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**RECOGNITION AND ENFORCEMENT OF FOREIGN
ARBITRAL AWARDS IN KUWAIT**

A thesis submitted for the degree of Doctor of Philosophy

By

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ABSTRACT

International commercial arbitration is undertaken for the purpose and in the confidence that an award emanating therefrom is binding, recognizable and enforceable between the parties. Recognition and enforcement give rise to legal issues because while awards may be obtained by private parties or companies, recognition and enforcement depend on the state through its judicial arm, the courts. There might be conflicts between the successful parties' aspirations and those of the state or the court that must recognize and enforce an award. The procedure is therefore key. This thesis seeks to analyse the rules relevant to the recognition and enforcement of foreign arbitral awards in Kuwait and also to evaluate the effectiveness of Kuwait's recognition and enforcement framework, especially against the backdrop of article V (1) and (2) of the New York Convention.

Kuwait derives its laws mainly from Islamic law, Islamic jurisprudence, local customs, international conventions and international law. Kuwaiti's statutory laws largely meet international standards but with some reservations. In particular, the recognition and enforcement of foreign arbitral awards is largely subjected to Islamic law and principles as arbitral awards must usually be registered in Kuwaiti courts and be validated by judges, who are constitutionally bound to adhere to the supremacy of Islamic law and values. Nevertheless, this study establishes that Kuwaiti laws and practices on recognition and enforcement of foreign arbitral awards for the most part have applied the rules and standards stipulated in the New York Convention, albeit restrictively. However, deviations exist between the Arabic text of the New York Convention and the actual text of the Convention. These deviations do not necessarily hamper the effective recognition and enforcement of foreign arbitral awards, but in some respects they render a narrower and more restrictive interpretation and application of the Convention in Kuwait.

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DECLARATION

I hereby declare that the work in this thesis is my own work and all quotations have been distinguished by quotation marks. This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is it being submitted in candidature for any degree or other award.

Saad Badah

DEDICATION

This thesis is dedicated to God almighty and all arbitration victims in the Middle East and around the world.

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Public Authority for Minors Law No 67 of 1983, art 7

Companies Regulation No 6 of 1965

Resolution No 90 of 1981

Stock Exchange Commission, Law No 31 of 1990

Oman

Code of Civil and Commercial Procedure, arts 21, 235, 352

Commercial Agency Law (Royal Decree No 26 of 77 as amended by Royal Decree 37/96) art 18

Commercial Code

Commercial Companies Law, arts 3, 6, 37, 109, 139

Law of Arbitration in Civil and Commercial Arbitration Disputes, arts 7, 10, 11, 12, 25, 30, 33, 43, 53, 18 and 19

Personal Status Law No 32 of 1997, arts 138-157 and 143-156, 182, 225, 280

Royal Decree No 37 2000 Promulgating the law on the Protection of Copyrights and Neighbouring Rights

Royal Decree No 38 of 2000 Promulgating the Law on Trade Marks, Descriptions and Secrets and Protection against Unfair Competition

Royal Decree No 39 of 2006 in the UAE by Decree No 7 of 2005

Royal Decree No 82 of 2000 Promulgating the Patent Law

Royal Decree No 39 of 2000 Promulgating the Law on the Protection of Industrial Designs

Sustain Decree No 116/91 Promulgating the system of Public Bodies and Institutions, arts 2-3

System of Public Bodies and Institutions, arts 2-6

Qatar

Civil and Commercial Procedure Code, art 206

Civil Law, art 127

Code of Civil and Commercial Procedure, arts 30(b)

Commercial Code, arts 78-86, 606-628

Decree Law No 30 of 2006 to issue Patent Law, Law No 7 of 2002 on the Protection of Copyright and Related Rights, and Law No 9 of 2002 on Trademarks, Geographical Indications and Industrial Designs

Investment Law, art 11

Law No 8 of 2002 on Organization of Business of Commercial Agents, art 23

Law of Arbitration in Civil and Commercial Disputes, art 10(2)

Penal Law, art 66(1)

Saudi Arabia

Code of the Settlement Preventing Bankruptcy issued by Royal Decree No M/16 of 4/9/1416 (H)

Commercial Agency Law (Royal Decree No 26/77 as amended by Royal Decree 37/96)

Companies Law, art 29

Implementation Rules of Arbitration Law, art 39

Royal Decree No M/15 of 1999 Implementing Regulation of the Law of Trade Names, Ministerial Decision No 1277 dated 3 July 2004 for issuance the regulation of Bordered Procedures for Protection of Intellectual Property Rights of Trademarks and Copyrights

Royal Decree No M/21 of 2002 Implementing Regulation of the Law of Trademarks

Royal Decree No M/27 of 2004 Implementing Regulation of the Law of Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs

Implementation Rules of 1985, art 8

Bankruptcy Law issued by Royal Decree No (M/16) on 4/9/1416 H, art 5

Commercial Companies Law, arts 8, 24, 39, 109, 112-113, 227, 228

Arbitration Regulation 1983, arts 1, 2, 5, 6

Civil Code, arts 1, 9, 10-54, 80, 111, 112, 118-126, 151, 130-147, 158-162, 190-199, 200, 207, 308, 380-381, 568, 575, 712

Arbitration Regulation of 1983, arts 5, 6

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Arbitration Law, arts 1, 2, 6, 5, 20

UAE

Civil Code, arts 11, 169, 174

Civil Transaction Code, arts 11, 20-21, 18-19, 85-88, 93-94, 157-189, 205, 714

Code of Civil Procedure, arts 13, 21, 203-208, 212-235

Commercial Companies Law, arts 11, 12, 45, 111-112, 221

Commercial Transactions Code, arts 76, 683, 685

Dubai: Electronic Transaction and Commerce Law No 2 of 2002, arts 9 and 13

Federal Act No 14 of 1988 modifying some provisions of Federal Act No 18 of 1981 of 1981 Organizing Trade Agencies

Federal Commercial Transactions Law No 18 of 1993, art 645

Federal Law No 1 of 2006 on Electronic Commerce and Transaction, arts 7 and 11

Federal Law No 17 for the year 2002 Pertaining to the Industrial Regulation and protection of Patents, industrial Drawings, and Designs, Federal Law No 37 of 1992, amended by Federal Law No 8 of 2002 in respect of Trademarks, and Federal Law No 7 of 2002 Concerning Copyrights and Neighbouring Rights

Federal Law no 18 of 1993 issuing the Commercial Transactions Law, arts 76, 77 and 88

Penal Law, art 76

Personal Status Law No 28 of 2005, art 175(1)

Transaction Law, arts 10, 27, 28, 85, 93-99, 159, 169, 168-173

TABLE OF ABBREVIATIONS

AAA	American Arbitration Association
ADR	alternative dispute resolution
ARAMCO	Arabian American Oil Company
BIT	bilateral investment treaty
BOOT	build-own-operate-transfer
BOT	build-operate-transfer
CCASG	Cooperation Council for the Arab States of Gulf
CCP	Code of Civil Procedure (Law No 38/1972)
CCPL	Civil and Commercial Procedure Law (Law No 38/1980)
CIETAC	China International Economic and Trade Arbitration Commission
EDI	electronic data interchange
EU	European Union
FAA	Federal Arbitration Act
FETAC	Foreign Economic Trade Arbitration Commission
GDP	Gross Domestic Product
GCC	Gulf Cooperation Council
ICA	International Court of Arbitration

ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Convention for the Settlement of Investment Disputes
IFA	Islamic Fiqh Academy
JAL	Judicial Arbitration Law
KSE	Kuwait Stock Exchange
LCIA	London Chamber of International Arbitration
LIBOR	London Interbank Offered Rate
LIBOR	London Interbank Offered Rate
MENA	Middle East and North Africa
MINE	Maritime International Nominees Establishment
NAFTA	North American Free Trade Agreement
NYC	New York Convention 1958
OPEC	Organization of the Petroleum Exporting Countries
OPIC	Overseas Private Investment Corporation
OTV	Omnium de Traitement et de Valorisation
SICAC	Shirjah International Commercial Arbitration Centre
UAE	United Arab Emirates

UK United Kingdom

UNCITRAL United Nations Commission on International Trade Law

USA United States of America

TABLE OF JOURNAL TITLES AND ABBREVIATIONS

AIAJ	Asian International Arbitration Journal
AIJS	Agora International Journal of Juridical Sciences
ALQ	Arab Law Quarterly
CJIL	Chinese Journal of International Law
CJIEL	Currents Journal of International Economic Law
CJCR	Cardozo Journal of Conflict Resolution
HJLS	Hungarian Journal of Legal Studies
IJAA	International Journal of Arab Arbitration
ILR	International Law Research
JA	Journal of Arbitration
JPL	Journal of Private International
JIA	Journal of International Arbitration
JLPKU	Journal of Law Published by Kuwait University
JLSPKU	Journal of Law & Sharia Published by Kuwait University
MLJ	Malayan Law Journal
NCJIL	North Carolina Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law

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CHAPTER 1: INTRODUCTION

1.1 Introduction

Arbitration clauses between contracting parties have become a salient feature in international trade.¹ They instil confidence in the parties to trade and also encourage investments with the knowledge that in the event of any wrong, there will be a remedy with some form of compensation. When awards are made in favour of a party, they engage the machinery of the state through the courts, for recognition and enforcement of such awards.² The courts have the discretion to enforce or deny such awards.³ A breach of contractual obligations where parties have an arbitral clause will lead to an arbitral award in favour of the aggrieved party. The award would, however, be of inconsequential benefit to the party in whose favour it is issued, if it cannot be recognized or enforced. Since enforcement of arbitral awards is a preserve of the state, it follows that foreign arbitral awards may be susceptible to non-recognition or failure of enforcement if the enforcing state has reservations about the award.⁴

To deal with that issue, various international legal instruments have been formulated following threats of non-enforcement of foreign arbitral awards and there have been concerted international calls for a homogeneous legal framework, for the recognition and enforcement of foreign arbitral

¹ Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International 2003) 127-31; Azemi Atiya, *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law* (University of Kuwait 2012) 417-521; Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (Arab Renaissance House 1999) 66-160; Iqbal Alqallaf, *Arbitration in the State of Kuwait* (Arab Renaissance House 2006) 150-152; Pierre Bourdieu, *international commercial arbitration and the construction of a transnational legal order* (the university of Chicago press 1996) 311-317; Stuart Dutton, Andy Moody and Neil Newing, *international arbitration* (global law and business 2012) 7-8; Gary Born, *international arbitration, law and practice* (Kluwer Law International 2012) 4; Christian Buhring-Uhle, *arbitration and mediation in international business* (Kluwer Law International 1996) 39-55; Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Sharia and Statute Law* (Mid- country press, London, Graham and Trotman 1984) 20-21; W Michael Reisman, W Laurence Craig, William Park, Jan Paulsson, *international commercial arbitration, cases, materials and notes on the resolution of international business disputes* (the foundation press 1997) Ixxv.

² *ibid.*

³ *ibid.*

⁴ Amazu Asouzu, *International Commercial Arbitration and African States: Practice, Participation, and Institutional Development* (CUP 2001) 175-81.

awards and arbitration agreements. A notable international legal framework calling upon member states to recognize and enforce foreign arbitral awards is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁵ known as ‘the New York Convention 1958’ (NYC).⁶ Kuwait acceded to the NYC on 28 April 1978. As a signatory to the NYC, Kuwait is expected to promote its objectives and to facilitate the recognition and enforcement of foreign arbitral awards. It should be noted however, that such compliance is not guaranteed, as the NYC⁷ provides that recognition and enforcement of an award may be refused at the request of the party against whom it is invoked. Thus, the possible problematic recognition and enforcement of foreign arbitral awards in Kuwait and other member states is a concern mainly because of overuse or abuse of the article V exceptions; effective international dispute resolution may be jeopardized among contracting parties. This is one of the bases of this study.⁸ The research examines the need to enact sufficient enforcement mechanisms in regard to enforcement of foreign arbitral awards for better cooperation of GCC⁹ states under the Cooperation Council for the Arab States of Gulf (CCASG).¹⁰ The thesis examines the intricacies in enforcement of foreign arbitral awards in Kuwait and Gulf states that are signatories to the NYC. The researcher examines the application of the school of theology under Islamic jurisprudence or *Fiqh*, and how the application and interpretation in Kuwait have hindered the

⁵ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959 (330 UNTS 3); New York Convention on Recognition and Enforcement of Foreign Awards <http://www.uncitral.org/uncitral/en/uncitral_text/arbitration/NYconvention_status.html> accessed 30 May 2016.

⁶ Kenneth R Davis, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Tex Intl LJ* 43, 57; Alan Redfern, ‘Having Confidence in International Arbitration’ (2003) 57 *DispResol J* 60, 61.

⁷ NYC, V1(a) and 2(b).

⁸ Xiaohong Xia, ‘Enforcement of the New York Convention in China’ [2011] *International Commercial Arbitration Brief* 20-24.

⁹ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

¹⁰ The Cooperation of Council For the Arab States of the Gulf, Secretariat General <<http://www.gcc-sg.org/eng/indexfc7a.html>> accessed 7 June 2016.

recognition and enforcement of foreign arbitral awards.¹¹ The research concludes that while Sharia affects the enforcement of foreign arbitral awards, the main problem of enforcement is due to the judicial interpretation of the arbitration clauses of the Civil Code on Commercial Procedure and the rigid application of the NYC.¹² Issues are also as a result of, the United Nations Commission on International Trade Law (UNCITRAL)¹³ Convention when a matter of arbitrability and enforcement of a foreign arbitral award is brought to their attention. There is a need in Kuwait to enact rules relating to the recognition and enforcement of foreign arbitral awards which promote harmony between Sharia law and norms of international arbitration with the Civil Code on Commercial Procedure.¹⁴

1.2 The Problem

The gross domestic product (GDP) and contribution to the world economy of member states of the Gulf Cooperation Council (GCC)¹⁵ are as follows: Oman's GDP is 70.25 Billion Dollars, contributing 0.11% to the global economy,¹⁶ Qatar's GDP is 166.91 Billion Dollars, contributing 0.27% to the global economy,¹⁷ the UAE's GDP is 370.29 Billion Dollars, contributing 0.60% to the world business GDP value,¹⁸ Bahrain's GDP is worth 32.22 Billion Dollars, contributing 0.05% to the world GDP,¹⁹ Saudi Arabia's GDP is 646 Billion US Dollars, contributing 1.04% to

¹¹ Ian Edge, *Islamic Law and Legal Theory* (Dartmouth 1996) Xvi.

¹² NYC, art V (1).

¹³ Model Law 1985.

¹⁴ CCP, art 130; UAE application of Foreign Arbitral Awards, with domestic courts whereby all foreign arbitral awards are now excluded from enforcement.

¹⁵ Brent Radcliffe, Countries with Fastest and Slowest GDP Growth February 8th 2013 <<http://www.investopedia.com/financial-edge/0213/countries-with-the-fastest-and-slowest-gdp-growth.aspx>> accessed 11 December 2016; Abdullah Alrumaih, *Arbitration in the GCC States, Arbitration General Framework in the GCC in accordance with the latest amendments including new Saudi Arbitration System 2012, Arbitration Development, Arbitration Agreement, Arbitration Panel, Arbitration litigation, Arbitral Award* (Arab Renaissance House 2013) 368-393; Ahmad Abdultawab, *Arbitration Agreement and Related Pleas, Comparative Study of the GCC Laws* (Arabian Renaissance House 2008) 137-227.

¹⁶ <<http://www.tradingeconomics.com/oman/gdp>> accessed 11 December 2016.

¹⁷ <<http://www.tradingeconomics.com/qatar/gdp>> accessed 11 December 2016.

¹⁸ <<http://www.tradingeconomics.com/united-arab-emirates/gdp>> accessed 15 December 2016.

¹⁹ <<http://www.tradingeconomics.com/bahrain/gdp>> accessed 11 December 2016.

global business,²⁰ and Kuwait's GDP is 112.81 Billion Dollars, contributing 0.81 to the global economy.²¹ Overall, GCC states contribute 2.88 % to the net global GDP. GCC's GDP is worth 995.97 Billion Dollars, compared to China's²² which is 10866.44 Billion Dollars. With a global GDP of 17.35%, Europe²³ is worth 1622.46 Billion Dollars with a GDP of 28.18 % across the Member States; the USA²⁴ is worth 1794 Billion Dollars with a GDP of 28.95% of the global economy.

However, when it comes to dispute resolution, GCC Corporations and their trading partners hardly resort to Kuwait, Saudi Arabia and Bahrain²⁵ or use GCC-based arbitration centres, raising the question of patriotism among other things. The reason for this is common to all GCC countries that have been accused by some of establishing 'dead' arbitration centres instead of active ones.²⁶ Kuwait, for instance, is a signatory of the NYC (1958),²⁷ which is the basis of the Modern UNCITRAL Law. Nonetheless, Kuwait has entered a reservation against Article I of the Convention,²⁸ rendering foreign arbitral awards unenforceable without prior approval/review of

²⁰ <<http://www.tradingeconomics.com/saudi-arabia/gdp>> accessed 11 December 2016.

²¹ <<http://www.tradingeconomics.com/kuwait/gdp>> accessed 11 December 2016.

