect of the public policy of Bahrain and the UAE.

5.3.1 Unlawful Contracts in Islamic Law as a Public Policy Barrier

In chapter 3, which related to arbitrability, it was emphasised that fraudulent agreements, the imposition of usury or interest,²⁶¹ speculative contracts and generally all business transactions the aim of which are to cause unlawful injury to one of the parties or a third person, or which concern other prohibited conduct such as alcohol²⁶² or gaming-related²⁶³ are in conflict with

²⁶¹ Qur'an 2:275, stating that "those who devour usury will not stand except as stands one whom the Evil one with his touch hath driven to madness".

²⁶² Qur'an 4:43, 5:90.

²⁶³ Non-Muslim courts have expressed their opinion on Islamic public policy, even if not in very precise terms. In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, the parties had gone to arbitration over a contract that envisaged illicit payments to a Qatari official in exchange for business favours. An award was rendered in that case but its enforcement in England was refused on several grounds, among which was that it violated the public policy of Qatar. A different conclusion was reached in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others* [1999] 3 WLR 811, whose facts were not very different from *Lemenda*. In this case, however, the court effectively held that fraud and bribery in a contract to

the express dictates of the Qur'an. The same is true of contracts that introduce a significant degree of uncertainty or speculation (*gharar fahish*) in the relations between parties. This means that the typical Sharia-based contracts, such as profit-sharing (*mudharabah*), leasing (*ijarah*) and safekeeping (*wadiyah*), as well as well joint venture (*musharakah*) are permissible and consistent with Islamic public policy.

No doubt, whether a contract meets the *gharar* criteria is subject to determinations that differ from country to country. In Saudi Arabia, futures trading agreements²⁶⁴ and Western-type insurance contracts would certainly fall under the public policy umbrella.²⁶⁵ In the UAE and Bahrain, however, this does not seem to be the case. This is reinforced by the fact that no explicit legislation bans such contractual arrangements and in any event said practices have been undertaken for a while now in both jurisdictions without the courts or the authorities having declared them unlawful. It stands to reason therefore that unless a particular contract, or its content, contravenes the statutory laws of Bahrain and the UAE, the fact that said contract allegedly violates the Qur'an or the *sunnah* will be of no legal relevance. This, of course, has not deterred foreign law firms from advising existing and prospective clients that the legal landscape in the two nations is rather foggy with respect to matters that would otherwise fall within the public policy exception, this being particularly highlighted in the case of interest.

5.3.2 The Complexity of Usury as Islamic Public Policy

It has already been explained that usury is prohibited under classical Islamic law. Yet, it is also notable that besides its explicit approval in the UAE and Bahrain,²⁶⁶ it is also tolerated in Saudi Arabia, at least in the sense that the authorities there are aware of the phenomenon and are willing to turn a blind eye. The answer to the question of enforcement of international arbitral awards bearing interest in countries that have some explicit or rather implicit ban on usury (which is the ban contained in Islamic law on "excessive" interest) depends on a number of factors.

be executed in Kuwait, did not offend that country's public policy and could therefore be considered arbitrable under the laws of England.

²⁶⁴ See generally, Freshfields, *Islamic Finance: Basic Principles and Structures* (2006), available at: <<http://www.freshfields.com/publications/pdfs/2006/13205.pdf>

²⁶⁵ K Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy to Refuse Enforcement of Non-Domestic Arbitration Awards?* (1995) 18 *Fordham Int'l LJ* 920, at p 954.

²⁶⁶ See Federal Supreme Court of Abu Dhabi, case No 245/2000, judgment (7 May 2000).

The first consideration is whether the ban encompasses all types of interest or such interest that exceeds a certain threshold. Moreover, one must also respond to the question whether the ban extends to interest accruing on a contractual or rather consensual debt or whether in fact it extends also to interest awarded by courts and tribunals to account for delays in paying the awarded sums. The second fundamental issue is whether the ban is explicitly formulated in a discernible source of law, namely a decree, canon, precedent or other. The third crucial factor concerns the actual practice within the commercial dealings in the country of enforcement. This may come down to a very simple query. Does this country have a regulated banking system which operates on interest-based transactions? Finally, and depending on the nature of the dispute as commercial or investment-related, is the ensuing award rendered under the law of investment arbitration (e.g. ICSID) or is it subject to enforcement under the terms of the New York Convention and thus open to non-recognition on the basis of public policy against usury (or interest as the case maybe)?

The first three questions relate to the “scope” of the Islamic law ban on usury, in order for it to function as a rule of law applicable in the country of enforcement. And to that extent, this author is unaware of any awards being denied enforcement in a country that supposedly lists Sharia as a source (or even the main source) of legal authority.²⁶⁷ Even in Iran, where payment of interest is explicitly prohibited by the Iranian Constitution, arbitral awards rendered against Iran under the Iran-US Claims Tribunal have been reported to bear interest.²⁶⁸ This author is moreover aware of two cases in Saudi Arabia where enforcement of international arbitral awards was refused because purportedly they violated Saudi public order, namely the Islamic law ban on interest.²⁶⁹

With regard to investment arbitration and whether Islamic public policy exceptions may in fact apply, there has been very little jurisprudence from ICSID on this matter.

²⁶⁷ Under Article 2-1.09(q) of the Sultani Decree 7/1974 on Omani Banking Law, the Central Bank of Oman enjoys the prerogative to set interest rates. This currently stands at 10% and hence the Omani Court of Appeal has held that parties and entities operating in Oman – and by extension those who wish to enforce arbitral awards in Oman – must respect the ceiling rates of interest. Anything above the statutory limit shall be declared void and unenforceable. See Case 43/1984 BSCD judgment (1984), Case 51/86 Omani Court of Appeal judgment (1986) and Case 7/87, Omani Court of Appeal judgment (1987). See Al-Siyabi, *supra* note 3.