²² <<http://www.tradingeconomics.com/china/gdp>> accessed 12 December 2016.

²³ <<http://www.tradingeconomics.com/european-union/gdp>> accessed 12 December 2016.

²⁴ <<http://www.tradingeconomics.com/united-states/gdp>> accessed 12 December 2016.

²⁵ The reservation of art 1(3) of the New York Convention <<http://www.newyorkconvention.org/countries>> accessed 13 December 2016.

²⁶ El Sayed Almarakebi, *Arbitration in the GCC States and to What Extent it is Affected by State Sovereignty* (Arabian Renaissance House 2001) 109-118; Abdultawab (n 15) 139-220.

²⁷ The accession of the State of Kuwait to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1978. Where in ratification of the Convention it put some reservation under reciprocity, under art 1(3), of the NYC. Kuwait reserved that "Convention does not mean in any way recognition of Israel or entering with it into relations governed by the convention thereto acceded by Kuwait." <<http://www.newyorkconvention.org/countries>> accessed 13 December 2016.

²⁸ Reservation means that when a state of Kuwait entered the New York Convention but did not entirely enforce it. In other words, the main objective of the convention was universality or international recognition and enforcement of foreign arbitral awards without, any reciprocity.

national courts.²⁹ This makes the status of foreign arbitral awards in Kuwait uncertain.³⁰ It undermines the autonomy of the parties to disputes.³¹ It escalates and lengthens dispute resolution. It duplicates the costs of dispute resolution, whereby a party who agreed under the arbitration agreement (party autonomy) is forced to seek court approval for enforcement of a foreign arbitral award.³² It creates conflicts between arbitration and litigation. The parties choose arbitration to avoid duplication of resources (litigation and arbitration) and lengthy periods in the courts.³³

The fact that Kuwait is subject to Islamic Law,³⁴ which is not compatible with circular perspective, is also an impediment to non-Islamic countries or persons, who due to patriotism choose to go to other centres, such as Qatar, Dubai, London, Paris and Hong Kong. Such centres are more arbitration-friendly and can be trusted to enforce foreign arbitral awards without any court approval.³⁵ In Kuwait, interest (*riba*)³⁶ is not allowed due to public policy.³⁷ Foreign investors, due to uncertainty, will not go to a country like Kuwait that is not friendly to investors.³⁸ Arbitration only becomes meaningful if the party to arbitration has trust that the foreign arbitral award will be enforced without any hindrances.³⁹

²⁹ Kuwait CCP art 183, 175 and 185.

³⁰ Kuwait ratified NYC in 1978. In other words, it should be the champion of recognition and enforcement of foreign arbitral awards. Other GCC states for example: Saudi Arabia ratified NYC in 1994; Oman ratified NYC in 1999 (Decree N.13 Of 1997), Bahrain Ratified NYC in 1988 (Decree Law No. 14 of 1988), Qatar ratifies NYC on 30th December 2002, UAE ratified and gazetted NYC in official UAE Gazette on 21 August 2006. It should be noted UAE, Qatar and Oman have no reservations; this has made Qatar, Oman, UAE states International Centres for enforcement of arbitral awards classified as foreign awards.

³¹ The Quran the highest Source of Sharia, which recommends to respect autonomy of the parties' as provided in "O ye who believe fulfil (all) obligations." (Surat Al-Maid 5:11) English Translation of Yusuf Ali.

³² CCP art 185, 187 and 186.

³³ Alan Redfern and Martin Hunter (with Nigel Blackaby and Constantine Partasides), *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell 2004) 560.

³⁴ Kuwait Constitution art 2.

³⁵ CCP art 177.

³⁶ Ibrahim Warde, *Islamic Finance in the Global Economy* (Edinburg University Press 2000)55-59.

³⁷ CCP art 199 (a) (d). A foreign arbitral award will not be enforced in Kuwait if it violates public policy or morals under Kuwait Law, for example, interest of an award by a tribunal conflicts with public policy of Kuwait.

³⁸ Ibid art 183, an award must be in Arabic, this creates tension non-Arabic Countries.

³⁹ Saleh (n 1) 271.

With diversification of economies foreigners invest in other services, for example, construction, hospitality or any other service provision industry. In their agreement to arbitration, the suppliers or investors want to be assured that they have a system of dispute resolution. An arbitration mechanism offers prompt solutions to any disputes that may arise, without having to rely on the courts for recognition and enforcement of foreign arbitral awards.

Given the reduction in oil prices, Kuwait's exclusive dependency on oil will affect its economic power, hence this problem needs an urgent solution. Meanwhile, it must be noted that Kuwait has a stronger currency (0.39 Kuwait Dinar is equal to 1 US Dollar) than, Bahrain (0.37 Bahrain Dinar equivalent to 1 US Dollar). By comparison, 0.38 Oman Riyal equals 1 US Dollar, 0.69 British Pound is equal to 1 US Dollar, and 0.92 Euro is equivalent to 1 US Dollar. Indeed foreign investors are keen to invest in strong economies, like that of Kuwait. Kuwait has a poor arbitration regime which renders the country unattractive to them. Investors instead choose places such as Dubai and Qatar, that have ratified the NYC without any reservation. This creates universality of enforcement of foreign arbitral awards, which is the main aim of the NYC. It should be noted that throughout the world, all countries use all possible means to attract foreign capital for direct investment.⁴⁰ In the case of Kuwait, the issue of foreign investment has not been given adequate consideration,⁴¹ owing to the large returns from oil production that the country enjoys. This means the state depends only on oil production. Hence, when unexpected market turbulence surfaces, the Kuwaiti economy is severely affected due to inflation and excessive dependency on oil. It is of great importance to note that Kuwait strives to find alternative sources of income for its economy, by opening doors or encouraging the private sector and calling for international investors.

⁴⁰ Foreign investor is the employment of foreign capital in a licensed activity in accordance with the provisions of the law. In other words, foreign investment means, any investment or use foreign funds and expertise inside the state of Kuwait in any economic project whether commercial, industrial, and hospitality, in accordance with the provisions and regulations of the foreign investment law.

⁴¹ Abdullah M. Al-Hayyan, *The Kuwait Foreign Investment Law: Comments and Suggestions*, Arab Law Quarterly (2003) 326-340.

Foreign investors would be a solution to the problem of over-dependency on oil, if they could find a favourable legal ground to protect the prosperity of their business. Such investment will only increase on a par with Dubai and Qatar if Kuwait fully endorses the NYC without any reservation. Dubai and Qatar have attracted multi-billion dollar foreign investments, because investors trust their legal system; assured that when a foreign arbitral award is granted by the tribunal it will be automatically enforced without facing court proceedings.

The thesis examines how foreign arbitral awards can be recognized and enforced in Kuwait. There is a problem of balancing the conflicting decisions of both the Islamic jurisprudence⁴² and circular law,⁴³ mainly the NYC. It should be noted that the NYC also known as the Convention on Recognition and Enforcement of Foreign Arbitral Awards, requires courts of contracting countries to enforce both arbitration agreements and arbitration awards.⁴⁴ The reservation of the NYC under Article 1 may hinder foreign states from coming to Kuwait, especially those that are against the Islamic application of domestic courts in Kuwait. There are 156 signatories to the Convention, internationally.⁴⁵

The interpretation of the NYC in Arabic conflicts with the English version in application of the NYC under Article V (2); the Arabic version specifies that⁴⁶ the courts “*shall*” enforce foreign arbitral awards, whereas the English version provides that the courts “*may*” enforce foreign arbitral awards. Furthermore, the English version provides more discretion to the courts to enforce foreign arbitral awards than the Arabic version. There is a need to reconcile the application of the NYC, so that the Arabic version is compatible with the original English

⁴² Wajdi Raghab, *Memos on the Principles of Kuwait Civil Law* (Dar Al Fikar Al Arabi 1978) 464; Khaled Alyaqout, *Commenting on Arbitration Law in the Kuwait Legislation* (Dar Al Fikar Al Jamea 2004) 50; Abdulfatah Abdulbagi, *Sources of Commitment under Kuwaiti Civil Law* (Modern Book House 1988) 51; Fathi Walli, *Civil Judiciary Law in Kuwait* (Kuwait University 1977) 89.

⁴³ NYC 1958; UNCITRAL.

⁴⁴ Nigel Blackaby and Constantine Partasides (with A Redfern and M Hunter), *Redfern and Hunter on International Arbitration* (5th edn, OUP 2010) 515.

⁴⁵ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2008) 202.

⁴⁶ Ministry of Kuwait Expertise and Arbitration Sector, *The State of Kuwait Arbitration System Code No 38 of 1980* at 63.

version of the NYC, compatibility affects clarity for foreign investors.⁴⁷ Accordingly, this thesis aims to provide solutions to this problem also seeking to provide awareness to non-Islamic states, if they are to attempt to enforce foreign arbitral awards in Kuwait. This thesis also examines how Kuwait may try to reach a compromise with non-Islamic states.

1.3 Aims and Objectives

The thesis examines the Islamic principles on arbitration, their influence on the interpretation of arbitration disputes will be analysed in this thesis. In order to make a contribution in this area, the thesis will further examine the legal framework for recognition and enforcement of foreign arbitral awards in Kuwait. Specifically, it will examine the extent to which Kuwaiti courts recognize and enforce foreign arbitral awards, as well as the reasons for the existing legal position.⁴⁸

The study will analyse the rules on recognition and enforcement in Kuwait, with the aim of assessing their effectiveness and the extent to which the relevant legal framework could be reformed to meet the global standards contemplated by the NYC⁴⁹ and related international regimes.

The study will also suggest and explore various recommendations for effective enforcement laws for foreign arbitral awards in Kuwait. In evaluating Kuwaiti domestic laws that govern arbitration (namely, secular laws and relevant Islamic laws),⁵⁰ benchmarks will be drawn from international law standards, principles, and perspectives as depicted in the NYC⁵¹ and other treaties binding on Kuwait. Since Kuwait is a signatory to these instruments, it is of great importance that they are applied with no rigidity of Islamic law.⁵² The lack of compliance with

⁴⁷ Civil and Commercial Procedures, art 130.

⁴⁸ Atiya (n 1) 417-521; Alsamdan (n 1) 66-160; Alqallaf (n 1) 150-152.

⁴⁹ NYC 1958.

⁵⁰ Abu Zaid Radwan, 'General Restrictions of International Commercial Arbitration' Part IV, Journal of Law and Sharia (Academic Publication Council, Kuwait University, April 1980) 9-69.

⁵¹ NYC 1958.

⁵² CCP.

rules and procedure therefore calls for substantive change in matters regarding the recognition and enforcement of foreign arbitral awards in Kuwait.

The study will also highlight the nature of arbitration in Kuwait, an Islamic state and a member of the Gulf Cooperation Council (GCC), and how this relates to international doctrines. The study will explore arbitration in Islam and elucidate Islamic perceptions of certain issues relating to arbitral awards for the purpose of enforcement. The thesis will aim to examine the religious, social, and economic justifications which underpin enforcement of arbitration awards in Islam and explain whether or not from this perspective the enforcement of a foreign arbitral award agrees with international standards, why this is so, and what can be done to improve the status quo. Since Kuwait is a member of the GCC and OPEC, it is important for Kuwait to meet the international standards in order to attract not only GCC states but also other countries that are oil-producing such as Iran, Nigeria, and Venezuela. Hence Kuwait must aim to become the best centre for dispute resolution under arbitration agreements and the NYC in order to be able to successfully enforce awards. Without recognition and enforcement of foreign arbitral awards, arbitration becomes meaningless.

Kuwait is a signatory to the NYC and a GCC member, however, it has not taken major steps towards enforcement of foreign arbitral awards, in its economic development. Although the United Arab Emirates (UAE) has recently joined the NYC (later than Kuwait), it has previously supported the NYC and Dubai is now a centre of arbitration within the Gulf states. For example, the UAE has established Dubai International Arbitration Centre (DIAC),⁵³ Dubai International Finance Centre-London Court of International Arbitration (DIF-LCIA),⁵⁴ Abu Dhabi Centre for Arbitration (ADCCCA),⁵⁵ Shirjah International Commercial Arbitration Centre (SICAC) and

⁵³ Dubai International Centre <<http://www.diac.aedias>> accessed 8 June 2016.

⁵⁴ <<http://www.difcbarbitration.com>> accessed 7 June 2009.

⁵⁵ Most transactions with the governmental entities based in Abu Dhabi prefer the ADCCCA as a dispute resolution hub: Khalil Mechantaf, 'Abu Dhabi Arbitration Centre Issues Its New List of Arbitration Rules' (Kluwer Arbitration Blog 10 Septempr 2013).

many other small arbitration centres.⁵⁶ At present the UAE's Civil Procedure Code supports enforcement of foreign arbitral awards, almost 20 provisions of the UAE Civil Code support foreign arbitral awards enforcement.⁵⁷ This is contrary to the Kuwait Civil and Commercial Procedure, which has not been revised to match international standards.

1.4 Importance of the Study

The thesis will specifically examine the issue of enforcing foreign arbitral awards in Kuwait. This is considered to be a particularly important aspect of international arbitration in view of the fact that the effectiveness of international arbitration is strongly linked to how these awards can be enforced. There is little point in establishing a robust system for arbitration if awards cannot be enforced within the appropriate jurisdictions.⁵⁸ Kuwait is a highly dynamic jurisdiction and needs to form international commercial relationships in order to sustain its long-term economic viability.⁵⁹ Therefore, it is argued that if international arbitration awards relative to Kuwait cannot be suitably enforced, this will impact on the desirability of entering into trade arrangements with companies or institutions based in Kuwait.⁶⁰

Furthermore, this study seeks to make meaningful contributions to scholarly literature with a view to offering guidance to practitioners and Kuwaiti policy makers. First, this study will explore the implementation of article V of the NYC,⁶¹ within the specific context of the Kuwaiti legal system, which up until today remains a subject of limited scholarly attention. To this extent,

⁵⁶ George Smith and Matthew Marrone, 'Recent Developments in Arbitration Law in the Middle East' Weinberg Wheeler (15 September 2010) 2 (stating that these events have strengthened Dubai position to bid as the International Centre Arbitration).

⁵⁷ UAE Civil Procedure Code Law No 11 of 1992, arts 203, 218, 235, 238.

⁵⁸ Abdul Hamid Al-Ahdab, *The Enforcement of Foreign Arbitral Judgments in Arab Countries* (Arbitration Center 2004) 60-74.

⁵⁹ Omar Abu Bakr Bakhshab, 'The Legal Concepts of the Saudi Arbitration System' (paper delivered at the International Conference for the Active Role of the Judiciary in Arbitration, Sharm El Sheikh, 2004) 80.

⁶⁰ Neil Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' (1996) 12 *Arb Intl* 28, 43; Xia (n 8).

⁶¹ NYC 1958.

the study is important as it contributes to building a body of knowledge on the realities and challenges of the implementation of article V of the NYC⁶² by the member states.

Second, this study critically reviews the longstanding but controversial view that article V of the NYC⁶³ is susceptible to abuse. Proponents of this view have often stated that by making provision for denial of recognition and enforcement of foreign arbitral awards,⁶⁴ Article V provides an opportunity for mischief by signatory states, enabling them to rely on the provision as a disguise for refusal of the enforcement of foreign arbitral awards within their territories.⁶⁵ By closely examining the denial of recognition and enforcement of foreign arbitral awards in the specific case of Kuwait,⁶⁶ the study aims to determine whether such a view is justified, given the Islamic jurisprudence of Kuwait.

Third, from a policy perspective, it is hoped that the findings of this study will offer to the Kuwaiti Government insights on whether, where, and the extent to which adjustments or reviews are needed for Kuwait's laws so that it may fulfil its obligations to recognize and enforce foreign arbitral awards under the NYC and other relevant international laws. Ultimately, the researcher hopes that the recommendations provided by this study will inform legislative, policy, and administrative reviews that the Kuwaiti authorities may need to take into account to meet their international law obligations, namely, to foster free trade and to promote effective dispute resolution mechanisms arising from international dealings.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Saad Badah, 'Enforcement of Foreign Arbitral Awards in Kuwait' (July-August 2014) *Malayan Law Journal* cxxviii.

⁶⁵ Al-Ahdab (n 58) 60-74.

⁶⁶ Yaqoub Sarkhouh, 'Validity Terms of the Arbitral Award in the Kuwaiti Legislation Compared with the Contents of Arbitration Treaties issued under the Auspicious of the UN' *Journal of Law* (Academic Publication Council, Kuwait University, September 1994) 23-56.

1.5 Scope of the Research

The study concentrates on the recognition and enforcement of foreign arbitral awards in Kuwait under the various governing judicial systems. However, some aspects of recognition and enforcement are subject to the national laws of the place of enforcement.⁶⁷ It is therefore necessary to extend the scope of study to the national arbitration laws of the GCC and other relevant international laws. The thesis makes reference to both GCC and non-GCC states' laws for illustrative and comparative purposes. Some foreign court decisions on aspects of the NYC on recognition and enforcement are unclear. On occasion, a prevailing view will emerge which suggests the correct interpretation of the NYC and points the way for GCC courts.⁶⁸

It is worth mentioning that the GCC states share the same historical, cultural, and economic (as well as some geographical) factors with Kuwait. However, the scope of the research will focus more on the Kuwaiti state and its regime on recognition and enforcement of foreign arbitral awards.

This study will also examine the hypothesis that regionalism can impact the framework for harmonization of international commercial arbitration, influencing the process of recognition and enforcement of foreign arbitral awards. The study attempts to analyse the legislative environment with regard to conducting recognition and enforcement of foreign arbitral awards in Kuwait.

Consequently this thesis seeks to identify the underlying factors that influence the attitude towards commercial arbitration law reform, as well as certain peculiar problems or limitations of the Kuwaiti regimes; preventing full participation in the reform to harmonize international commercial arbitration law.

The scope of the research can be justified on the basis that comparative law is not simply an academic exercise, but offers a genuine way to develop ideas and solutions. This must consider

⁶⁷ Kuwait Civil Code on Commercial.

⁶⁸ See chapter 7 for critical examination of enforcement of foreign arbitral awards in the GCC.

the socio-economic, political-cultural, and systematic differences of the respective jurisdictions.⁶⁹

1.6 Research Questions

The thesis will examine the following questions:

- 1- To what extent has the Kuwait Arbitration Act provided a ground for recognition and enforcement of arbitral awards?
- 2- What are the differences in recognition and enforcement of arbitral awards between GCC states and the NYC regime? If there are differences, how are they justified?
- 3- How satisfactorily does the current legislative regime for the recognition and enforcement of foreign arbitral awards work in Kuwait?
- 4- Does Kuwait have modern legislation on recognition and enforcement of foreign arbitral awards or is it still subject to Islamic laws?
- 5- Is there any need for reform of the Kuwaiti recognition and enforcement of foreign arbitral awards?

1.7 Research Methodology

In addressing the questions above, the doctrinal approach⁷⁰ will be deployed.⁷¹ Chapter 7 which deals with the GCC necessarily involves comparative analysis. The researcher chose this because

⁶⁹ Mark Van Hoecake, *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004), discussing the importance of comparative law.

⁷⁰ Pier G. Monateri (ed), *Methods of Comparative Law: Research Handbooks in Comparative Law* (Edward Elgar Publishing 2012) 145; Tushar K.Saha, *Textbook on legal Methods, Legal Systems and Research* (University Law Publishing) 4-5; William Putman and Jennifer Albright, *Legal Research, Analysis and Writing* (3rd edn, Cengage Learning 2013)3; Charles Chatterjee, *Methods of Research in Law* (2nd edn, Old Bailey Press 200) 6; Mike McConville and Wing H. Chui (eds), *Research Methods for Law* (Oxford University Press 2007)3-4; Robert Cryer, Tamara Hervey and Bal Sokhi- Bulley with Alexandra Bohm, *Research methodologies in EU and international law* , 2011 Hart publishing Ltd 1-75 ;Richard Posner, 'In Memoriam: Bernard D Meltzer (1914-2007)' (2007) 74(2) *University of Chicago Law Review* 435, 437.

Kuwait is a member of the GCC. The researcher has compared it with other GCC to show that Kuwait's arbitration regime needs to change and also to examine how other states enforce the NYC. The doctrinal approach is the systematic exposition of legal doctrine in the works of juristic commentators. This method is used to examine primary and secondary sources relevant to the subject area. Since Kuwait adheres to Islamic law or Sharia, it is necessary to examine the Sharia sources to find solutions for promoting international arbitration, recognition and enforcement of awards in Kuwait. The methodology entails a code of criteria to examine from an Islamic perspective by grounding the arguments in the fundamentals of the Quran⁷², *Sunna*⁷³ *Ijma*,⁷⁴ *Ijtihad*,⁷⁵ *Qiyas*,⁷⁶ and *Urf*,⁷⁷ (the primary sources of Sharia). It should be noted that a distinction must be made between Sharia and many of the technical legal rules derived from the *Quran* and *Sunna* through *fiqh*.⁷⁸

In Islamic jurisprudence, the great jurists⁷⁹ are Abu Hanifi, Maliki, Shafi and Ahmad ibn Hanbal (known as *Ulsul al fiqh*), who are also referred to as the knowledgeable ones.⁸⁰ All jurists unanimously agree that the *Quran* is the primary source of Sharia, although this statement does

⁷¹The doctrinal approach is directed at solving legal problems and it includes: assembling relevant facts in the identification of the legal issues, with a view to searching the law; reading background materials, for example text books, encyclopaedia, policy papers, law reform committees and documents, and journal articles; and allocating primary sources, mainly legislation or delegated legislation and case law which have to be synthesized in context before coming to a tentative conclusion.

⁷² Dr Muhammad Muhsin Khan and Dr Muhammad Taq-ud-Din Aihilala, 'The Noble Quram English Translation of the Meaning and Commentary, King Fahd Glorious Quran Printing Complex Madina, verse 35 of Surah 4 (An-Nisa) of the Holy Quran (2002) 112; the Quran is composed of 114 chapters, 6,616 verses and 77,934 words.

⁷³ Precedent set by prophet Muhammed; Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 Loyola of Los Angeles Intl & Comp L Rev 585.

⁷⁴ Means Community Consensus; Kutty (n73) 588.

⁷⁵ Independent reasoning or intellectual effort by a *mujtahid*; Kutty (n73) 586.

⁷⁶ This means reasoning with analogy to solve a new legal problem; Kutty (n73)586; Warde (36) 243.

⁷⁷ A custom can be used as a basis to build a body of law; Warde (36) 243.

⁷⁸ Abdul Ghafur Muslim, *Islamic Laws in Historical Perspective: An Investigation into Problems and Principles in the Field of Islamization*, 31 *Islamic Quarterly* 69 (1987). (*Fiqh* means a jurist; an expert in the field of law who possesses outstanding knowledge of revealed sources and methodology, and the intelligence to makes use of the basic sources through independent reasoning and the principles provided by sharia); Kutty (n73) 579.

⁷⁹ Oxford Dictionary of Islam which defines *Fiqh* as the human efforts to codify Islamic norms in practical terms and such human generated legislation is considered fallible and open to revision.

⁸⁰ Kutty (n73) 565-624.

not always occur in the works of the jurists.⁸¹ Arbitration has a long history under Sharia.⁸² The practice of arbitration is provided in the Quran in the context of matrimony: “*if you fear a breach between them twain (husband and wife), appoint two arbitrators, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation, indeed Allah hath full knowledge and is acquainted with all things.*”⁸³

It is on record that the prophet used to arbitrate whenever disputes arose. The international world of arbitration has been in doubt of Islamic scholarship on arbitration, due to its rejection of interest.⁸⁴ There is a problem with the jurists’ interpretation of arbitration; for example, Hanifi *fiqh* suggests that arbitration is closer to conciliation though some jurists maintain that an arbitrator has the same power as the judge. By contrast, Shafi *fiqh* argues that arbitrators’ status is lower than that of judges because their appointment can be revoked, while the appointment of judges’ cannot. Iman Shafi agrees with Hanifi *fiqh* that arbitration is closer to conciliation. Malik argues that a decision of an arbitrator is binding unless there is a fragrant injustice by the arbitrator.

The Hanbali theology of jurisprudence advances that an award is the same as a court judgement and that an arbitrator must have the same qualifications as the judge. The application of the NYC in Kuwait is problematic because scholars have to choose which line of reasoning to follow. This dilemma is particularly prominent in Bahrain due to the division of the *Sunni* and *Shia* sects. The *Shia* jurisprudence does not agree with jurists of *Sunni* jurisprudence. There is a need for Kuwait and GCC states to remedy such appalling problems and uncertainty to attract foreign investors, who demand access to an effective arbitration mechanism for solving disputes of an international

⁸¹ Zafar Ishaq Ansari, An Early Discussion on Islamic Jurisprudence: Some Notes on al-Raad, ala Siyar al-Awzai, In Islamic Perspectives: Studies in Honour of Malwlanas Sayyid Abul Ala Mawdudi 147-150; Kutty (n73)584.

⁸² Abdul Hamid El- Ahdab, Arbitration with the Arab Countries (2nd edn 1999) 11-12.

⁸³ The Holy Quran, An-Nisa 4:35, Yusuf Ali Translation.

⁸⁴ Lord Asquith in Petroleum Development (Trucial Coast) Ltd.v. Sheikh of Abu Dhabi, INT L and COMP.L.Q.247,250-51(1952). Where he said that there is no general practice of arbitration in sharia. The same arrogance was evident in the case of Ruler of Qatar v. International Marine Oil Co Ltd 20 ILR 534 (1953), where the judge held that Islamic law does not have any principles to interpret arbitration agreement; Saudi Arabia v. Arab Am. Oil Co.(ARMCO), 27 ILR 117 (1963).

nature. Furthermore, in its doctrinal approach, this thesis examines the regional conventions of the GCC. The Arab League is composed of eighteen countries, namely, Tunisia, Morocco, Algeria, Libya, Iraq, Jordan, Lebanon, Saudi Arabia, Sudan, Oman, Qatar, UAE, Yemen, Bahrain, Egypt, Kuwait, Palestine and Syria.⁸⁵

There is a need for Kuwait to open its doors to non-Arabic countries in order to match international business. Qatar and UAE are members of the Arab League but they have also opened doors to non-Arabic states. Such states have become international centres of arbitral disputes. The Riyadh Convention is another regional convention that is composed of only six GCC states,⁸⁶ namely Saudi Arabia, Kuwait, Qatar, UAE, Bahrain and Oman. Although these countries are very rich with a GDP ratio of 2.88 of the world economy, Kuwait should not limit its capacity to these states if it is to remain competitive in the global market.

The recent slump in oil production is a signal that Kuwait needs to plan for its economy in services other than oil. This can only be achieved if it opens its doors to the outside world. The Amman Arab Convention on Commercial Arbitration⁸⁷ led to the founding of the Arab Centre for Commercial Arbitration in Rabat, Morocco.⁸⁸ The purpose of which is to ensure the resolving of disputes within Arab countries and also Arab heritage in Arabic states.⁸⁹ The Amman Convention was a solution to western dominance over arbitration of Arabic disputes.⁹⁰ In other words, the Amman Convention has established new laws and treaties supporting Arab and international arbitration effective from January 10th 1983.⁹¹

⁸⁵ <<http://www.aia-adr.com/blank-c10t5>> accessed 30 December 2016.

⁸⁶ Riyadh Arab Agreement for Judicial Cooperation, 6 April 1983.

⁸⁷ Fourchard, Gaillard, Goldman on International Commercial Arbitration, the Amman Convention, (Kluwer law International 1999) 148.

⁸⁸ The Amman Arab Convention on Commercial Arbitration, Arab Law Quarterly Vol.7 No.1 (1992) 83-92.

⁸⁹ Jalal El Ahdab, The Arab (Amman) Convention on Commercial Arbitration (1987), World Arbitration Reporter 2nd edition Vol.4. Treaties and Bilateral and Regional Agreements, Arab 1-29.

⁹⁰ Saudi Arabia v. Arab Am. Oil Co (ARAMCO), Ad hoc Arbitration August 23 1958, International Law Review 117, 179; Ruler of Qatar v. International Marine Oil Co. Ltd.1953, 20 International Law Review 545.

⁹¹ The Amman Convention1983.

The preamble of the Amman Convention explains the basis of the agreement. Arab states were convinced of the need to conceive unified Arab Rules on Commercial Arbitration rules. The objective was to obtain a fair balance in the matters of dispute resolution involving international commercial contracts as well as wishing to find a solution to the disputes.⁹² The irony with this convention was that it was exclusively based on the French Model. The scope of its application is also too restrictive to Arab states.⁹³ However, the courts are given wide discretion in enforcement of arbitral awards within member states. The convention does not address the position of recognition and enforcement of foreign arbitral awards, a contentious issue of discussion in this thesis.⁹⁴

The NYC is an international mechanism that was adopted to promote enforcement of foreign arbitral awards by signatory states. However, despite being a signatory state, Kuwait has maintained its reciprocity instead of the universality of the convention. It has not enforced the entire NYC due to having a reservation.⁹⁵ The Kuwait Commercial Civil Code (CCP) is draconian in application of the Convention. The CCP does not avail any autonomy to the parties.⁹⁶ The NYC provides automatic recognition of awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought. The convention gives priority to foreign arbitral awards over domestic awards.⁹⁷ The irony in

⁹² Walid Ben Hamida, The First Arab Investment Court Decision, *Journal of World Investment* 2006, 700.

⁹³ Case No. 1/2K, 21 August 2007, *Journal of Arab Arbitration* 2009 Issue No.2, 426, Comments by Walid Ben Hamida.

⁹⁴ The Amann Convention arts 34 (1), 35, 31 (2) - (4) 33, and 27.

⁹⁵ NYC art I (3).

⁹⁶ The Code of Civil and Commercial Procedure art 177, whereby the composition of the Tribunal is monopolised by the Judiciary. The tribunal is set by the ministry of justice, and the members of the panel two are judges and one is an arbitrator. This indeed against the aims of arbitration proceedings for parties to be in control that is the reason as to why they avoid litigation of courts; NYC art II (3), which provides autonomy of the parties, whereby a court that has seized an arbitral dispute, should refer it to arbitration.

⁹⁷ NYC art II (3).

Kuwait⁹⁸ is that there is more support for domestic awards than foreign awards,⁹⁹ which means that the aims of the NYC are breached.¹⁰⁰

Although Article 1(3) of the NYC provides reciprocity for a ratifying state, Kuwait should withdraw from this principle in order to limit its public policy approach¹⁰¹ to foreign arbitral awards that are not given support for enforcement.¹⁰² The Kuwait CCP provides that an award to be enforced shall be in Arabic, or, if it is in English it should be interpreted in Arabic.¹⁰³ The translator must be a judge who is experienced in the Kuwait legal system.¹⁰⁴ This hinders foreign investors who would be willing to invest in Kuwait but due to the nature of the draconian arbitration, would rather not use Kuwait; choosing instead centres such as Paris, Qatar, USA, Hong Kong or UAE.¹⁰⁵

In Kuwait, there is no difference between arbitration and courts, since all arbitration composition is monopolised by the courts,¹⁰⁶ This thesis is examining the extent to which the CCP of Kuwait is compatible with the NYC, in order to find solutions to this problem, enabling Kuwait to become an international centre for dispute resolution. This will help attract foreign investors who will be assured that when disputes arise, they will be able to resort to arbitration. Awards will be given effect by the courts with no review or lengthy conflicts emerging between arbitration and litigation. It should be noted that, although Kuwait is a member of GCC, prominent countries like UAE, Qatar, and Oman have no reservation. Therefore, this thesis calls for the withdrawal of reservation from Saudi Arabia, Bahrain and Kuwait, in order to enhance the GCC and GDP ratio.

⁹⁸ CCP art 185, an award to enforced is subject to review of the Court to be binding; CPP art 199.

⁹⁹ Ibid art 200.

¹⁰⁰ NYC art I.

¹⁰¹ NYC art V (2) (b), on public policy a ground of refusal of recognition and enforcement of a foreign arbitral award.

¹⁰² CCP 199.

¹⁰³ Ibid 183.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 185 and 199.

¹⁰⁶ Ibid 177 and 200.

The thesis draws on a wide range of publications, including books,¹⁰⁷ journal articles,¹⁰⁸ Internet sources,¹⁰⁹ conferences,¹¹⁰ and seminar papers, that have been drafted on Kuwait arbitration or international arbitration with regards to enforcement of foreign arbitral awards.

The views of commentators and academic scholars on enforcement of foreign arbitral awards in different jurisdictions are equally and critically examined as sources of insight for the study.¹¹¹ A

¹⁰⁷ Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 155; Redfern and Hunter (n 33) 510-561; Gary B Born, *International Arbitration: Cases and Materials* (Kluwer Law International 2011) 1125-1205; Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edn, Kluwer Law International 2011) 305-336; Anton G Maurer, *The Public Policy Exception under the New York Convention: History, Interpretation and Application* (Juris 2012) 58; Georgios Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) 300-301; Moses (n 45) 202-219; Atiya (n 1); Alsamdan (n 1) 66-160; Alqallaf (n 1) 150-152; Abdulbagi (n 42) 51; Walli (n 42) 89; Sultan Rashed Al Atifi, 'Development of Arbitration System in the State of Kuwait (Judicial and Voluntary Arbitration) in accordance with Law No. 11 of 1995 and Civil and Commercial Procedures Law No. 38 of 1980 and 1995' (Ministry of Justice, Kuwait) 2-91; Raghab (n 42)464; Alyaqout (n 42) 50.