²⁶⁸ See J A Westberg, *International Transactions and Claims Involving Government Parties: Case Law of the Iran-USA Claims Tribunal* (International Law Institute, 1991), p 253. Of course, it may be posited that in the case of Iran it was forced to accept the imposition of interest because it entered into the relevant treaty (or otherwise this would have been imposed by the UN Security Council) and in any event this did not constitute *gharar* because it was not in respect of a future event the aim of which was to make profit, but instead related to a past event with detailed losses.

²⁶⁹ For further details of these cases, see <http://www.alsindilaw.com/wp-content/themes/AlSindi/pdf/enforcement.pdf> p 174.

However, one case does stand out with relevance to this discussion, namely the judgment in *Wena Hotels Limited v The Arab Republic of Egypt*.²⁷⁰ Although the annulment request did not raise the “Islamic law purported Ban on Usury” it did deal with the provisions of the Egyptian Civil Code setting a maximum on interest to be paid on any outstanding financial obligation (at 4% in civil matters and 5 % on commercial matters), as the applicable rule of law that should have been applied by the Tribunal when deciding the matter of damages and interest. The Tribunal, nevertheless, awarded 9% compound interest. The Tribunal applied a criterion compatible with international business practices as “an alternative that is most appropriate in this case” in an effort to satisfy the requirements of prompt, just and equitable compensation that does not diminish the “market value of the investment immediately before the expropriation” (as per Articles 2 and 5 of the 1976 Agreement on the Protection and Promotion of Investments Between Egypt and the UK). The Egyptian Government paid the award in full with compound interest upon rejection of its application for annulment.²⁷¹

It seems appropriate to conclude that the UAE and Bahrain permit interest-based activities in accordance with the statutory and judicial limitations already identified. Therefore, said activities cannot be deemed as contravening the public policy of the two nations because such an outcome would frustrate the parties’ legitimate expectations.

5.4 The Bechtel case as a Precedent

One of the aberrations of public policy invocation in the UAE is no doubt the outcome in the *Bechtel* case. There, the Dubai Court of Cassation refused to enforce a foreign arbitral award rendered in favour of the claimant on the ground that the arbitrator had failed to swear witnesses in the proceedings in the manner prescribed by UAE law for court hearings.²⁷² This procedural “defect”²⁷³ relates, among others, to UAE public policy but is not listed, even

²⁷⁰ *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Decision January 8, 2002. Available at <http://italaw.com/documents/Wena-annulment.pdf>

²⁷¹ The Cairo Court of Appeal has ruled that an arbitral tribunal was allowed to apply interest above the maximum rate set by statute because the parties had come to a mutual agreement and thus the award did not contravene Egyptian public policy. Case No 41/114, judgment (2 October 1997).

²⁷² *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, case No 503/2003, judgment (15 May 2004). This same result was later reaffirmed by the Court in case No 322/2004, judgment (11 April 2005).

²⁷³ In fact, following the issuance of the award, the losing party, the Dubai government, filed a claim with the Court of First Instance (CFI) arguing that the arbitrator’s warning to the witnesses that they were “bound to tell the truth” and could “face severe consequences” for failing to do so was contrary to Dubai law [specifically Article 211 of the Civil Procedure Code) which requires witnesses to swear “by the Almighty to tell the truth

indirectly, among the reasons for non-enforcement in the New York Convention. In any event, given that none of the parties during the arbitral proceedings protested against the particular manner of swearing witnesses and given also that the procedure in arbitral proceedings is not limited by reference to any domestic civil procedure law, but is rather delineated by the wishes of the parties – which usually reflects the procedure of the institutional arbitration of their choice – it is inconceivable that the Dubai Court of Cassation could have assumed that awards sought to be enforced in the UAE ought to comply with its civil procedure law. Such an outcome defeats the fundamental principle of party autonomy and reduces the credibility of that particular legal system.²⁷⁴ Some commentators have noted that UAE courts routinely require that foreign awards satisfy its rules and procedures and may as a result refuse to enforce awards that violate its local laws.²⁷⁵

Although this author has not undertaken an extensive review of all judgments at the lower courts and hence is not in a position to know with any degree of certainty whether other foreign arbitral awards have been stricken down on petty procedural grounds, the fact that no other similar judgments have come out of the senior courts of Dubai or of other Emirati courts since *Bechtel* indicates that *Bechtel* must be viewed as an aberration and not as the norm, particularly since the losing party was a government entity. This is especially so given the adoption of the new UAE Arbitration Law which supersedes *Bechtel* and moreover the government has ratified the New York Convention since the adoption of that judgment. Equally, it is inconceivable that following the creation of DIFC that the Dubai authorities would allow similar judgments to take place, especially since the judges sitting at the DIFC courts are internationally respected jurists who would not strike down awards on the basis of petty public policy considerations of this nature. Of course, one has to wait and see the legal climate more carefully in order to make sound judgments about the future but it is the contention of this author that although *Bechtel* was a shock case that tested the system, the Dubai Court of Cassation remains adamant that certain irregularities that contravene procedural aspects of UAE law are sufficient to refuse recognition on public policy

and nothing but the truth". Not surprisingly, both the CFI [Case No 288/2002] and the Court of Cassation agreed with this claim and vacated the award.