¹⁰⁸ Masheal Abdul-Aziz Alhajeri, 'A Critical Approach to the Kuwait Law of Judicial Arbitration No 11 of 1995: with reference to the UNCITRAL Model Law On International Commercial Arbitration' (2000) 15 Arab LQ 1-24; Sarkhouh (n 66); Ahmad Almusadah, 'Independence of Commercial Arbitration Condition from the Relevant Original Contract, Descriptive, Analytical Comparative Study' [December 2013] Journal of Law (published by the Academic Publication Council, Kuwait University) 272-307; Radwan (n 50); Abu Zaid Radwan, 'General Restrictions of International Commercial Arbitration' Part III (June 1979) Journal of Law and Sharia (published by the Academic Publication Council, Kuwait University) 29-65; Abu Zaid Radwan, 'General Restrictions of International Commercial Arbitration' Part I (June 1977) Journal of Law and Sharia (published by the Academic Publication Council, Kuwait University) 15-54; Ahmad Almelhim, 'Commercial Arbitration Contract Concluded Between Arbitrators & Litigant Parties' [June 1994] Journal of Law (published by Academic Publication Council, Kuwait University) 185-263; Ramzi Seif , 'Civil and Commercial Procedures Law in accordance with the Kuwaiti Law' (Kuwait University, Faculty of Law Journal 1974) 31-43; Ahmed Alsamdan, 'The Applicable Law under International Commercial Arbitration [March 1993] Journal of Law published by Academic Publication 173-212; Azmi Abdulfatah, 'Procedures of Repelling Arbitrators under Kuwait Procedures Law (Commenting on Award)' Journal of Law published by Faculty of Law, Kuwait University December 1984) 227-263; azemi Atiya, 'Technical Expertise in Arbitration Proceedings: A Study of the Kuwaiti Law compared to French and Egyptian Arbitration Laws' (June 2009) Journal of Law, Kuwait University 13-67; Ahmed Alsamdan, 'Application of Foreign Arbitration Awards in Kuwait' (March 1998) Journal of Law, Kuwait University 13-80.

¹⁰⁹ OPEC, 'Member Countries' <http://www.opec.org/opec_web/en/about_us/25.htm> accessed 5 October 2014; MP, 'Country Focus: Arbitration in the Middle East' (MP, 15 March 2006) <http://www.mpmagazine.com/display.asp?articleid=CE4288F6-3701-4C13-8E29-C94BC0EAD513&eTitle=Country_focus_Arbitration_in_the_Middle_East> accessed 17 August 2013; Shaistah Akhtar, 'Arbitration in the Islamic Middle East: Challenges and the Way Ahead' (ICLG, 10 March 2008) <<http://www.iclg.co.uk/khadmin/Publications/pdf/2201.pdf>> accessed 28 August 2011; Shaistah Akhtar, 'Enforcement of Awards under Inter-Arab Conventions' <http://www.lac.com.jo/_private/pdf/Enforcement%20of%20Awards%209-8.pdf> accessed 29 August 2011; Kuwait Chamber <www.kcci.org.kw> accessed 9 October 2014.

¹¹⁰ Conference on Enforcement of Arbitral Awards in GCC Countries (Kuwait and Oman) held on 12 August 2012 and 3 March 2013.

review of relevant literatures is conducted to give the researcher different perspectives on arbitration and arbitral awards using various media ranging from journal articles to professional websites and online scholarly articles.¹¹² These are important due to their contribution to policies and legal regulations¹¹³ in both domestic and international law.¹¹⁴ Based on the review of the literature, it should be noted that, apart from the articles by the researcher, there are no other studies on the enforcement of foreign arbitral awards under the NYC in Kuwait.¹¹⁵

1.8 Literature review

Authors like Redfern and Hunter,¹¹⁶ a known scholar, have not addressed recognition and enforcement of arbitral awards in Kuwait, but rather their international perspective in the United States, China, and the United Kingdom. Fawcett¹¹⁷ partially addressed enforceability of awards annulled in their state of origin. There is no mention of recognition and enforcement of foreign arbitral awards in GCC states. Moses¹¹⁸ partially addresses article III of the Convention as being automatic to all member states in regard to enforcement; she does not, however, address the position of Islamic jurisprudence as regards Kuwait. Born, a leading author on arbitration, makes

¹¹¹ Ali Yasrilmak, 'Arbitral Provisional Measures' (Thesis, Queen Mary University of London 2007); Born, *International Arbitration: Cases and Materials* (n 107) 1125-1205; Redfern and Hunter (n 33) 510-561; *Merrilynch v Behbehani* [1985] Case No 859/M; *Government of State of Kuwait v American Independent Oil Company (Aminoil)* (Award of 24 March 1982) (1982) 21 ILM 976.

¹¹² Alhajeri (n 108).

¹¹³ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions Nos 43, 44, 174, and 179.

¹¹⁴ NYC 1958, art V, UNCITRAL Model Law, ICSID, the Arab League, and the Riyadh Convention.

¹¹⁵ Badah (n 64) ; Saad Badah, 'Incapacity of Parties and Invalidity of an Arbitration Agreement as Grounds for Refusal of Recognition and Enforcement in Kuwait'(July-August 2014) *Malayan Law Journal* ix; Saad Badah, 'Rules Relevant to Recognition and Enforcement of Arbitral Awards in Kuwait (2015) 11(2) *Asian International Arbitration Journal* 117; Saad Badah, 'Grounds for Refusing Recognition and Enforcement of a Foreign Arbitral Award Which Was Set Aside Abroad' (2015) 41(1) *The North Carolina Journal of International Law* 1-82; Saad Badah, 'Enforcement of Foreign Arbitral Awards in GCC States Countries: Focus on Kuwait (November 2014) 3(1) *International Law Research* , Canadian Centre for Science & Education 24. All these articles adduce that the researcher is knowledgeable on the topic of enforcement in Kuwait.

¹¹⁶ Alan Redfern and Martin Hunter, *International Arbitration* (OUP 2009) 585.

¹¹⁷ Petrochilos (n 107) 299-301.

¹¹⁸ Moses (n 45) 202.

no mention in his various books on Kuwait of enforcement of foreign arbitral awards.¹¹⁹ It is of great importance to note that the researcher of this thesis is the only authority on enforcement of foreign arbitral awards in Kuwait and GCC states, according to the articles submitted to international journals.¹²⁰

Samir examines the domestic laws of Middle Eastern countries including Egypt.¹²¹ He discusses how the countries in the region, namely Egypt, Lebanon and Syria, have viewed regional and international arbitration in their domestic legislations and the decisions of the domestic courts, in conjunction with relevant treaties and conventions that the countries have ratified and committed to.

This research covers a large amount of arbitration practice in the Middle East and Arab countries. The author also makes references to some specialized work to establish his point. However, the enforcement of foreign arbitral awards in Arab states is partially covered. This current study fills a gap by analysing enforcement of foreign arbitral awards in Kuwait. For example, Khaled Alyaout in his book *Commenting on Arbitration Law in the Kuwait Legislation*, does not deal with arbitration, only arbitration according to Islamic jurisprudence.

Another prominent author on arbitration, Atiya, in his Arabic book *The Arbitration System in Kuwait*, partially discusses enforcement of domestic arbitral awards. There is no scholarly research on international arbitration and enforcement of foreign arbitral awards. This makes this thesis of great importance, since it examines and offers solutions in regard to enforcement of foreign arbitral awards.¹²²

Abdul Hamid El-Ahdab examines arbitration legislations of Arab states, underscoring fundamental legal jurisdictional systems and the role of arbitration in the field of foreign

¹¹⁹ Born, *International Arbitration: Cases & Materials* (n 107) 1125.

¹²⁰ Badah (n 115)

¹²¹ Samir Saleh, *Commercial Arbitration in the Arab Middle East* (2nd edn, OUP 2006).

¹²² Atiya (n 1) 417-521.

investment within the Arab nations.¹²³ The book covers the methods of formation of arbitration laws with comparative examples of such laws. However, the analysis of arbitration of foreign investment and enforcement in Kuwait has only been superficially examined compared to the other relevant states. Hence, there is a need for a deeper analysis of the recognition and enforcement of foreign arbitral awards in Kuwait.

1.9 Structure of the Thesis

Structurally, the thesis comprises seven chapters, each with a distinctive but closely related contribution to the main purpose of the study so as to ensure a systematic argument in addressing the research questions.

Chapter 1 presents an introduction to the thesis and sets out the main problem in enforcement of foreign arbitral awards, the research questions that will be examined in the chapters of the thesis, doctrinal and comparative methodology, the aims and objectives of this research, the importance of this study, the scope of the research, literature review, and examination of the structure of the thesis in chronological order.

Chapter 2 examines the legal framework in Kuwait, focusing on the Kuwait Constitution, the supremacy of Islamic Law, the guarantee of access to justice, statutory provisions of the Code Civil and Commercial Procedure, the Code of Civil Procedure, the Civil and Commercial Procedure Law. Arbitrators and their conduct in arbitration, arbitration and awards, enforcement of appeals and nullification, judicial arbitration, provisions of the Judicial Arbitration Law, arbitration under Islamic theology, arbitration, and the four schools of theology, together with a conclusion of the chapter.

Chapter 3 examines the international treaties as sources of recognition and enforcement of foreign arbitral awards in Kuwait: the NYC,¹²⁴ the reservation of the NYC¹²⁵ in Kuwait, and the

¹²³ El-Ahdab and El-Ahdab (n 107).

¹²⁴ 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) NYC 1958.

GCC¹²⁶ conventions (for example, the Riyadh Convention,¹²⁷ the Arab League Convention on Enforcement of Judgments 1952,¹²⁸ and the Jordan-Amman Convention on Commercial Arbitration 1987).¹²⁹ The chapter will also provide a conclusion or summary.

Chapter 4 examines the role of Kuwait courts in the enforcement of foreign arbitral awards, and will provide an explanation or definition of a foreign arbitral awards by the courts of Kuwait, in comparison to the NYC. The Kuwaiti party autonomy doctrine, the procedure requirements for enforcement of a foreign arbitral awards in Kuwait, recognition and enforcement of foreign arbitral awards in Kuwait, and foreign investment in Kuwait will also be examined. Given that many corporations have investments in Kuwait, it is of great importance that this thesis examines how those investments will be secure in the event that they seek enforcement of their awards in Kuwait. The effects of arbitral awards, and the importance of recognition and enforcement of arbitral awards. The chapter will conclude with a summary.

Chapter 5 examines the grounds for refusing recognition and enforcement of foreign arbitral awards under the NYC in Kuwait. The first ground, incapacity of parties is examined, including the nature of persons, successfully resisting an arbitration agreement. Legal provisions of invalidation of arbitration agreement, legal provisions governing substantive invalidity, legal provisions governing formal invalidity, formal grounds for invalidating an arbitration agreement, and substantive grounds for invalidating an arbitration agreement. The second ground is that the arbitral proceedings were unfair and also addresses the composition of the arbitral tribunal. The chapter will examine the lack of due process and applicable law, proper notice, proper notice standards, composition of the arbitral tribunal, and the arbitration proceedings. The third ground for refusing an award is where it was set aside abroad. Non-binding award under Article V(I) (e)

¹²⁵ NYC, art (I)(3).

¹²⁶The Gulf Cooperation Council (GCC) is a political and economic alliance of six Gulf States (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. Founded on 26 May 1981, the aim of this collective is to promote coordination between member states in all fields in order to achieve unity.

¹²⁷ League of Arab States, Riyadh Arab Agreement for Judicial Cooperation, 6 April 1983.

¹²⁸ Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards 1952.

¹²⁹ The Arab (AMMAN) Convention on Commercial Arbitration (1987).

of the NYC. This ground examines final awards under other Kuwaiti legal regimes or conventions ratified by Kuwait excluding the NYC. Further, the thesis examines the suspended awards and the adjournment of enforcement proceedings. The chapter will conclude with a summary.

Chapter 6 examines refusal of recognition and enforcement on grounds of non-arbitrability and public policy. The thesis will examine the arbitrability of an award, non-arbitrability, the concept of non-arbitrability, and what constitutes a non-arbitrable dispute in the Kuwaiti jurisdiction; predominantly bankruptcy, intellectual property disputes, commercial agency, administrative contracts, unit trusts, and competition claims. The thesis will then examine public policy in detail, by assessing the choice of law regarding public policy. The implementation standards of the public policy exception, the difference between national and international public policy, lack of award justification, arbitration bias, interest or *riba*, corruption, obligatory rules, and public policy. The chapter will conclude with a summary.

Chapter 7 addresses the enforcement of foreign arbitral awards in GCC. This chapter examines the Kingdom of Saudi Arabia, court structure, the law governing arbitration, and the recognition and enforcement of arbitral awards in Saudi Arabia, where foreign investment awards will be examined. It will also explore the application and the effects of the NYC on enforcement of foreign arbitral awards and investment arbitration in Saudi Arabia. The Kingdom of Bahrain will be examined as a GCC state in the context of its judicial framework, the law governing arbitration, the enforcement of foreign arbitral awards, and the recognition and enforcement of foreign arbitral awards. The thesis will also examine Qatar, another GCC state, on the recognition and enforcement of foreign arbitral awards. The thesis will further examine the UAE's judicial framework, arbitration and the rules governing enforcement of foreign arbitral awards, the recognition and enforcement of foreign arbitral awards in the UAE. The thesis further examines Oman on recognition and enforcement of foreign arbitral awards. A summary will be provided at the end of the examination of this chapter.

Chapter 8 summarizes the research of all the chapters and offers conclusions and relevant recommendations. The thesis opens the door for future researchers in this area. The thesis provides contribution to knowledge, since the researcher is the first and only person to carry out this research in Kuwait regarding the enforcement of foreign arbitral awards in Kuwait. The thesis will be a yardstick for the recognition and enforcement of foreign investment disputes. The thesis undertakes a comparative discussion of the GCC states. How progressive the UAE has been in recognizing the recognition and enforcement of foreign arbitral awards by limiting foreign arbitral awards strictly to NYC; despite the fact that the UAE has not ratified the UNCITRAL Model Law. How Saudi Arabia trails behind in enforcement of foreign arbitral awards. The thesis argues that Kuwaiti arbitration laws need urgent reform.

CHAPTER 2: THE LEGAL FRAMEWORK ON RECOGNITION AND ENFORCEMENT IN KUWAIT

2.1 Introduction

This chapter seeks to examine the relevant rules and laws relating to the recognition and enforcement of foreign arbitral awards in Kuwait by identifying and analysing pertinent national laws applicable to Kuwait. The main areas of concern in the Kuwait Constitution will be examined, namely: The Kuwait Constitution, the supremacy of Islamic law, guarantee of access to justice, the Civil Code and the Code of Civil Procedure, Civil and Commercial Procedure Law, arbitrators and their conduct in arbitration proceedings, arbitration and arbitral awards, enforcement, appeal and nullifications, judicial arbitration and provision of the Judicial Arbitration Law.

The chapter will further examine the Islamic schools of theology in support of the arbitration process. The main schools of theology examined are: The Imam Maliki School of theology, the Imam Shafi School of theology, the Imam Hanbali School of theology and the Imam Hanifi School of theology.

Kuwaiti laws governing arbitration are spread across a myriad of statutory laws (Islamic law, international law, and various institutional regulations).¹ However, the general philosophy of their interpretation are informed by Islamic principles and to a limited extent, the Islamic laws and the implications of these specific provisions for the recognition and enforcement of arbitration agreements and arbitral awards are further analysed.

¹ Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (Arab Renaissance House 1999) 66-160; Azemi Atiya, *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law* (University of Kuwait 2012) 417-521; Ahmad Alsamdan, 'Application of Foreign Arbitration Awards in Kuwait' (March 1998) *Journal of Law, Kuwait University* 13-80; Ahmad Almelhim, 'Commercial Arbitration Contract Concluded Between Arbitrators & Litigant Parties' [June 1994] *Journal of Law* (published by Academic Publication Council, Kuwait University) 185-263; Ramzi Seif, 'Civil and Commercial Procedures Law in accordance with the Kuwaiti Law' (Kuwait University, Faculty of Law Journal 1974) 31-43.

2.2 The Kuwaiti Constitution

The Constitution of the State of Kuwait² makes no specific reference to arbitration.³ It should be noted that the first official reference to arbitration in Kuwaiti legislation was in the Regulation of Internal Commerce in 1938, repealed by Law No 2 of 1960. This provided for the establishment of a commission of commerce.⁴ The main duty of the commissioner was to resolve disputes between merchants through applicable arbitration laws. In addition, the Ottoman Law applied in Kuwait in 1938,⁵ which provided for arbitration, until repealed by a Decree issued in the Civil Code. The 1960 Constitution expanded and provided for arbitration,⁶ which remained in force⁷ until it was repealed by the present law governing arbitration. Since Kuwait is a signatory to the New York Convention (NYC) and has ratified it,⁸ it is of great importance that the Kuwait commercial laws should explicitly make provision in matters pertaining to arbitration and recognition and enforcement of foreign arbitral awards. The Constitution sets out certain principles that have a bearing on the interpretation of arbitration agreements, including the recognition and enforcement of arbitration agreements and arbitral awards. The value of the Constitution cannot be overlooked in assessing the legal position in recognizing and enforcing arbitral awards in Kuwait,⁹ as it offers key principles that are paramount to the application and interpretation of laws and legal instruments by Kuwaiti public authorities. Key among the constitutional principles is the supremacy of Islamic law¹⁰ and the duty of the state to guarantee access to justice.¹¹

² Kuwaiti Constitution, promulgated on 11 November 1962.

³ *ibid.*

⁴ Yaqoub Sarkhouh, *The General Basis of International Commercial Arbitration* (1st edn, publisher 1996) 28.

⁵ Medjella Al-Adlieah, arts 1841-1846.

⁶ Civil and Commercial Procedures Law No 6/1960 (CCPL).

⁷ 1960 Constitution, ch III, arts 254-266.

⁸ Kuwait became a member of the NYC in 1978.

⁹ *ibid.*

¹⁰ Kuwaiti Constitution promulgated on 11 November 1962 ch I.

¹¹ *ibid* ch V.

The researcher however, argues that there is a lacuna in the Constitution of Kuwait with regard to arbitral recognition and enforcement, as it provides no clear procedure or mechanism that courts must follow when dealing with arbitral recognition and enforcement.¹²

Hence, the study will attempt to explain the reasons as well as possible solutions to this, so that both the domestic and foreign users of arbitration in Kuwait are informed of the problems that arise during recognition and enforcement. This examination will attract the Kuwait arbitration centre to be a champion not only within the GCC states¹³ but also within non-Islamic states for example, the United Kingdom, the USA, France, Hong Kong, South Africa, Malaysia, China, Brazil, Japan, Canada, Germany, and India, which have international arbitration centres that dominate international business, in resolving arbitral disputes and enforcement of foreign arbitral awards.

2.3 Supremacy of Islamic Law

Chapter I of the Kuwaiti Constitution declares that Kuwait is an Islamic state, and provides that Islamic law is the main source of law.¹⁴ Islamic law is sourced from the provisions of the Quran,¹⁵ as it is believed that it emanates from God. All jurists, academics, judges, students and lawyers refer to the Quran when deciding cases in Kuwait; in other words, it is like a Constitution in Kuwait. However, in understanding the Quran, attention must be given to the traditions of the Prophet Muhammad (May Peace and Mercy be upon Him), which are referred to as *Sunna* or *Hadith*, as secondary sources of Islamic law.¹⁶

¹² :ibid

¹³ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

¹⁴ Kuwaiti Constitution, promulgated on 11 November 1962 art 2.

¹⁵ Sayed Mahmoud, *Arbitration System: Comparative Study between Islamic Law & Kuwait & Egyptian Legislative Law* (Bookshop House Est 2004) 69-217.

¹⁶ Verse 35 of Surah 4 (An-Nisa) of the Holy Quran.

In other words, both the Quran and the *Sunna* are sources of Islamic law; both encourage parties to arbitrate in a good manner, whenever there are problems. It should, however, be noted that there is a conflict between Islamic law and circular law in regard to arbitration, especially when it comes to recognition and enforcement of awards. For example, under the NYC awards are subject to interest (*riba*), and are enforced by domestic courts, contrary to the Islamic law of Kuwait, an award will not be recognized and enforced, since interest under Islamic theology (*Madhhab*) teachings is prohibited in Islam. Such conflicts between circular and Islamic law cause impediment in regard to recognition and enforcement of foreign arbitral awards in Kuwait. There is a need to harmonize circular law and Islamic law to meet international standards. The irony is that the harmonization may take too long since in theory it may work but in practical terms it is subject to Islamic dominance in Kuwait and therefore it may not work. The researcher argues that the concept of arbitration is well grounded in the Quran; for example, the Holy Quran requires all Muslims to comply with their contractual obligations:

“O ye who believe! Fulfil (all) obligations. (Ya ayuhal-ladhin a manu awfu bil uqud.)”¹⁷

This authority from the Quran orders scholars or Islamic jurisprudence to enforce agreements between parties. In disputes where one party is a non-Muslim, choosing a non-Muslim Sharia, is recognized according to Imam Maliki, Hanbali, and Shafi schools of theology.¹⁸ Recourse to a non-Islamic law is permitted in Islamic jurisprudence as long as the rules to be applied to the contract do not violate the express provisions of the Quran and the traditions of the Prophet (*Sunna*).¹⁹ In application of the NYC, it is very important that Kuwait meets its obligations.²⁰ National courts should not interfere with supranational arbitral awards under the NYC or ICSID

¹⁷ The Holy Quran Surat Almaid 5:1 English Translation of Yusuf Ali.

¹⁸ Abu Hanifi, Badaei El Sanaei, 132 and et seq; Abu Yssef, Badaei, 132 and et seq; Imam Malik, Mawaheb Al Jalil, vol III, 355; Imam Shafi, Al Muhazab, vol II, 358; Imam Ibn Hanbal, Al Mughni, vol X 439; Al Charh AlKabir, vol IV 383.

¹⁹ *ibid.*

²⁰ *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1984] 23 ILM 1071.

conventions except at the execution stage.²¹ Kuwaiti courts should follow the NYC's straightforward definition of foreign arbitral awards, defined as 'an award made in the territory of a state other than the state where the recognition and enforcement of such awards are sought'.²² In other words, the domestic courts' definition should be limited to domestic arbitration and conventional treaties of only GCC states.²³ One cannot assume that non-Muslim parties are also not citizens or residents since²⁴ there are non-Muslims residents and citizens in Islamic countries including Kuwait and GCC states.²⁵ Based on the facts above the researcher argues that since foreign arbitral awards are supranational,²⁶ the distinction between Islamic scholars would be irrelevant, as domestic courts would not have the jurisdiction to refuse enforcement of a foreign arbitral award or even to set aside. For example, in the case of *Saipem SPA v The Republic of Bangladesh*,²⁷ the domestic court interfered with the ICC arbitration by not following the ICC tribunal. The ICC court held that Bangladesh had no jurisdiction in respect of supranational conventions, and that their intervention amounted to expropriation.²⁸

It involves two people sitting together or bringing a problem to an arbitrator to act as judge.²⁹ This general provision may have far-reaching implications for the administration of justice, especially in the context of the recognition and enforcement of foreign arbitral awards because

²¹ *Jan de Nul nV Dredging International nV v Arabic Republic of Egypt*, ICSAID Case No Arb/04/13 November 2008.

²² NYC, art VII.

²³ Abu Zakaria Al- Ansar, *Asl Al Mataleb Fi Charch Raud El Taieb*, vol IV 204 et seq, also cited in Abdul Hamid El- Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edn, Kluwer Law International 2011) 50.

²⁴ *Lander Company Inc v MMP Investments Inc* 107 F 3d 476, 477 (7th Cir 522 US 811 (1997); Abu Yusef, Badaei El Sanaei, 132 and et seq (Sharia applies to all residents and none Muslims).

²⁵ Albert Jan Van den Berg, when is an arbitral award Nondomestic Under New York Convention of 1958? (1985) 6 Pace L Rev 25. at 47.

²⁶ *Ceskoslovensska Obchodni Banka, AS (CSOB) v The Slovak Republic*, ICSID Award No 97/4 decision on objection on jurisdiction (24 May 1999).

²⁷ *Saipem SPA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07 <<http://www.icsid.worldbank.org/ICSID>> accessed 7 June 2016.

²⁸ Felipe Suescum de Roa, Comments on the ICSID Award Saipem v Bangladesh: would its rationale be applicable in futures cases? International Institute for Conflict Prevention and Reslolution 2011 <<http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/714/Comments-on-the-ICSID-Award-Saipem-v-Bangladesh-Would-its-rationale-be-applicable-in-future-cases-2011-Writing-Contest-Winner.aspx>> accessed 10 June 2016.

²⁹ Irshad Abdal-Haqq, 'Islamic Law An Overview of its Origin and Elements' in Hisham M Ramadan (ed), *Understanding Islamic Law From Classical to Contemporary* (AltaMira Press 2006) 40.

the Kuwaiti Constitution is highly reliant on the Quran. This implies that in the event of a conflict of laws between secular and Islamic law, Islamic law shall prevail.³⁰ Thus, commercial transactions or agreements that may have been lawfully concluded under the secular law of another jurisdiction may be rendered void or unenforceable on account of their inconsistency with Islamic law. This position would hold even if one or all of the parties are not conversant with Islamic law.

2.4 Guarantee of Access to Justice

Chapter V of the Kuwaiti Constitution broadly grants the right to access justice by providing that every party reserves the right to litigation.³¹ However, the Constitution does not delve into the formalities and procedures of access to justice; these are dealt with in other parliamentary enactments.³² It is also silent on the nature of justice and the kind of litigation contemplated,³³ whether judicial or alternative dispute resolution (ADR).³⁴ The provisions of this chapter are relevant to the recognition and enforcement of arbitral awards, since such recognition and enforcement signify the state's commitment to guarantee to every person a means of enforcing their rights and access to justice.

Given the fact that arbitration is an established ADR mechanism and the fact that a person has access to justice, chapter V of the Constitution paves the way for the recognition of any arbitral award that is made in compliance with the law.³⁵

Furthermore, the guarantee of the right of access to justice determines the standards for ordinary legislation that seeks to regulate any aspect of arbitration. The researcher agrees that such laws must serve to promote the practical realization of this right; failure to do so would render the

³⁰ Mahmoud (n 15).

³¹ Kuwaiti Constitution, promulgated on 11 November 1962, arts 162-66.

³² *ibid.*

³³ Sayed Mahmoud, *Specialty of Judicial Arbitration: Combined Arbitration in accordance with Kuwait Law No 11 of 1995* (Bookshop House Est 1997) 195-213.

³⁴ *ibid.*

³⁵ Kuwaiti Constitution, promulgated on 11 November 1962, arts 162-66.

legislation unconstitutional. In this respect under the doctrine of constitutional supremacy,³⁶ any law or administrative directive that is inconsistent with the Constitution becomes null and void, to the extent of its inconsistency. In order for the NYC to be applied more in Kuwait, there is a need to enact or pass a bill on recognition, so that the Convention becomes part of the domestic laws of Kuwait. This will support the notion of constitutional supremacy in Kuwait and provide a solution to the ambiguities of the NYC and the Kuwaiti legal framework.

Moreover, the constitutional guarantee of access to justice would, at least in theory, influence the court's interpretations of ambiguities in a manner consistent with the spirit of the Constitution; this facilitates rather than hinders access to justice.³⁷ Arguably, to decline to recognize and enforce foreign arbitral awards made in accordance with the law would be tantamount to hindering access to justice. This is because such denial would force the parties to start another rigorous pursuit of justice from the Kuwaiti judicial system, and thereby incur further loss of time and resources on a subject matter that had been heard and determined as per the agreement of the parties.³⁸

2.5 Statutory Provisions of the Civil Code and Commercial Procedure

Arbitration in Kuwait is subject to a wide range of legislative instruments.³⁹ However, the researcher has identified three of these as significant for the recognition and enforcement of foreign arbitral awards. These are: the CCPL,⁴⁰ the CCP⁴¹ and the Civil Code.⁴² The latter two are of general application, especially in grey areas or where the law is silent on a specific issue

³⁶ *ibid.* The Constitution, being a codified document of the laws of the land and the highest legal document which regulates the source of all government powers, takes precedence over all laws of the land with superiority over the institutions it creates; however, in Kuwait it must be Sharia-compliant.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

⁴⁰ Law No 38/1980.

⁴¹ CCP, art 199, 1980

⁴² Law No 67/1980.

regarding recognition and enforcement of foreign arbitral awards. The former, however, is more specific to arbitration and has a number of articles applicable to the present subject. The CCPL therefore qualifies as the main legislation for the present purposes and will be explored in detail in this study. However, only a brief overview of the applicable articles of the Civil Code⁴³ will be explored as it is not specific to arbitration but applies only where there are no specific legislative provisions.

2.5.1 Civil Code

The Civil Code of Kuwait⁴⁴ makes provision for litigation in civil matters. The most relevant provision for arbitration is article 1(2)⁴⁵ which provides that in the event of no legislative provisions on any matter, or where legislative provision exists but is not sufficient to resolve/regulate a matter, then any matter is to be resolved in accordance with custom (*urf*).⁴⁶ It further provides that in the absence of *urf*, the matter should be resolved following the applicable *fiqh* (principles of Islamic jurisprudence).⁴⁷ Article 1(2) has three significant effects in relation to recognition and enforcement of foreign arbitral awards.⁴⁸

First, the established custom on recognition and enforcement of such awards will be the key determinant of enforcement.⁴⁹ Arguably, for a jurisdiction that does not follow the principles of *stare decisis* or the doctrine of precedent (where the decisions of higher courts are binding on lower courts) as is the case with Kuwait, established court practices on recognition and enforcement are still very influential in determining the outcome. In this case, the decision would be relied on not so much as binding precedent,⁵⁰ as would be the case in common law jurisdictions, but as indicative of the customs of the jurisdiction. Therefore, this requires Kuwaiti

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Civil Code, art 1(2).

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ Mahmoud (n 33) 195-213.

courts to be conversant with the various rules and principles applicable to arbitration with respect to recognition and enforcement of foreign arbitral awards.⁵¹

Second, article 1 reiterates the constitutional status of Islamic law on civil matters to be resolved within Kuwaiti jurisdiction. By upholding Islamic law, article 1 upholds article 2 of the 1962 Kuwaiti Constitution which declares Islam to be the state religion of Kuwait, and by extension, provides room for resolution where religious values would thrive.⁵²

Third, the CCP⁵³ stipulates the hierarchy of sources of law in relation to particular matters. It clearly gives supremacy to legislative provisions as customs are to be applied where legislation is lacking or is inadequate.

The thesis further argues that by giving legislation and customs priority over Islamic jurisprudence, the Civil Code seems to mitigate the influence of Islamic law on civil matters.⁵⁴ This is quite commendable in the context of arbitration, especially in view of the fact that in international trade, parties do not necessarily profess the same faith and furthermore, commercial transactions that give rise to arbitration are essentially secular in nature. To assert the supremacy of *fiqh* would prejudice parties to the transaction who do not profess the Islamic faith.⁵⁵ However, the constitutionality of article 1(2) of the Civil Code remains questionable in view of article 2 of the Kuwaiti Constitution which declares Islamic law as the supreme source of law in Kuwait. Moreover, Islamic law is typically derived from two main sources: the Quran and the *Sunna*.⁵⁶ It is contended that the scope of Islamic law now extends to include the consensus of

⁵¹ *ibid.*

⁵² Kuwaiti Constitution, promulgated on 11 November 1962.

⁵³ The Code of Civil Procedure, art 1(2).

⁵⁴ *ibid.*

⁵⁵ Mahmoud (n 33).

⁵⁶ Michael Mumisa, *Islamic Law: Theory and Interpretation* (Amana Publications 2002) 23; Arabic: *fiqh* . ([h]فقه) While Sharia is believed by Muslims to represent divine law as revealed in the Quran and *Sunna* (the teachings and practices of the Islamic prophet Muhammad), *fiqh* is the human understanding of the Sharia. Sharia is expanded and developed by interpretation (*ijtihad*) of the Quran and *Sunna* by Islamic jurists (*Ulema*) and implemented by the rulings (*Fatwa*) of jurists on questions presented to them.

Islamic religious scholars (*ijma*)⁵⁷ and analogical deduction (*qiyas*).⁵⁸ It should be noted that in promotion of reasoning, which is termed as *Ijma*, there is no mention of recognition and enforcement of foreign arbitral awards in Kuwait. This remains a gap that needs scholars to fill, in order to make Kuwait an International Centre of Arbitration where enforcement of foreign arbitral awards is well recognized by the courts. An award can only be enforced if it is recognized by the domestic courts; otherwise the award will be null and void. There is therefore an urgent need by scholars to find a solution to this problem in Kuwait.

2.5.2 The Code of Civil Procedure (CCP)

Article 199 of the CCP provides that foreign judgments will only be considered valid and enforceable in Kuwait if the foreign law in question permits the mutual recognition and enforcement of judgments from Kuwait,⁵⁹ that is, reciprocates enforcement of Kuwaiti laws and judgments.⁶⁰ The effect of this provision is that the enforcement of foreign arbitral awards depends entirely on the equivalent provisions in the laws of the foreign country, in relation to enforcing awards or judgments made in Kuwait.⁶¹ Article 199⁶² provides that ‘judgments and orders made in a foreign country may be performed in Kuwait, under the same condition applied by the law of this foreign country for performance of Kuwait judgments and orders.’⁶³ It must however be noted, that there are conditions to be met by a state or contracting state to perform the doctrine of reciprocity. Which have to be submitted to the national court to adduce that the foreign arbitral award can be enforced in this state. If insufficient evidence is adduced, the national courts will dismiss the award. The doctrine of reciprocity is mentioned in the NYC,

⁵⁷ Jan Michiel Otto, *Sharia and National Law in Muslim Countries Tensions and Opportunities for Dutch and EU Foreign Policy Law, Governance, and Development* (Amsterdam University Press 2008) 29-31.

⁵⁸ Abdal-Haqq (n 29) 4.

⁵⁹ Mahmoud (n 33) 195-213; Alsamdan, ‘Application of Foreign Arbitration Awards in Kuwait’ (n 1) 13-80.

⁶⁰ *ibid.*

⁶¹ Fernando Téson, ‘State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration’ (1984) 24 Va J Intl L 323.

⁶² CCP, art 199.