²⁷⁴ See AS Rau, *Fear of Freedom* (2006) 17 *Am Rev of Int'l Arb* 469.

²⁷⁵ See C Fadel, N Sader, *Arbitration in the United Arab Emirates: The CMS Guide to Arbitration* (3rd edition), available at: http://cmsarbitration.com/wiki/index.php?title=United_Arab_Emirates#ARBITRATION_IN_THE_UNITED_ARAB_EMIRATES.

grounds.²⁷⁶ The next section will provide an analysis of case 180/211, decided in 2012 by the Dubai Cass

5.5 Particular Manifestations of Public Policy in the Judicial Systems of the UAE and Bahrain

Whereas Bahraini legislation does not specifically articulate the meaning of public policy, Article 3 of the UAE Civil Code²⁷⁷ defines public policy in the following manner:

Rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Sharia.²⁷⁸

This is an unfortunate definition that is so broad and hence susceptible to arbitrary interpretations by the courts and government authorities. It is no doubt at odds with the UAE's ambition to be a global commercial centre. Moreover, Article 235(e) of the UAE Code of Civil Procedure (CCP)²⁷⁹ stipulates that a foreign judgment may not be executed so long as 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". Given the immutability of public order in the UAE legal system it is unlikely that a contrary conclusion may be read in the country's recent Arbitration Law which applies, as has already

²⁷⁶ It should be mentioned that Bechtel applied to US federal district courts while the case was pending with the Dubai Cassation Court. It was noted there that the nullification of the award on the basis of the oath alone "registers at the hypertechnical fringe of what Americans would call justice". *In re Arbitration between International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai [Bechtel I]* 300 F Supp, 2d 112, at 118 (DDC, 2004). Funnily enough, once the Cassation judgment was issued, the US federal courts in a rather calculated move proceeded to dismiss Bechtel's petition on the ground that the UAE was not at the time a signatory to the New York Convention and therefore was not entitled to relief under the Convention nor the US Federal Arbitration Act (FAA) because the parties had failed to agree that a judgment on the award could be entered in a US court, as is otherwise required by section 9 of the FAA. See *Bechtel II*, 360 F Supp, 2d 136, at 137 (DDC, 2005).

²⁷⁷ Federal Law No 5/1985.

²⁷⁸ Article 27 of the Civil Code stipulates that "the provisions of all the laws which would be against the Islamic Sharia, public policy or good morals of the State of the United Arab Emirates shall not be applied". This test supplements that which is found in Article 3 of the Civil Code.

²⁷⁹ Federal Law No 10/1992.

been considered, to international arbitration. This outcome is reinforced by the fact that the UAE views public order and public policy from a local lens.²⁸⁰

In a recent judgment rendered by the Dubai Court of Cassation one sees the same maladies that plagued it in the Bechtel case. In case 180/2011 the respondent had filed a claim before the Dubai Court of First Instance (CFI), requesting the recognition and enforcement of an arbitral award rendered by a sole arbitrator under the DIAC Rules. The matter seemed simple enough, encompassing a sale agreement of a unit entered into with the appellant, a local real estate developer. The respondent claim before the arbitrator was that the agreement was null and void because the purchase had not been registered with the Interim Real Estate Register of Dubai within the determined period, as is otherwise required under Article 3 of Law No 13/2008 regulating the Interim Real Estate Register. As a result, the arbitrator determined that the purchase agreement was invalid and ordered the real estate developer to return the sale amount and pay interest as well as the other party's arbitration costs. The CFI upheld the dictum of the arbitral awards and rejected the arguments of the real estate developer that the arbitrator had exceeded the limits of his jurisdiction and in doing so violated his right to defend himself. When the case ultimately reached the Dubai Court of Cassation, it decided to justify the developer principally on grounds of public policy and arbitrability. It referred to Article 203(4) of the CCP and argued that the matter at hand was not susceptible to conciliation and was therefore beyond the lawful ambit of arbitral disposition by the parties. It went on to emphasize that:

... The selling of units without compliance with the registration requirement as provided for in Article 3 of Law No. 13/2008 may not be the subject matter of arbitration simply because this sale without registration contravenes public policy. Therefore, where a dispute subject to Article 3 of Law No 13/2008 is brought before an arbitral tribunal, and that tribunal rendered an award settling that dispute, such award is null as only the Court shall decide on the same dispute, at its own discretion, as it is a matter which relates to public policy.²⁸¹

Although this is not an international arbitral award, the case is emblematic of the approach of the Dubai Court of Cassation. No doubt, the Emirate should have its laws implemented

²⁸⁰ One should also consider Article 203(4) of the CCP which stipulates the well-known arbitrability test in Islamic jurisprudence, according to which matters not susceptible to conciliation are equally not susceptible to arbitration. Again, this principle applies to international awards sought to be enforced in the UAE. Matters that are not subject to conciliation are referred to in Article 733 of the Civil Code.

²⁸¹ Dubai Court of Cassation, Case No 180/2011, judgment (12 February 2012).

without failure by all persons, especially where this relates to a sensitive financial field such as real estate. It is within the interests of the State to know and regulate in detail the purchase of real estate and the registration of sales is an integral aspect of the laws of all nations, industrialized and non-industrialized. However, the Court in the present case could have taken a much different route and could have avoided giving the impression that public policy may extinguish legitimate expectations and legal certainty.²⁸²

For one thing, if every violation of the substantive or procedural law of a nation amounted to a public policy concern that sufficed to render an arbitral award unenforceable, then arbitration would not exist. Therefore, one is in the dark as to the methodological criteria of the Court in respect of the public policy violation in the present case. The objective of the parties was to determine whether the agreement was valid, not to substitute the State in its land registration function. In fact, the award itself recognized that the purchase was invalid precisely because it had not been registered. The arbitrator had complied with the local legal requirements and the award was both lawful and legitimate. Of course, the effects of the *Bechtel* judgment were much more significant than the present case because the irregularity complained of was of little value, whereas in the present case the violation was indeed significant. The Dubai Cassation Court could have just as well proclaimed that the matter was not arbitrable and avoided any references to public policy, which was unfortunate because it created unnecessary confusion.

A ray of hope in the cloudy world of UAE public policy, and particularly that of the jurisprudence of the Dubai Court of Cassation, has been offered by the Court itself. It has ruled that not all procedural faults fall within the sphere of public policy. In the case at hand it held that the expiration of an arbitration agreement does not relate to public policy. Rather, the concerned party has the burden of invoking the nullity of the agreement before the arbitrators or the courts. If he, or she, fails to do so, that person cannot later invoke said expiration as a public policy ground in order to refuse enforcement of the ensuing award.²⁸³ This line of judgments reinforces my previously held view that the *Bechtel* decision was exceptional in that the winning party was unfortunate that its opponent was a government

²⁸² See K Mechantaf, H Al-Mullah, Public Policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards (6 July 2012), available at: <<http://kluwerarbitrationblog.com/blog/2012/07/06/public-policy-in-the-uae-as-a-ground-for-refusing-recognition-and-enforcement-of-awards/>>.

²⁸³ Dubai Court of Cassation, case No 322/2004, judgment (11 April 2005); Dubai Court of Cassation, case No 141/2006, judgment (10 October 2006).

entity. It does not of course mean that we can predict with any degree of certainty the mentality and direction of the Dubai Court of Cassation in similar circumstances.

Although as we have already indicated Bahraini law is silent as to what constitutes public policy, it is safe to assume that any fundamental violations of the Sharia as well as mandatory provisions of statutory law will be found to contravene public policy. The Bahraini Court of Cassation seems to have taken a more liberal attitude towards public policy without restraining itself with minor technicalities and thus frustrating without much reason party autonomy. By way of illustration, the Court has ruled that although the parties cannot waive mandatory rules that direct them to litigation by submitting their dispute to arbitration. However, in a case concerning a labor dispute where mandatory rules applied, the Court ruled that the parties may validly refer to arbitration pecuniary rights and interests generated by public policy matters, as was the case at hand.²⁸⁴ This is reminiscent of the breakthrough decisions of the US Supreme Court whereby it distinguished between the public character of anti-trust conduct from its contractual and pecuniary dimension in respect of which there was no reason why the parties could not validly refer to arbitration.²⁸⁵

An exception to this principle was introduced by the Bahraini Court of Cassation in a case where one of the parties to an arbitral award challenged the award on the basis that it was issued by the arbitrator after the 3-month mandatory period stipulated under Bahraini law. Although the Court did not specifically invoke public policy, it held that the parties do not have the capacity to waive this requirement through a mutual agreement and therefore an award that is rendered at an expired date is null and void.²⁸⁶ Although this judgment is consistent with the principle enunciated by the Court in case No 79/2005²⁸⁷ (i.e. that the parties are not free to waive the substantive dimension of mandatory rules) it seems rather harsh to nullify an award in respect of which neither party protested at the time of issuance. In order to mitigate the harshness of this line of thinking the Court has emphasized that rules of evidence, as opposed to substantive rules, do not relate to public policy.²⁸⁸ This judgment

²⁸⁴ Bahraini Court of Cassation, case No 79/2005, judgment (24 October 2005).

²⁸⁵ The leading Arab jurisprudence on the issue comes from Egypt. There, the Egyptian Court of Cassation – and it should be remembered that both the UAE and Bahrain have been significantly influenced by Egyptian law-making- has ruled that not all mandatory rules are relevant to public policy. See case No 1259/49, judgment (13 May 1983) and Egyptian Court of Cassation, case No 326/51, judgment (31 January 1986).

²⁸⁶ Bahraini Court of Cassation, case No 305/2004, judgment (9 May 2005).

²⁸⁷ It is also very much consistent with the Dubai Court of First Instance, case No 268/2010, judgment (12 January 2011), where it was held that two arbitral awards were void because they were issued more than six months after the first arbitration hearing.

²⁸⁸ Bahraini Court of Cassation, case No 165/2005, judgment (3 October 2005).

is certainly at odds with its *Bechtel* counterpart decided by the Dubai Court of Cassation, because it clearly suggests that the swearing of witnesses and oath-taking, both of which are procedural rules, are not related to public policy and therefore an arbitral award whereby these had not been complied with would survive and be enforced.

Chapter 6

CONCLUSION AND RECOMMENDATIONS

It was stated in the Introduction to this thesis that having reached the end of the research and after having examined in detail all matters pertinent to the enforcement of foreign arbitral awards in Bahrain and the UAE that the conclusion would not necessarily focus on summarising what has already been said, but on what needs to be done in order to render the two legal systems all that more effective. This is no easy task because according to the data available, a significant number of foreign arbitral awards are brought before the courts of Bahrain and the UAE for recognition and enforcement because the parties have assets therein. Despite some isolated incidents, most of which were remedied in one form or another by judgments offered in other courts, the perception of foreign lawyers is certainly not that the UAE and Bahrain are hostile to the enforcement of foreign awards. This is consistent with the conclusion reached by this author, i.e., that the two nations are generally arbitration-friendly, generating significant amounts of revenues for foreign law firms to continue expanding their presence there. Hence, if one were to offer any concrete recommendations in terms of improvement these would have to offer something new to an already successful system.