⁶³ *ibid.*

however, it is not always complied with⁶⁴ by member states, and it is considered a reservation to some countries.⁶⁵ Although Kuwait is a signatory to the NYC, the doctrine of reciprocity applies only to GCC states, this hinders other countries like the US, the UK, and Germany, that are not members of GCC from enforcing foreign arbitral awards. The researcher argues that Kuwait should open borders to non-GCC states, in order to become an international centre of arbitration. It is possible that Kuwaiti laws on recognition and enforcement of foreign arbitral awards impede foreigners, especially those from European states which have developed their arbitral laws based on their constitutions and not their faith.⁶⁶ In that regard, the researcher argues that, given that Kuwait adopted the NYC⁶⁷ in order to address the problems of recognition and enforcement of foreign arbitral awards, it is incumbent upon the Government of Kuwait and its jurists to enact all-encompassing laws on arbitration; to avoid the technicalities of interpreting the Quran and *Sunna* as the main sources of jurisdictional authority in Kuwait, in regard to recognition and enforcement of foreign arbitral awards.⁶⁸

2.5.3 The Civil and Commercial Procedure Law

The CCPL was promulgated in June 1980 in order to keep Kuwaiti law abreast of modern commercial practices and developments in the late twentieth century.⁶⁹ Chapter 12 of the CCPL⁷⁰ deals exclusively with voluntary arbitration.⁷¹ There are no specific provisions on the recognition and enforcement of foreign arbitral awards. However, considering that the majority of foreign arbitral awards are likely to arise from voluntary arbitral agreements between the parties

⁶⁴ Decree Law No 10 of 1978 approving the accession of the State of Kuwait to the New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards of 1958.

⁶⁵ Article 1 of Kuwait Civil Code; Article 14 of the New York Convention.

⁶⁶ English Arbitration Act 1996.

⁶⁷ 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) NYC1958.

⁶⁸ Yaqoub Sarkhouh, 'Validity Terms of the Arbitral Award in the Kuwaiti Legislation Compared with the Contents of Arbitration Treaties issued under the Auspicious of the UN' Journal of Law (Academic Publication Council, Kuwait University, September 1994) 23-56; Atiya (n 1) 417-521.

⁶⁹ Abu Zaid Radwan, 'General Restrictions of International Commercial Arbitration' Part III (June 1979) Journal of Law and Sharia (published by the Academic Publication Council, Kuwait University) 29-65.

⁷⁰ CCPL, arts 173-188.

⁷¹ *ibid.*

concerned, then matters relating to the recognition and enforcement of foreign arbitrations and arbitral awards would properly fall within the ambit of this legislation. The CCPL has sixteen articles relating to arbitration (articles 173-188).⁷² The thesis will focus only on the articles⁷³ that have a bearing on the recognition and enforcement of foreign arbitration and arbitral awards. These include: sections on the validity of arbitration agreements and arbitral awards,⁷⁴ sections dealing with recognition and enforcement of foreign arbitral awards, sections regarding freedom of arbitration and bar to suit in matters subject to arbitration.⁷⁵

Article 173⁷⁶ recognizes the right to voluntary arbitration in order to resolve specific disputes arising from contractual matters. It proceeds to prescribe the form of arbitration agreement and provides that arbitration may not be legitimate if such an agreement is not in writing. Notably, in affirming parties' rights to resort to arbitration in contractual disputes, article 173⁷⁷ is silent on where and when arbitration agreements should be concluded. The silence on jurisdiction implies that the parties reserve the right to determine where their arbitration will be undertaken. By extension, a foreign arbitration agreement would be as good as a locally concluded arbitration agreement, as the jurisdiction is not a parameter for determining the validity of an arbitration agreement.⁷⁸ Having given the parties freedom to resort to arbitration on their own terms under the principle of party autonomy, it would again be unfair of the state to refuse to recognize and enforce an award that arises from a legally sanctioned method of dispute resolution, unless the arbitration took place in contravention of the CCPL or any other law.⁷⁹ The article further stipulates that an arbitration agreement needs to specify the subject matter of the dispute giving

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ CCPL, art 173.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ Atiya (n 1) 417-521; Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (n 1) 66-160; Iqbal Alqallaf, *Arbitration in the State of Kuwait* (Arab Renaissance House 2006) 150-152.

⁷⁹ *ibid.*

rise to the arbitration.⁸⁰ Failure to include the subject matter in an arbitration agreement may have a fatal effect, and could render the arbitration null and void.⁸¹

Article 173⁸² also specifies some circumstances in which arbitration may or may not be held valid. First, arbitration would not be tenable where the parties are not in a position to reconcile. It is however, silent on what specific circumstances or conduct would be deemed to constitute or indicate inability to reach a compromise.⁸³ In all probability, this will be determined by the particular circumstances of the case and the relationship between the parties. The article also requires parties to be competent to exercise the right of arbitration in relation to the subject matter. Again, the scope of capacity is not defined but the term would probably be accorded its ordinary meaning, as used in the law of contract to include capacity in terms of age, mental state, and privity of contract.⁸⁴

On the jurisdiction of Kuwaiti courts, article 173⁸⁵ precludes jurisdiction in disputes where the parties have agreed to be subject to arbitration, unless there is an implicit or explicit waiver for non-jurisdiction. The researcher observes that article 173⁸⁶ is ambiguous and does not provide a definition for what constitutes an express or implied waiver.⁸⁷ Ordinarily, an express waiver will arise where the parties have agreed in writing or verbally that the court may adjudicate upon a matter. An implied waiver, on the other hand, would be inferred from the conduct of the parties, such as where a suit is instituted in a court of law and none of the parties' object to the jurisdiction. The courts' business is to dispense with disputes brought before it.⁸⁸ Thus, if parties

⁸⁰ CCPL, art 173.

⁸¹ Mahmoud (n 33) 195-213.

⁸² CCPL, art 173.

⁸³ Atiya (n 1) 417-521; Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (n 1) 66-160; Alqallaf (n 78) 150-152.

⁸⁴ CCPL, art 173.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Akasha Abdulaal, *Civil & Commercial International Procedures and Enforcement of Foreign Arbitral Awards* (University of Kuwait 2010) 378-444; Abu Zeid Radwan, *The General Principles of International Commercial Arbitration* (Dar University 1981) 19; Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Sharia and Statute Law* (Mid- country press, London, Graham and Trotman 1984) 252-274.

who are in a privileged position know of the existence of a barrier to jurisdiction, fail to bring to the notice of the court such a fact, then they will be assumed to have submitted to the court's jurisdiction and waived their right to have the matter resolved by arbitration. This would be contrary to the intentions of the parties who chose arbitration as a dispute mechanism; recourse to courts is a breach of the doctrine of party autonomy.⁸⁹ In the researcher's view, the courts in Kuwait should refer the parties to arbitration in order to comply with their agreement, as the parties chose arbitration to avoid recourse to the courts. Given that Kuwait is a world leader in oil production and a member of OPEC,⁹⁰ it is incumbent upon the courts to interpret Kuwaiti laws with a purposive approach so that foreigners are not seen as victims of Kuwaiti laws and procedures. This will attract arbitration proceedings in Kuwait as a leader in the GCC and internationally, hence competing with centres like the London Chamber of International Arbitration (LCIA), the Paris Centre of Arbitration, Hong Kong, China, and the US. The researcher argues that by limiting court jurisdiction on matters subject to arbitration, due to the doctrine of competence-competence⁹¹ and separability;⁹² pursuant to written arbitration agreements.⁹³ The CCPL acknowledges the freedom of the contracting parties under party autonomy doctrine to determine their contractual terms,⁹⁴ including how disputes are to be resolved. It also limits the mischief of parties who contemplate an unfavourable arbitration outcome or who have not been favoured by the arbitral award due to forum shopping in the courts of law. In this way, the article upholds arbitral agreements, irrespective of where such agreements are concluded and by extension, the outcome of the arbitration (as depicted in the arbitral award).

⁸⁹ *ibid.*

⁹⁰ OPEC, 'Member Countries' <http://www.opec.org/opec_web/en/about_us/25.htm> accessed 5 October 2014.

⁹¹ Klaus Peter Berger, 'Germany Adoption of the UNCITRAL Model Law' (1988) *Intl Arb Rev* 122; Model Law, art 16; Germany Arbitration Act 1998, Part IV, s 1040.

⁹² Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet and Maxwell 2005) para 2.91; Adam Samuel, 'Separability of Arbitration Clauses and Administration of Justice' <<http://www.adamsamuel.com/pdf>> accessed 30 May 2016.

⁹³ English Arbitration Act 1996, s 45.

⁹⁴ *ibid.*

2.6 Arbitrators and Their Conduct in Arbitration

Arbitrators and their conduct in arbitration is covered in articles 174-179 of the CCPL. The CCPL is clear on the qualifications of arbitrators, prescribing various factors that may disqualify one from being a competent arbitrator.⁹⁵ Specifically, article 174 states that an arbitrator will not be competent if he or she: is a minor, has restricted civil liberty due to criminal punishment, is underage, or has been declared bankrupt (unless discharged from bankruptcy). Basically, these are intended to ensure that the arbitrators are people who have the capacity to understand and appreciate the nature of the contract and are not easily vulnerable to undue influence by the contracting parties, on account of their financial or legal situations.⁹⁶ The CCPL further requires that where there are numerous arbitrators, they should adjudicate the matter in an odd number. This is most likely to ensure that there is a clear majority and to avoid deadlocks in resolving contractual disputes.⁹⁷

The CCPL⁹⁸ also grants parties the right to choose their preferred arbitrators⁹⁹ and insists that arbitrators derive their capacity to determine a matter from being appointed, either by the parties or by a court.¹⁰⁰ The freedom to choose arbitrators is evident in article 174 as it provides that the parties shall specify the arbitrators, in the arbitration agreement or in a separate agreement. The fact that the choice of arbitrators is left to the parties¹⁰¹ and further that there is no geographical restriction on where arbitrators may come from, indicates that it is possible to appoint foreign arbitrators.¹⁰² It could be argued that the open choice of arbitrators signifies the legislative intent to uphold a party's freedom of contract. In other words, it is in the spirit of the CCPL that any arbitration undertaken in accordance with the law, as well as the subsequent arbitral awards

⁹⁵ CCPL, art 174.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ CCPL, art 175.

¹⁰¹ Mahmoud (n 33) 195-213.

¹⁰² *ibid.*

should be respected by the Kuwaiti authorities.¹⁰³ If the legislature had wished to place a barrier on foreign arbitral awards, then nothing whatsoever would have barred the imposition of geographical restrictions on the choice of arbitrators in voluntary arbitrations to be enforced in Kuwait.¹⁰⁴ Courts should support arbitration due to the doctrine of compatibility¹⁰⁵ and complimentary,¹⁰⁶ so that they support recognition and enforcement of foreign arbitral awards in Kuwait in order to comply with the doctrine of party autonomy, the backbone of arbitration. Parties choose arbitration over litigation in the hope that arbitral awards will be enforced by the domestic courts of states which are signatories to the NYC,¹⁰⁷ which came into place to remedy the hindrance to recognition and enforcement of foreign arbitral awards internationally.

The CCPL also contemplates the possibility of parties not reaching agreement on the choice of arbitrators, or where the chosen arbitrators do not take up their tasks; setting out how to address such outcomes. Article 175 provides that in the event that parties fail to reach an agreement on the choice of arbitrators, then the court designated by law shall appoint the number of arbitrators that has been agreed upon by the parties.¹⁰⁸ The court however, will not move *suomoto*, at least one of the parties would have to file an application in an ordinary court for the court to appoint an arbitrator.¹⁰⁹ Other cases¹¹⁰ where the court may make similar applications include situations where the arbitrators withdraw, where the arbitrators are dismissed, where the arbitrators abstain from working or fail to proceed due to insurmountable obstacles, and in any of these cases where the parties are unable to agree on the replacement of the arbitrator.¹¹¹

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ English Arbitration Act 1996 in regard to enforcement of foreign arbitral awards and recognition; UNCITRAL Model Law, art 17 (J).

¹⁰⁶ *Channel Tunnel v Balfour Beut* [1993] AC 33.

¹⁰⁷ *Coppe Levalin v Ken Fertilizers and Chemicals* [1994] 2 Lloyds Rep, para 16.

¹⁰⁸ CCPL, art 175.

¹⁰⁹ *ibid.*

¹¹⁰ Mahmoud (n 33) 195-213.

¹¹¹ *ibid.*

Article 178 of the CCPL¹¹² requires an arbitrator who accepts a matter to indicate this in writing. Although this requirement appears to be conditional, it is to be imposed without prejudice to provisions of the CCPL that precede article 178.¹¹³ Therefore, the researcher agrees that it is possible that the failure of an arbitrator to confirm his acceptance in writing, will not necessarily be fatal in relation to recognition and enforcement of the eventual arbitral award. For instance, if failing to recognize and enforce the arbitral award is likely to undermine the preceding provisions, such as the right to have contractual disputes resolved through arbitration under article 173, then the wording of article 178 suggests that article 173 should take precedence.¹¹⁴

2.7 Arbitration and Arbitral Awards

Articles 179–184 of the CCPL provide for arbitration and arbitral awards. The arbitrators are required by article 179 to notify the parties about the venue and the date of the first hearing, within 30 days after accepting to adjudicate on the dispute.¹¹⁵ They should also make appointments so that the parties may submit their statements of claim and defence, as well as relevant supporting documents. In the event that one of the parties fails to appear to make submissions on the fixed date, then the arbitrators have the power to render judgment based on the submission of only one party.¹¹⁶

Generally, the arbitration should be handled within six months unless the parties agreed otherwise in their arbitration agreement.¹¹⁷ Failure to adhere to the prescribed time frame justifies an aggrieved party's recourse to judicial intervention. The award rendered should be founded on the law and based on majority opinion (where there is more than one arbitrator).¹¹⁸ It is important to mention that it is a legal requirement that the award be drawn up in Arabic, save

¹¹² CCPL, art 178.

¹¹³ *ibid.*

¹¹⁴ CCPL.

¹¹⁵ CCPL, art 179.

¹¹⁶ *ibid.*

¹¹⁷ CCPL, art 181.

¹¹⁸ CCPL, art 183.

for cases where the litigants agree to the contrary.¹¹⁹ Article 184 requires that the original award be deposited with the registry of a court of competent jurisdiction, alongside the arbitration agreement within ten days following issuance of the award terminating the litigation.¹²⁰

2.8 Enforcement, Appeal and Nullification

Article 181¹²¹ makes provision for the enforcement, appeal, and nullification of arbitral awards. The CCPL provides that an award rendered by an arbitrator is not enforceable unless the chief judge of the court in which it was deposited, issues an order to the effect that it should be enforced.¹²² Article 185 provides that such an order shall be issued upon the request of the concerned parties, after the judge has had time to peruse the award and the arbitration agreement, having verified that there are no barriers to its enforcement and due regard has been given to appeal limitations. As such, this provision means that Kuwait requires a ‘double exequatur’ for enforcement of a foreign arbitral award.

Generally, an arbitral award may not be appealed against unless the parties had agreed before the award was rendered that there would be a right of appeal.¹²³ Even then, such appeals are subject to a number of statutory restrictions. Under article 186 of the CCPL, an appeal will not lie where the value of the matter exceeds KD 500 and where the arbitrator was not authorized to arbitrate.¹²⁴ A party seeking nullification of an award may make application for nullification within 30 days after receiving notice of the award and upon payment of the requisite statutory charges.¹²⁵ However, a suit for nullification will not operate as an automatic stay of enforcement

¹¹⁹ *ibid.*

¹²⁰ CCPL, art 184.

¹²¹ CCPL, art 181.

¹²² CCPL, art 185.

¹²³ *ibid.*

¹²⁴ CCPL, art 186.

¹²⁵ Art 187.

of the award, unless the party seeking nullification specifically applies for such stay and the court grants it.¹²⁶

The CCPL is undoubtedly the principal source of obligatory standards that govern how Kuwaiti's legal system approaches the enforcement of arbitral awards.¹²⁷ It addresses issues of the validity, legitimacy, and enforcement of arbitration agreements in Kuwaiti courts, the freedom of parties to resort to arbitration and the duty of the court to exercise restraint in adjudicating matters that are subject to arbitration. It also has detailed provisions relating to the arbitrators chosen, their relatively unrestricted powers, their liabilities for enforcement and the granting of arbitral awards.¹²⁸

The above synopsis clearly demonstrates that Kuwaiti's arbitration laws do not distinguish or discriminate between domestic arbitration and international arbitration,¹²⁹ rather, both domestic arbitration and international arbitration are known and referred to as arbitration generally without any differentiation. Presumably, the conditions laid down by the CCPL relating to forms, procedures, qualifications and legal barriers generally apply to international arbitration as well as local arbitration.¹³⁰ However, it seems there is a need to make some adjustments to the enforcement of foreign arbitral awards, to ensure that arbitral processes are consistent with other relevant considerations in international relations; such as the need to preserve good diplomatic relations with the country from which the award originates.¹³¹ In order to achieve this, it is necessary that the awards are certified by the Ministry of Foreign Affairs of Kuwait.¹³²

¹²⁶ *ibid.*

¹²⁷ Civil and Commercial Procedure Laws.

¹²⁸ *ibid.*

¹²⁹ This is governed by the Judicial Arbitration Law (JAL).

¹³⁰ *ibid.*

¹³¹ Bayoumi Abdel Fattah Hijazi, *The Legal System for Enforcement of Foreign Judgments* (Dar University Publications 2004) 344.