6.1 Impediments to Enforcement from the Practitioner's Perspective and Appropriate Solutions to the Problems Raised

One does not expect his or her clients, or clients involved in litigation more generally, to possess an understanding of the relevant procedures or to be aware of arbitration-friendly jurisdictions, such that would render any prospective award enforceable there. The clients' perspective is necessarily coloured by their legal teams' experience and is fleshed out by means of their conversations with their legal teams. Clients, whether commercial entities or investors, choose to enter into contractual relationships with a view to making profit, with legal considerations playing a part, but not a determinative one. Given that arbitration is a process typically associated with the legal profession it is prudent to determine under what light this profession views the enforcement practices of the UAE and Bahrain from the point of view of advising their clients that they should invest and trade there. The key terms are legitimate expectations and legal certainty, especially since the enforcement of an arbitral award coincides with the *raison d'être* of the parties' contract and their obligations therein. Hence, it is not merely a part of the contract, it is *the* contract. Given, as was stated in the Introduction, that there is no empirical dimension to this thesis, including interviews, the perceptions of the legal profession will be assessed from the point of view of an independent observer who will proceed to step into their shoes, although this is done sparingly and some use is made, especially in chapter 1a, of existing studies to this effect.

From the outset it should be pointed out that there is nothing inherently controversial in the arbitration laws of the two nations. If nothing, given their extensive reliance on the UNCITRAL Model Law they can be viewed as manifestations of this Law. However, it is with the interpretation of the local statutes that the problem really lies. It should be emphasised that throughout the thesis the reader will have observed that there was nothing particularly controversial about the judgments that have come out from the senior courts of Bahrain – although this of course may be attributable to the fact that no complex cases have come before them. Rather, it is the Cassation Court of Dubai that has given rise to much criticism with isolated decisions such as *Bechtel*.²⁸⁹ This is worth signalling out because it stands out for the concern and retreat it has caused, as well as for its rather biased reasoning.

It will be remembered that in this case the Cassation Court of Dubai ruled that because an arbitral tribunal had not administered an oath to the witnesses in accordance with the requirements of the UAE Federal Code of Civil Procedure – and more specifically the

²⁸⁹ *International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, case No 503/2003, judgment (15 May 2004). This same result was later reaffirmed by the Court in case No 322/2004, judgment (11 April 2005).

wording of the oath – the entire award was deemed to be null and void. It will also be remembered that the losing party in the arbitration was a Dubai government entity engaged in a commercial activity. That this judgment is fundamentally problematic is without doubt and this opinion has been expressed by all professional commentators. However, what is of interest in the present analysis is whether this decision and its follow-up will be detrimental to the views of the legal profession working or bringing legal business to Dubai and the UAE more generally.

In the aftermath of the *Bechtel* judgment there was significant confusion among the international legal community. On the one hand there was uncertainty as to whether the Dubai Cassation Court had retracted back to an anachronistic public policy defence with general application, or whether this was simply a one-off decision with a view to protecting the particular government entity from civil liability. On the other hand, the fear was expressed that even if this was a one-off, it was not certain that the Court would fail to honour its ruling in subsequent cases, particularly since a losing party could find this precedent attractive. In the latter scenario, the fear is that if the Court were to “save face” and honour the precedent it set, many cases would fail to be enforced on very narrow technical grounds. More worrying is the fact that future claimants may not simply rely on the narrow set of facts as those relied on in the *Bechtel* case (the inappropriateness of the administered oath), but may in fact go a step further and apply this ruling in analogy to all situations where a narrow technical rule with no significance to the merits of the case has been breached by the arbitrator, even if the parties failed to protest at the time.

Legal professionals want to be able to advise their clients that the very expensive and time-consuming arbitral award they have been successfully pursuing is not simply an empty promise, but is in fact susceptible to fast and effective recognition and enforcement in the country or countries where the losing party has assets. Given the assets held by individuals and companies in the UAE and Bahrain, it is natural that lawyers suggest that enforcement be sought there. When enforcement is sought in a country, it is presumed that a loss accrues to the losing entity and to the country at large. This presumption is based on the fact that the winning entity will repatriate all its earnings from the enforcing nation. No doubt, this assumption is true, but it paints only a minor part of a much larger picture. A country that is deemed to be investor-friendly, but particularly arbitration and enforcement-friendly, has a number of enticing advantages. For one thing, it attracts a higher concentration of lawyers who in turn will advise their clients that enforcement in that country is expedient and to their

interest. This raises legal fees and associated court fees and augments the profit accruing to the “legal industry”. This in turn feeds not only the local legal profession but also associated professions, such as clerks, accountants, secretaries, surveyors, engineers, bailiffs, not to mention the secondary economy, which is concerned with the feeding, clothing and housing of those professionally engaged in this industry. As we shall see in the next section, the arbitration business, including its enforcement strand, are incorporeal commodities that have just as much value as produce derived from the land. Thus, even if the winning party repatriates its winning assets from the territory of the enforcing State, this is only a temporary setback, given that by opening up one’s jurisdiction to such claims one is necessarily investing in one’s legal system and its capacity in attracting those who wish to make good use of the legal system.

The second major advantage of having an efficient enforcement regime relates to the capacity of this legal system to be the recipient of legal claims, including enforcement claims, and judicial cooperation requests against other legal systems. In this manner, along with the trust that comes with having a liberal and trustworthy legal system, the legal profession will also use that legal system to bring claims it cannot easily bring elsewhere, in the knowledge that the courts of said legal system can assist in transferring such claims abroad effectively and diligently. It is no wonder, therefore, that the courts of New York and London have seen a significant degree of international and transnational litigation, even in respect of cases that had little relevance with the two jurisdictions, simply because the legal profession behind these cases was not only familiar with the two legal systems, but also because they were keenly aware that their courts would issue sensible enforcement judgments, as well as international injunctions against recalcitrant parties. Thus, it is fair to say that the courts of London and New York have in essence become international courts that decide matters beyond their immediate jurisdiction simply because of their perception in the eyes of the legal profession.

This is exactly the kind of perception that the courts of the UAE and Bahrain should be looking for. Nonetheless, this does not mean, and in no way am I suggesting otherwise, that the two nations should in the process give up their religious, cultural and social identity in order to render themselves global legal systems, in the manner of London and New York. On the contrary, a solid legal system must depend on strong social – or religious and ethical as the case may be – values in order to yield legitimacy from within and also to garner respect from outside. It would be absurd to divest the Bahraini and UAE legal system from those

distinct characteristics that make it Arabic and adherent to a post-classical Islam, as it would also be absurd to return to a system of Islamic interpretation similar to that of Saudi Arabia, as this is no longer consistent with the social and cultural climate of the UAE and Bahrain. At the same time, however, what is needed in order to entrench and fortify internal legitimacy and attract external approval is to render certain elements of commercial laws far more precise and subject to legitimate expectations. The legal profession does not expect Bahraini and UAE courts to adhere to Western laws or to adopt judgments in the same socio-cultural light as the courts in New York and London. They know very well that the courts of the Gulf have to respect their cultural and religious heritage and expect nothing less. What they are demanding is that the laws and the judgments of the courts be made predictable and subject to the highest degree of legal certainty, even though in their vast majority judgments are predictable. So, here I am referring to the isolated aberrations, which although isolated, provide bad publicity to the system as a whole

Arbitrability and the various vague strands of public policy are areas where concerted effort is required in order to render them more predictable and in order to avoid situations such as that of *Bechtel*. Because even a *Bechtel*-type impediment, if it is well advertised in a law, will not be ignored by the lawyers of the parties, even if one deems it unreasonable to observe such technical criteria in the course of an arbitral hearing. The law-makers of both notions ought to collect in a single legislative instrument all those issues that they deem contrary to Islamic or Gulf public policy and public order and render this law a supplement to the existing arbitration legislation. Although it would be prudent for such a law to be as extensive and detailed as possible, this may make it rather rigid and inflexible. Whatever choice of drafting is ultimately adopted it should be supplemented with a solid commentary based on the *travaux* of the drafting process on the basis of which the judges may draw appropriate analogies or references in order to dispel any disputes that come before them by the parties. As things currently stand the legal profession can only guess as to what issues may come under the umbrella of public policy. The introduction of a legislative instrument will take away much of the uncertainty, the arbitrariness and the element of surprise currently felt by the legal community. Such a development will also begin the process for the harmonisation of the public policy debate in the Gulf and among Arab nations more generally.

It is also crucial that a similar statute be adopted on the issue of arbitrability. Although it is common in all Western nations to treat arbitrability through dispersed laws and rules, the

situation in the Gulf is rather different. In the West, arbitrability is not necessarily synonymous with public policy, the latter being perceived in narrow terms. On the contrary, in the Muslim world public policy and arbitrability are more or less the same and therefore there is an urgent need to delineate its precise boundaries. A statute that would deal with both public policy and arbitrability would constitute the ideal solution to this problem and would clear up much of the indeterminacy. It is crucial that if the governments of the two nations were to take up this idea and conjure a relevant law encompassing and clarifying arbitrability and public policy that they do not do so in isolation of their stakeholders. There has to be a strong and open public consultation process with the local and international legal profession practicing therein, the local chambers of commerce and foreign businesses operating there, as well as religious leaders. The final outcome should garner the widest possible public support and should reflect the opinion of the countries' direct stakeholders otherwise it will be doomed to failure.

It is equally important that once a new code or law is promulgated under the widest possible public consultation that the judiciary be given directions to apply the new law objectively and without opposition. A new precise law will make it far easier for the ultimate judicial institutions such as the courts of cassation to give rulings that do not require interpretative thinking or other means of imaginative construction. Such a development will allow a more fruitful discussion about the compatibility of arbitration and its various strands with Islamic law more generally, something which has not really occurred in the UAE and Bahrain.

It is also prudent, in order to fizzle out *Bechtel*-type situations from the list of precedent of higher courts that the authorities set up standing committees, such as the Law Commission of England and Wales, to review the law every ten years or so with a view to eliminating all those judgments and institutions that are aberrations or which have not worked as originally expected. It would be ideal if local and international experts were appointed to such standing committees because their work would facilitate and enhance the role of law-makers in the two jurisdictions. The ultimate decision about adopting the recommendations of these standing committees will naturally lie with the legislative bodies of the UAE and Bahrain and apart from political considerations it would be unwise to reject proposals that have received wide stakeholder support and which are moreover in tune with international developments and which in no way breach social and other mores.