¹³² Abdullah Al-Ayoub, 'Doing Business in Kuwait, A Practical Model.1-10' (*Country Q&A*, 1 November 2013).

The fact that diplomatic considerations are pertinent to the enforcement of foreign arbitral awards was reiterated by a Kuwaiti court in the case of *Aminoil v Kuwait*,¹³³ where it was pointed out that the host country (where the award was issued) should reciprocate in the enforcement of Kuwaiti laws. The court further pointed out that in determining the procedural and substantive rules, the law of the host country is the applicable law, as a result of which Kuwait is the supreme defender of the rights of any person.¹³⁴

Further to the above, one major question is whether recognition and enforcement of foreign arbitral awards can be independent of Islamic law.¹³⁵ This question is relevant as it goes to the root of the efficiency and fairness of litigation processes, given that there will be cases where parties may not intend that their disputes are subject to Islamic law.¹³⁶ The researcher suggests that the answer appears to be in the negative, recognition and enforcement of foreign arbitral awards cannot be independent of Islamic law, since Kuwaiti laws make it compulsory for (foreign) arbitral awards to be reviewed and approved by the courts.¹³⁷ These courts apply Islamic laws and are bound by the constitutional supremacy of Islamic law. However, that does not automatically mean that this situation works against enforcement of foreign arbitral awards. This is another issue that this thesis will explore in the subsequent chapters.

2.9 Judicial Arbitration

Natural and legal persons (corporations)¹³⁸ may resolve disputes through arbitration by selecting arbitrators in conformity with the rules agreed upon, as long as they do not contradict the basic rules of litigation.¹³⁹

¹³³ *Government of the State of Kuwait v American Independent Oil Company (Aminoil)* [1982] Ad Hoc Tribunal.

¹³⁴ Al-Ayoub (n 132).

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Weinberg Wheeler Hudgins Gunn and Dial, *Recent Developments in Arbitration Law in the UAE* (Law House 2010) 34.

¹³⁸ A registered company is a legal person, capable of being prosecuted, and should be treated as an individual because of its artificial personality or its predecessors cited in any Act or equivalent legislation in another jurisdiction. Unincorporated bodies (for example, partnerships, and clubs) may also be prosecuted where liability

The arbitration procedure in Kuwait had been subject to gradual development until the current legislative phase, in which it was appropriately established in two forms. The first is the CCPL (Law No 38/1980), particularly articles 173 to 188. Article 177 was repealed by article 12(2) of the Judicial Arbitration Law (JAL). The second is that arbitration was proscribed absolutely through the provisions of the JAL, which contains the civil and commercial provisions.¹⁴⁰ The CCPL outlines within articles 173 to 188¹⁴¹ the requirements of the Kuwaiti system of arbitration, its main features are set out below:¹⁴²

- It stipulates the conditions pertinent to the arbitration agreement or the contract if they are united, in that any disputes arising from its enforcement shall be subject to arbitration.¹⁴³
- It sets out that the parties to the arbitration have the right to nominate their arbitrators.¹⁴⁴
- It establishes that the dispute referred to arbitration (which has been decided and for which enforcement is sought) must not be contrary to the public policy of Kuwait and that enforcement must be carried out in accordance with the CCP of Kuwait.¹⁴⁵

can be established (Archbold: Criminal Pleading, Evidence and Practice (2009), paras 1-78 and 1-81b). A corporation could be vicariously liable for the acts of its employees and agents where a natural person would be similarly liable: *Moussell Bros Ltd v London and North Western Railway Co* [1917] 2 KB 836.

¹³⁹ Abu Zeid (n 88) 30.

¹⁴⁰ *ibid* 37; This is governed by the Judicial Arbitration Law (JAL).

¹⁴¹ CCPL.

¹⁴² Sami Fawzi, *International Commercial Arbitration* (The House of Culture for Publishing and Distribution 1992) 32.

¹⁴³ Aziz Abdel Mone'am Khalifa, *Arbitration in Contract Disputes* (Legal Book House 2006) 48-57.

¹⁴⁴ Nasser Ghoneim Zaid, 'The Modern Principles of Judicial Control over Arbitration in the Gulf Cooperation Council (GCC)' (Paper delivered at the International Conference for the Active Role of the Judiciary in Arbitration, Sharm El Sheikh, 2005) 57.

¹⁴⁵ Abdullah bin Hamad Al-Sa'adan, 'The Enforcement of the Provisions of the Arbitrators and Problematic Enforcement' (Conciliation and Arbitration seminar, Ministry of Justice, Taif, Saudi Arabia, 2001) 55-89.

As a general rule, the CCPL prohibits appeals or objections against the arbitral award unless the parties are united in this regard before the delivery of such an award. All the same, a challenge to a decision under the Arbitration Act¹⁴⁶ must be made in accordance with the legal requirements, and any objections thereto must be filed in the registry of the court.¹⁴⁷

2.10 Provisions of the Judicial Arbitration Law

The JAL was promulgated on 19 February 1995, creating a new procedure for the judicial arbitration of civil and commercial disputes. It entered into force one month after its publication in the Official Gazette.¹⁴⁸

The JAL created a judicial arbitration system through arbitration panels¹⁴⁹ comprising three judicial officers and two arbitrators,¹⁵⁰ selected by the disputing parties from the Roll of Arbitrators in accordance with the official register of qualified arbitrators in Kuwait,¹⁵¹ or nominated by the Judicial Arbitration Department from the Roll of Arbitrators, in rotation. The panels are presided over by the most senior members of the judicial grade. Moreover, the arbitrators are regulated by means of an application covering a memorandum of judgment to be issued by the registry of the Court of Cassation,¹⁵² which is competent and has jurisdiction to hear and determine on the issue without staying the arbitration proceedings during the hearing.

The judicial arbitration panels have jurisdiction over the determination of a dispute where the disputing parties agreed to submit to arbitration regarding contracts concluded after the JAL

¹⁴⁶ CCPL, art 199.

¹⁴⁷ Muqbel Shaker, 'Arbitration and Alternative Means of Settling International Trade Disputes' (Paper delivered at the International Conference for the Active Role of the Judiciary in Arbitration, Sharm El Sheikh, 2005) 145.

¹⁴⁸ Al-Kuwait Al-you, No 196 of 28 February 1995; A Rubaie and M Kikhany, *Arbitration Procedural Guarantee for the Settlement of Investment Disputes: A Comparative Study* (The Center for Studies and Research 2012) 72.

¹⁴⁹ Mahmoud (n 33) 195-213; Mustafa Al-Nasseri, *International Commercial Arbitrator: Comparative Study* (Arab Renaissance House 2013) 121-134; Khairi Albatanouni, *The Concept of Arbitrator in the International Commercial Arbitration* (Arab Renaissance House 2013) 24-92; Karam Al-Najar, *Arbitrator Legal Status* (Arab Renaissance House 2010) 248-268.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² *ibid.*

came into force, including the agreement for their settlement through arbitration unless another or special system of arbitration is provided for in the relevant contract.¹⁵³ The key requirement is for public companies to have access to justice or redress for any perceived acts of the government which they consider a threat to their business. The underlying philosophy is to increase the confidence of investors and international businesses.¹⁵⁴

The Ministry of Justice Resolution No 43/1995, which was issued in relation to the legislative powers vested in the Minister as granted in article 13 therein, lays down the requirements for arbitrators appointed and enrolled in the Roll of Arbitrators of the judicial authorities.¹⁵⁵ The key condition and prerequisite is that for a person to be enrolled as an arbitrator with judicial authority, he or she should be a Kuwaiti national¹⁵⁶ of good character and reputation, with good academic credentials and practical experience.¹⁵⁷ Moreover, there is a special committee for the nomination of arbitrators under the chairmanship of the Chief Justice and the Head of the Court of Appeal¹⁵⁸ as well as both Assistant under Secretaries of the Ministry of Trade.¹⁵⁹

Despite the fact that disputes under the guidelines of the CCPL¹⁶⁰ should be heard free of charge, the law requires the chairman of the arbitration panel to decide on the pay of each appointed arbitrator for his or her service on the arbitration panel,¹⁶¹ which shall be deposited by the parties to the arbitration. This was controversial, in light of the fact that before the enactment of the JAL, disputes used to be dealt with free of charge. It may be assumed that the remunerations of those arbitrators shall be borne by the state.¹⁶²

¹⁵³ Abdullah Mohammed Al-Khnin, *Arbitration in Islamic Law* (Law Book House 1999) 112.

¹⁵⁴ Osama Al-Salim, 'The Enforcement of the Provisions of Foreign Arbitral Awards' (Paper delivered at a seminar, 'Arbitration from an Islamic Perspective and International', Saudi Arabia, 2003) 57-71.

¹⁵⁵ Mahmoud (n 33) 195-213; Al-Nasseri (n 149) 121-134; Albatanouni (n 149) 24-92; Al-Najar (n 149) 248-268.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ Ahmad Salama, *The Mediator in Private International Law* (King Saud University 1998) 68.

¹⁶⁰ CCPL, art 181.

¹⁶¹ Mahmoud (n 33) 195-213; Al-Nasseri (n 149) 121-134; Albatanouni (n 149) 24-92; Al-Najar (n 149) 248-268.

¹⁶² Salama (n 159) 77.

There are procedures for hearing and resolving disagreements before the arbitration panels.¹⁶³ The arbitration panels have the right to hear and decide primary matters that fall within the jurisdiction of the civil courts or the commercial courts.¹⁶⁴ They also have the right to consider provisions and related commands as set out in sections A, B and C of article 18 of the CCP, that is, default judgment in cases of debt up to KD 20 if witnesses fail to appear or fail to answer, as provided for in article 47(1) of the Law of Evidence on Civil and Commercial Procedure.¹⁶⁵ The ruling instructing a third party to provide any document in his possession required to determine the arbitral award (article 24 of the JAL), and which may help the arbitral tribunal reach a just decision.¹⁶⁶

Furthermore, awards and rulings by the arbitration panel are binding on the parties to the dispute. However, both are under the jurisdiction of the Court of Cassation.¹⁶⁷ Under the said law and resolution, the arbitration panel's awards and verdicts shall have the authority of a judgment which is enforceable immediately, endorsed with a self-executing formula through the Register of the Court of Appeal. Moreover, the publication of all or part of such awards or verdicts is prohibited except with the consent of the parties.¹⁶⁸

2.11 Arbitration Process under Islamic Theology or Jurisprudence

The concept of arbitration and its use as a means of ADR are not new to Kuwait and other Islamic states.¹⁶⁹ Arbitration appears in the Quran,¹⁷⁰ which suggests that it has, albeit in a

¹⁶³ Mahmoud (n 33) 195-213; Al-Nasseri (n 149) 121-134; Albatanouni (n 149) 24-92; Al-Najar (n 149) 248-268.

¹⁶⁴ *ibid.*

¹⁶⁵ Law No 39/1980.

¹⁶⁶ KA Mohammed, *Authentic and Force Provisions Arbitrators* (The Arab Renaissance House 1995) 80.

¹⁶⁷ Mahmoud (n 33) 195-213; Al-Nasseri (n 149) 121-134; Albatanouni (n 149) 24-92; Al-Najar (n 149) 248-268.

¹⁶⁸ NYC, art V (5).

¹⁶⁹ Mahmoud (n 15) 69-217; Abdullah Alremeh, *Arbitration Award in Accordance with Civil & Commercial Procedures Law and Judicial Arbitration Law: Comparative Study in the Kuwaiti & Egyptian Laws Compared with Islamic Jurisprudence* (Bookshop House Est 2009) 121-147; Mahmoud Alsaratawi, *Arbitration in the Islamic Law* (University of Kuwait 2007) 9-64; Abdullah Al-Rumah, *Arbitral Awards in Accordance with Civil & Commercial Procedures Law & Judicial Arbitration Law: Study on Kuwaiti & Egyptian Laws compared with Islamic Law* (University of Kuwait 2009) 3-24.

somewhat rudimentary way, been seen as an efficient means of dealing with disputes for several centuries.¹⁷¹ It can therefore be argued that arbitration is a concept that has long been embedded in Islamic rules for over 1,400 years.¹⁷² Despite the present codification of arbitration rules, one should not ignore the spirit and theory of arbitration.¹⁷³ The historical doctrine will to a large extent influence courts' interpretations of arbitration disputes, including those relating to arbitration agreements and awards.¹⁷⁴

Scholars have argued that the arbitration rules as stipulated in the Quran are not entirely different from the modern approach to arbitration, and that the principles seem to be substantially similar.¹⁷⁵ This suggests that maintaining a private mechanism for dealing with commercial disputes has been regarded as being of great significance in a variety of situations, particularly in those jurisdictions that place a heavy reliance on moral and religious obligations.

2.12 Arbitration and the Four Major Islamic Schools

The definition of commercial arbitration given by the four major Islamic Schools of theology depends on how Islamic law is interpreted by each of them. Generally, arbitration is defined in similar ways by these schools, with a particular emphasis on three aspects: conflict resolution, the overseeing of the conflict resolution by an arbitrator, and the enforcement of the decision. These aspects also figure prominently in the description of arbitration by the contemporary

¹⁷⁰ Dr Muhammad Muhsin Khan and Dr Muhammad Taq-ud-Din Aihilala, *The Noble Quram English Translation of the meaning and commentary*, King Fahd Glorious Quran Printing Complex Madina; Verse 35 of Surah 4 (An-Nisa) of the Holy Quran (2002) 112.

¹⁷¹ Hafeeza Al-Saied Haddad, *General Theory of International Commercial Arbitration* (Human Rights Publications Halabi 2004) 102; Abdulfatah Abdulbagi, *Sources of Commitment under Kuwaiti Civil Law* (Modern Book House Kuwait 1988) 51.

¹⁷² *ibid.*

¹⁷³ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

¹⁷⁴ Jack Joseph Hakim, *The Recognition and Enforcement of the Provisions of the Arbitration* (Conference on the Model Arbitration Law 2005) 115.

¹⁷⁵ *ibid.*

Muslim schools, which also stress the binding decision underpinned by Islamic law; enacted by the Organisation of Muslim Conference via the Islamic Jurisprudence Panel.¹⁷⁶

The focus point of all these aspects is the selection of an appropriate arbitrator. All the schools implement separate rules for conflict settlement as well as for arbitrator selection and establishing the arbitration features and scope.

2.12.1 The Hanbali School

The Quran and the *Sunna* have a significant influence on the teachings of the Hanbali School. The school specifies that, since his judgment is mandatory and binding according to Islamic law, a person must fulfil several requirements comparable to those of a court judge in order to be selected as arbitrator.¹⁷⁷ Therefore, his decision and especially the award, must be respected by the parties involved. However, provided that the decision or award has not been finalized, a disputing party is entitled to retract an arbitrator's representation. This is made possible by the fact that arbitration is considered to be similar to the power of attorney, which the disputing party can renounce at any time.

The Hanbali School permits arbitration to be applied in every kind of conflict. Nonetheless, there are cases in which the school absolves parties from penalties specified in the Quran. There is, however, a limitation in the application of Hanbali ideology of scholarship in regard to the NYC due to Islamic jurisprudence.¹⁷⁸ There is a need in Kuwait for scholars to adopt a solution to harmonize the NYC and Islamic law, so as to allow litigants to settle their disputes or enforce their awards in Kuwait. In Kuwait the Hanbali School is acknowledged as the official authority on which the country's legal system is based.¹⁷⁹ However, there have been instances in which the

¹⁷⁶ Alsaratawi (n 169); El Sayed Almarakebi, *Arbitration in the GCC States and to What Extent it is Affected by State Sovereignty* (Arabian Renaissance House 2001) 103-121.

¹⁷⁷ Sayed Mahmoud and Abdulsattar Almulla, *Ordinary Arbitration (Voluntary or Individual Arbitration) under Islamic Law & Kuwaiti Law* (Arab Renaissance House 1998) 18-21; Radwan (n 69) 29-65.

¹⁷⁸ Alsaratawi (n 169) 103-121.

¹⁷⁹ *ibid.*

school has risked becoming unpopular due to its exaggerated deference to the Quran and *Sunna*,¹⁸⁰ which has been perceived not only as bigotry towards the opinions of other schools but also as discrimination against adversaries holding positions in the legal or governmental system. The school declares that all other views are subordinate to the Quran and the *Sunna*.¹⁸¹

2.12.2 The Shafi School

The fulfilment of particular requirements is also specified by the Shafi School of theology as a condition for the selection of a person to act as arbitrator in conflict resolution. Regardless of whether or not it is overseen by a judge,¹⁸² arbitration is deemed by this school to be a legal process.¹⁸³ Comparable to the rules of the Hanbali School, the Shafi School equates the power of an arbitrator with the power of attorney, meaning that an arbitrator can be dismissed at any time until the award is announced. This signifies that unlike a court judge, an arbitrator has less power and his role is restricted to dispute settlement.¹⁸⁴ If the arbitration process fails to reconcile the disputing parties, the matter must be taken up in court.¹⁸⁵ To establish the usefulness of arbitration in conflict settlement, the Shafi School relies on a categorization of dispute matters. Conflicts related to financial issues and contracts that are deemed to be pardonable transgressions are classified as one group of dispute matters.¹⁸⁶ Unpardonable transgressions, including the rights of Allah and orphan custody, constitute the second group. The third group includes debatable matters which are open to arbitration, as a result of the existence or absence of agreements between parties¹⁸⁷ or as a result of the lack of legal jurisdiction on arbitration, such as the rules regarding marriage.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ NYC, art 1(2).