6.2 Arbitral Forums as Places of Contention and Competition

This section will kick off with a very simple question. Why do Bahrain and the UAE desire to be perceived as arbitration-friendly and enforcement-friendly jurisdictions? This question was partially addressed in the previous section when dealing with the incentives of being enforcement-friendly. Yet, this would work well with countries that have relied excessively on the provision of services as their primary income source, which is to a large degree the case with Dubai, but not the remainder of the UAE or Bahrain. The establishment of arbitration free zones or the DIFC are manifestations of a desire to capture part of the global dispute resolution market, which as has already been explained is rather lucrative and brings with it a vibrant secondary economy. For Bahrain and the UAE, in the opinion of this author, the attraction of the arbitration world in their respective jurisdictions is a reaffirmation of their place in the global economy, not simply as mere oil-pumping nations but as equal partners in a world where the real money-makers are those who provide expensive services, whose cost is far smaller than manufacturing and engineering.

Are States competing among themselves for the share of the global dispute resolution market? The simple answer is a flat, yes! Not only are they competing, but they are vying for clients. In fact, there is significant competition within the UAE itself, not to mention between the various Gulf nations. This is evident principally from the varieties of institutional mechanisms that have sprung up throughout the Arab world, with or without the intervention of well-established institutional arbitral mechanisms in the UK and USA. There is certainly enough work to go around for everyone, albeit there is no denying that like-minded States compete among themselves for the coveted prize. More significantly, research suggests that whereas the European arbitration market is saturated the Asian market continues to provide significant opportunities for growth.

The outcome of this competition can be both negative and positive. The negative dimension forces States to commit financial resources that would best be deployed to offset other social needs. On the positive side, a healthy competition is great for legal professionals because it makes their product cheaper, easier to sell to clients and more effective. Competition among nations is a catalyst for such changes, the effect of which is then immediately felt by the clients. We have not yet seen the fruits of this competition in the Gulf States, or at least this has not yet become evident to this author, although the growth of the legal industry there may be the first important sign. Ultimately, however, many restrictions

and impediments will be lifted and new and precise laws will be enacted so as to convey a greater feeling of legal certainty. This outcome should not be divorced from the practice of Bahrain and the UAE in respect of the recognition and enforcement of foreign court judgments as the two constitute an integral part of a much larger process. It is only hoped that this competition will not simply be a drive to the top but a means of providing a better service and as enhancing the existing legal system. By conclusion, the competition between London, New York and Paris has not stopped other jurisdictions from claiming a stake in the burgeoning market, particularly Hong Kong, Singapore and Stockholm, among others. It is hoped that this healthy competitions drives the relevant actors in Bahrain and the UAE.

6.3 The Need for Judicial Clarity and the Role of Transnational Precedent

What makes London and New York significant players in the global dispute resolution industry is the fact that their local courts not only produce independent judgments that are respected worldwide and assist the parties in enforcing their awards, but also because said courts produce judgments that are clear, concise and leave no future room for arbitrary manoeuvres. According to this author, the quality of judgments differs significantly from one court to another and from one jurisdiction to another. In theory, when a case goes before a higher court, such as a supreme court or a court of cassation, the expectation is that the judgment delivered by this court will set a precedent for future cases in that country. Hence, its deliberation is doubly important, both for the parties at hand as well as for future litigants. It goes without saying therefore that judgments delivered by higher courts in precedent-setting cases should allow future litigants and their lawyers to form a precise view of their arguments so that they can rely on them and that other persons in the jurisdiction can rely in addition in order to reform their conduct accordingly. This can only be achieved if said judgments are detailed enough both in their factual and legal analysis. The latter is no doubt of the utmost important. The judgments delivered thus far by the higher courts of Bahrain and the UAE are of excellent quality, albeit the training of the judges and the practice of their predecessors has necessarily limited the way in which they view what should be encompassed within a judicial order. This is very much down to the distinct legal culture of the Gulf, which differs from the culture of courts and tribunals in common law jurisdictions – much like the courts in the Gulf their counterparts in civil law nations provide rather brief judgments. The DIFC judgments handed down to date are very similar to those delivered in common law jurisdictions, the reason of course being that the judges appointed to the DIFC

courts have their origin in the legal profession in the common law, whether from England, Singapore, or elsewhere.

With regard to decisions in the field of international arbitration, a further condition is pertinent in the relevant judgments. Given that the international arbitration laws in both the UAE and Bahrain have been based on the UNCITRAL Model Law, the intention of their drafters must have been to elicit international best practices, harmonise their rules and regulations to the benefit of the legal profession and in the interest of greater volumes of litigation. This necessarily entails paying some attention to the legal developments in other nations. It would be inconceivable therefore for a court in the UAE, for example, to decide an issue of separability and make no mention at all to the abundant case law on the matter based on judgments from respected courts all over the world, when there is no similar judgment in the UAE and taking into consideration that the relevant provision in the UAE statute is based on the UNCITRAL Model Law. The courts of London, New York, Hong Kong and many others routinely cite the judgments of other courts and tribunals when considering cases with an international element and this certainly the case when considering international arbitration disputes. These courts do so not only because there is now an established *lex mercatoria* in the field of international commercial arbitration which is undeniable, but also because foreign judgments serve as authorities for the precise interpretation of particular concepts for which there is no other precedent or authority in the particular nation. The courts of the UAE and Bahrain have been disinclined to employ respected foreign judgments and again this is down to their judges' legal culture, which has generally been apprehensive in the use of foreign precedent. Judges in these two nations focus only on domestic law, disregarding international development.

According to this author, said approach of the judges in the UAE and Bahrain is problematic. International arbitration involves foreign parties and perhaps also some local parties. When all these actors signed a contract setting forth an arbitration clause they had a clear vision of the relevant process and their legal advisors were well aware of the transnational jurisprudence which provides a distinct degree of authority. It is therefore rather retrogressive when these same lawyers have to apply for enforcement in the UAE and Bahrain and the courts refuse to recognise their award on the basis of a legal analysis that is completely divorced from international practice and the foundations which were all too familiar to them. While it is understandable that certain mandatory rules are not susceptible to conformity with international practice, particularly arbitrability and public policy – in general

terms all other matters have some basis in transnational precedent. If the judges are not familiar with such precedent – assuming that they were allowed to make use of it – then without going into a process of training them, it may be a good idea if said judges were given suitable clerks with experience in the relevant fields who could act as their advisors on the law, in the same manner as the clerkship systems works in the USA. Following the approval of the judges as to the relevance of the transnational precedent or practice, the clerks could then be authorised – in the case of the UAE and Bahrain – expand on and write the relevant part of the judgments as is common practice in many overburdened courts that employ clerks.

There does not seem to be any explicit rule in the law of the UAE and Bahrain that forbids the judges from employing foreign law to the merits of a dispute. In fact, this author would add that as long as the foreign law does not clash fundamentally with domestic law and the countries' constitutional sources, it may legally be employed by the courts. From a practical point of view, once a Gulf court issues a decision involving foreign precedent it will possess the authority to render its own judgment a matter of domestic as well as international precedent. This will give a significant amount of authority to the courts of the UAE and Bahrain and advertise the two countries as progressive and as adhering to the rule of law.

6.4 The Role of Amicus Briefs

It is common practice for courts in the common law world, as well as international courts and tribunals, to accept amicus briefs from non-interested third parties with the object of illuminating the court as to the law in the particular case. Amicus briefs have proven extremely useful in areas which the court has little or no expertise and is also a good way of demonstrating that the courts are not closed institutions but rather that they are open to the public and are as a result transparent. Even the ICSID Tribunal, and its various emanations, has gone ahead to accept amicus briefs. This is significant given that ICSID is an arbitral tribunal and it is well known that arbitral proceedings are covered by a cloak of confidentiality to which third parties have no entry rights. The higher courts in Bahrain and the UAE could also be the recipients of amicus briefs, especially from counsel, both foreign and local, working in the region who have an interest in specifying to the courts where the law is and where it is heading. In this manner the courts will get an idea of the views of the legal profession on a particular matter. Moreover, amicus briefs may equally give rise to a

healthier civil society not only in the narrower field of arbitration, but also more generally in other fields of commerce, economic and social life.

Very importantly, amici briefs from recognised think tanks could render the courts an instrument of commercial policy in the following manner. Where the stated aim of Bahrain and the UAE is to become international arbitral centres, the courts of the two nations stand out as beacons regarding their claim to a modern, efficient and international-leaning legal system. Therefore, the courts need to be appraised of international developments constantly and pay heed to legal initiatives elsewhere. The judges cannot afford to be trained continuously on such matters as this would defeat the interests of justice. Rather, in addition to the appointment of law clerks, it is imperative that one or several think tanks apprise the courts of international developments so that the courts can decide whether they wish to go down that same route or deviate from said route in order to attract a greater volume of litigation and arbitration, without necessarily violating the forum's laws.

As things stand, the judges are unable to fathom international developments in the fields under their docket because they lack the requisite knowledge and expertise, have no one to advise them and do not perceive that they have an additional role – albeit indirect one – to promote the commercial and economic interests of their nation without compromising justice. I am not of course suggesting that the courts should become direct organs of the State and execute State policies, but the courts should be sensitive to the situation on the ground and conform in their judgments as much as possible – without in any way compromising justice – to the confirmed policies of the country they are serving.

That justice needs modernisation in the UAE and Bahrain is without question. In this thesis, including its conclusion, this author has merely dealt with the practice of enforcing foreign arbitral awards and the obstacles that impede such enforcement. It was not the aim of this thesis to set out a general discussion about the judicial system in the two nations, particularly since the subject matter of the thesis was rather limited from the outset. That is why the recommendations in the Conclusion are not meant to be exhaustive, albeit the majority of these recommendations could find concrete applications in all areas of arbitration and could enhance the work and efficiency of the respective judicial systems. There is no doubt that in the coming years the two nations under consideration will attract a significant portion not only of international trade and commerce but also of the burgeoning dispute resolution industry that has hit the shores of Bahrain and the UAE since the early 1980s. There has been much improvement by the passage of specialist laws, especially in the field of arbitration,

supplemented by more general laws that are relevant to all the actors involved in arbitral proceedings. Moreover, the courts have provided a tremendous degree of legal certainty and have cemented the reputation of the two nations as countries strongly adhering to the rule of law and the rules and practices of international commerce. The next phase of modernisation should be grounded on two axes: the first should culminate in the introduction of court judgments that are precise enough to create solid precedents; this should be supplemented by the passage of legislation that clarifies all existing gaps in the law, such as in the field of arbitrability and public policy; the second should comprise of a mechanism that takes into consideration developments in the progressive and successful arbitration nations with a view to taking measures that makes them competitive and more attractive to the international legal profession and their clients. This is still a rather long road but it is hoped that the present thesis has made even a minor contribution towards this end.

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[93] *Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No. ARB/98/4, Annulment Decision January 8, 2002.*

[94] *Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No. ARB/98/4, Annulment Decision January 8, 2002.*

GCC Conventions

[A] Oman GCC Convention is very similar to the Riyadh Convention.

[B] The Euro-Arab Arbitration Rules of 1983

[C] Riyadh Convention 1983.