¹⁸⁵ Kuwait Cassation Court Decision No 65/1980 dated 27 May 1981.

¹⁸⁶ *ibid.*

¹⁸⁷ Khan and Aihilala (n 170).

2.12.3 The Hanafi School

No requirements for arbitrator selection are specified by the Hanafi School.¹⁸⁸ However, it recognizes the importance of arbitration for dispute settlement, thus essentially restricting the role of arbitration to conciliation. On the other hand, the school does not emphasize award issuing as much as a court judgment does.¹⁸⁹ By defining arbitration as a contractual agreement on conflict resolution among two parties,¹⁹⁰ the Hanafi School dictates that the parties have an obligation to accept the judgment of the arbitrator or the award.¹⁹¹ With regard to cases where arbitration fails, the provisions of the Hanafi School are identical to those of the Shafi School, declaring that the conflict must be taken up in court.¹⁹² Moreover, the Hanafi School maintains that the only person able to make legally binding decisions is the court judge. It should be emphasized that the Kuwaiti doctrine that only municipal courts should handle arbitral issues is against the doctrine of party autonomy and separability.¹⁹³ The researcher argues that arbitral cases should be handled by the arbitral tribunal in Kuwait and courts should only provide an enforcement arm due to the doctrine of complimentary approach; in other words, the role of the courts is to support arbitral proceedings,¹⁹⁴ or recognition and enforcement of foreign arbitral awards. Another point on which the views of the Hanafi School are similar to those of the Shafi School, is that apart from the issues for which the penalties are specified in the Quran,¹⁹⁵ the application of arbitration is permitted in all dispute matters.¹⁹⁶

¹⁸⁸ Mahmoud (n 33).

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² *Ibid.*

¹⁹³ Gary Born, *International Arbitration, Cases & Materials* (Kluwer International 2011) 813-827.

¹⁹⁴ English Arbitration Act 1996, s 44(6).

¹⁹⁵ Alsaratawi (n 169) 103-129.

¹⁹⁶ *ibid.*

2.12.4 The Maliki School

While not stipulating any requirements that an arbitrator must fulfil, the Maliki School demands that the arbitrator focuses on reconciling the opposing parties. Hence, the school prioritizes arbitration that results in a binding decision, similar to the Hanbali School. So high is the confidence of the Maliki School in the arbitration process that it permits the appointment of an opposing party as arbitrator.¹⁹⁷ Additionally, it favours the creation of a tribunal that treats both parties equitably.¹⁹⁸ It also supports the doctrine of party autonomy.¹⁹⁹ However, in contrast to the Shafi School, under the rules of the Maliki School the power of the arbitrator cannot be retracted following the commencement of arbitration.²⁰⁰ Moreover, it specifies that arbitration does not apply to matters for which penalties are established in the Quran, nor does it apply to personal affairs like marriage, divorce, and other relationship problems.²⁰¹ There is a dilemma with the Maliki School of theology due to its conservative application in regard to arbitration enforcement. In order to rival the modern arbitration enforcement mechanism, it needs to be revised by scholars of Islamic jurisprudence to match the new trends of commerce. Islamic theology should be interpreted to match modern trends of commerce. This will solve the problem

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

²⁰⁰ Alremeh (n 169) 223-295.

²⁰¹ Judicial Arbitration Administration, *The Way to the Panels of Judicial Arbitration (How to Resort to the Panels of Judicial Arbitration)* (Judicial Arbitration Administration, Kuwait 2013) 3-8; Judicial Arbitration Administration, *Challenge to Awards of Judicial Arbitration Boards* (Judicial Arbitration Administration, Kuwait 2013) 3-4; Judicial Arbitration Administration, *Associates of Judicial Arbitration Boards* (Judicial Arbitration Administration, Kuwait 2013) 3-5; Judicial Arbitration Administration, *Rights and Duties of Claimant and Respondent under the System of Judicial Arbitration* (the Judicial Arbitration Administration, Kuwait 2013) 3-13; Judicial Arbitration Administration, *Nature and Advantages of Juridical Arbitration Pursuant to Law 1195* (Judicial Arbitration Administration, Kuwait 2013) 3-13; Judicial Arbitration Administration, *Associates of Judicial Arbitration Boards* (Judicial Arbitration Administration, Kuwait 2013) 3-7; Judicial Arbitration Administration, *Rules of Arbitration in Kuwait Commercial Arbitration Centre* (Kuwait Arbitration Centre 1999) 5-49. Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

of recognition and enforcement, where the gaps in law could be filled with scholarly opinions to match other international arbitral centres that are non-Islamic in nature.²⁰²

²⁰² *ibid.*

2.13 Summary

This chapter critically examined the applicable legal framework rules and procedures in regard to recognition and enforcement of foreign arbitral awards in Kuwait. The main emphasis of the thesis in this chapter was: the Kuwait Constitution.²⁰³ The supremacy of Islamic law, the guarantee of access to justice, the statutory provisions, including the Civil Code, the CCP and the CCPL. Arbitrators and their conduct in arbitration, arbitration and arbitral awards, enforcement, appeal and nullification. Judicial arbitration, the provisions of the JAL and Islamic theology.²⁰⁴ The first point that can be observed is that Kuwaiti law has provided for the procedures and requirements to enforce foreign arbitral awards, the clearest provision being article 199 of the CCP.²⁰⁵ On a more general note, the Kuwaiti Constitution²⁰⁶ is silent on the issue of recognition and enforcement, but it does set out two key principles affecting recognition and enforcement of foreign arbitral awards: the supremacy of Islamic law and the guarantee of access to justice. In general Kuwaiti courts do not enforce foreign judgments. With reference to foreign arbitral awards,²⁰⁷ the Kuwaiti courts permit enforcement if the law of a foreign country offers reciprocity in relation to the law of Kuwait. The issue of reciprocity is limited to GCC states, meaning that non-GCC states are disadvantaged when it comes to recognition and enforcement of foreign arbitral awards in Kuwait. There is a need for this doctrine to be revised to accommodate non-GCC states, in order to make Kuwait attractive as a centre of arbitration to all the 156 members of the NYC. It should be noted that the GCC is made up of only six states, which shows that the scope of reciprocity of Kuwait practices, is too limited to compete with international standards of arbitration in the twenty-first century. The applicability of the legal framework above leads the researcher to a conclusion, that the legal framework for the recognition and enforcement of foreign arbitral awards in Kuwait is not uniformed and fragmented. Various systems and components apply at the same time, for example, Kuwait civil

²⁰³ Kuwaiti Constitution, promulgated on 11 November 1962.

²⁰⁴ *ibid.*

²⁰⁵ CCP, art 199.

²⁰⁶ Kuwaiti Constitution, promulgated on 11 November 1962.

²⁰⁷ Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (n 1) 66-160.

law,²⁰⁸ the Civil Code and Islamic law. Under the Kuwaiti Constitution²⁰⁹ Islamic law is the supreme law. However, there have been suggestions that Islamic law and principles do not see eye to eye with international rules, in terms of the recognition and enforcement of foreign arbitral awards; the researcher argues that Kuwait's strict adherence to these, will create an undue impediment to an effective and robust system of enforcement.

²⁰⁸ CCCP, arts 199 and 200.

²⁰⁹ Kuwaiti Constitution, promulgated on 11 November 1962.

CHAPTER 3: INTERNATIONAL CONVENTIONS AND TREATIES AS SOURCES OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN KUWAIT

3.1 Introduction

This chapter examines the sources that provide authority to Kuwait domestic courts to recognize and enforce foreign arbitral awards. The thesis in this chapter will explore all treaties internationally ratified by Kuwait, namely the New York Convention (NYC), the Riyadh Convention, the Arab League Convention on the enforcement of judgments and the Amman Convention on Commercial Arbitration of 1987. It should be noted that Kuwait has ratified many conventions governing the enforcement of foreign arbitral awards. Thus it was the forerunner of the GCC states¹ in approving the NYC.² The thesis in this chapter will provide solutions to the gaps in the conventions, in order to attract international investment in Kuwait.

3.2 New York Convention 1958

The NYC is composed of 156 member states that have ratified the NYC.³ It should be noted that enforcement of arbitration awards in all member states is mandatory. The NYC requires that

¹ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

² Law No 10 of 1978, which entered into force on 2 July 1978. Kuwait applies the reciprocity reservation in regard to recognition and enforcement of foreign arbitral awards.

³ Ahmed El-Saied Sawi, 'The Extent of the Authority of the Arbitral Tribunal in Making Provisional or Conservatory Measures and the Issuance of the Temporary Provisions During the Course of the Arbitration Dispute' (Paper delivered at the International Conference for the Active Role of the Judiciary in Arbitration (Sharm El Sheikh 2005) 117-58; Stuart Dutson, Andy Moody and Neil Newing, *international arbitration* (global law and business 2012) 21-22; Gary Born, *international arbitration, law and practice* (Kluwer Law International 2012) 369-409.

foreign arbitral awards are recognized in the signatory states including Kuwait.⁴ According to the NYC, a party seeking enforcement has to supply the following:

- (a) The duly authenticated original award or a duly certified copy thereof.
- (b) The arbitration agreement or a duly certified copy thereof.
- (c) A translation of the aforementioned documents if they are written in a language other than that of the country where enforcement is sought.

It must be noted that the NYC is designed to provide international uniformity in regard to recognition and enforcement of foreign arbitral awards.⁵ The irony is that in Kuwait the domestic courts have not complied with this national standard due to its conservative approach in interpreting the Convention, which should be implemented internationally by signatory states.

It should be noted that that these provisions are the only provisions that govern the conditions that should be fulfilled by the party applying for enforcement of a foreign arbitral award. Thus the Convention's provisions should supersede the national law of the land, in this case Kuwait.⁶ The NYC provides that when a party to arbitration proceedings has provided prima facie evidence, the award should be enforced.⁷ The burden of proof shifts to the other party if there is resistance of enforcement, subject to NYC, article V (I). In Kuwait a number of decisions of the Court Cassation reflect these principles, for example the decision of 1988.⁸ In this case a dispute was about construction of headquarters of the Kuwait Arab Economic Development Fund, the agreement provided disputes to be resolved by ICC Rules; an award was made in France in favour of the respondent who sought enforcement in Kuwait. Both the court of first instance and

⁴ Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Sharia and Statute Law* (Mid- country press, London, Graham and Trotman 1984) 273-274; Essam AL Tamimi, *The Practioner's Guide to Arbitration in the Middle East and North Africa* (Juris Net 2009) 194; Smith Herbert, LLP Freehill, 'Guide to Dispute Resolution in the Middles East' (2010/2011) <<http://www.herbertsmith.com/NR/rdonlyres/EBFC4E7F-223C-41Ce-941e>> accessed 30 May 2016.

⁵ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International 1981) 246.

⁶ *ibid* para 27-03.

⁷ *ibid*.

⁸ Cassation Court Decision No 1202/2004 of 12/2/2006, No 423 of 2003, No 292/95 of 1997.

the Appeal Court granted leave to enforce. The appellant lodged an application, arguing that the arbitration award did not satisfy the conditions of the enforcement order to be issued in Kuwait in accordance with articles 199 and 200.⁹ The Court of Cassation upheld the decision of the lower courts after finding that the award and procedure fully complied with the NYC and that it was necessary that the award first be granted exequatur in France.¹⁰

The researcher however, argues that although this case on its merits looks authoritative in terms of recognition and enforcement of foreign arbitral awards, there has not yet been any court decision dealing with this matter either in Kuwait or the GCC states. A court decision which if used, would promote the doctrine of binding precedent.

3.3 Reservations of the New York Convention in Kuwait

A reservation in international law is a caveat to a state's acceptance of a treaty as defined by the Vienna Convention on the Law of Treaties 1969 (VCLT).¹¹ Under article 19 of the VCLT, a state may when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation however phrased or named. It is a limitation on the commitment undertaken which purports to exclude or modify the legal effects of certain provisions of the treaty, in their application to that state. This existing customary law was only codified but not created by VCLT.¹²

In effect, a reservation allows the state to be a party to the treaty, while excluding the legal effect of a specific provision in the treaty to which it objects. A reservation is defined under the Vienna Convention¹³ but declarations are not, and the two are sometimes difficult to differentiate from one another. Unlike a reservation, a declaration is not intended to affect the state's legal

⁹ See the CCPL, which governs the enforcement of foreign arbitral awards. Article 200 demands that an award must have been enforced in the country in which it was made, and that it was argued. Art 1477 of the French Civil Code only demands that an award is enforced by a tribunal.

¹⁰ Kuwait Cassation Court Decision of 21 November 1988 (1997) XXII 750, 748-752.

¹¹ United Nations, Vienna Convention on the Law of Treaties (23 May 1969) UNTS vol 1155, p 331.

¹² *ibid.*

¹³ *ibid.*

obligations but is attached to a state's consent to a treaty to explain or interpret what the state deems unclear.

Thus, the declarations and reservations made upon ratification by Kuwait were that it would only apply the NYC to the recognition and enforcement of foreign arbitral awards, made in the territory of another contracting state. The Convention is considered to be a non-self-executing treaty and requires adoptive legislation compatible with principles laid down in the treaty. The United Nations Commission on International Trade Law (UNCITRAL)¹⁴ has issued the arbitration Model Law, part of which is intended to simplify the process for ratified state(s) in implementing the NYC into their municipal legislation system. The NYC provides that 'any state may on the basis of reciprocity declare that it will apply the convention to the recognition and enforcement of foreign arbitral awards made only in the territory of another contracting state.'¹⁵ The principle of reciprocity is mentioned in the Convention since some members did not agree to the recognition and enforcement of foreign arbitral awards, regardless of the country where the award is made under the doctrine of universality. It should be noted that states that kept the reservation when ratifying the treaty, may subsequently withdraw from the reservation. For example, Australia made a reservation when it ratified the NYC in 1961 and later withdrew it in 1988.¹⁶ It should be noted that the principle of reciprocity undermines the recognition and enforcement of foreign arbitral awards, which was not the main aim of the Convention. The Convention was intended to harmonize enforcement of arbitral awards internationally, not to hinder their enforcement due to the principle of reciprocity. Kuwait reserves implementation of the Convention to the recognition and enforcement of foreign arbitral awards made in the territory of other contracting states.¹⁷ The main irony of reciprocity is that there is no automatic

¹⁴ UN Doc A/RES/31/98; 15 ILM 701 (1976) United Nations Commission on International Trade Law (UNCITRAL).

¹⁵ W Michael Reisman, W Laurence Craig, William Park, Jan Paulsson, *international commercial arbitration, cases, materials and notes on the resolution of international business disputes* (the foundation press 1997) 1246-1247; NYC, art 1(3).

¹⁶ Australian Supreme Court Decision 30 November 1994, (1997) YBCA XXII 628-630.

¹⁷ Decree Law No 10 of 1978 approving the accession of the State of Kuwait to New York Convention on the recognition and enforcement of foreign arbitral awards of 1958; Ahmed Alsamdan, 'The Applicable Law under

recognition of the NYC in regard to recognition and enforcement of foreign arbitral awards. The position of reciprocity under the NYC differs in various GCC states. Reservation regarding reciprocity in GCC states was first applied by Kuwait, Bahrain,¹⁸ and Saudi Arabia.¹⁹ In Kuwait the Decree provides²⁰ that Kuwait reserves implementation of the Convention to the recognition and enforcement of foreign arbitral awards made in the territory of other contracting states.²¹

It should be noted that the principle of reciprocity does not apply to GCC states, for example Kuwait, Oman, Bahrain, Qatar, Saudi Arabia, and the UAE. In other words, these states will automatically recognize or enforce foreign arbitral awards under the NYC, irrespective of the country in which it is made. Indeed, this evidences the support by the GCC states of international arbitration. The researcher however argues, that since the NYC is composed of 156 countries, limiting reciprocity to only six member countries will not attract international arbitration where they are not signatory to GCC conventions.²²

3.4 The Riyadh Convention on Judicial Cooperation 1983

The Riyadh Convention on Judicial Cooperation emerged in 1983²³ as a substitute for the Arab League Convention on the Enforcement of Judgments of 1952.²⁴ It combines the essence of the NYC²⁵ with the principles of Islamic law.²⁶ The Riyadh Convention adapted many basic tenets

International Commercial Arbitration' [March 1993] (Journal of Law published by Academic Publication) 173-212; Ahmed Alsamdan, 'Application of Foreign Arbitration Awards in Kuwait' (March 1998) (Journal of Law, Kuwait University) 13-80; Yaqoub Sarkhouh, *Arbitral Awards and their Enforcement in Accordance with the New York Convention, 1958: Comparative Study of Commercial Arbitration* (Arab Renaissance House 1996) 160; Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (Arab Renaissance House 1999) 98-102.

¹⁸ Bahrain Decree Law No14 of 1988, which provides that there will be no enforcement of awards of Israel in Bahrain.

¹⁹ Saudi Arabia Decree No M/11 of 16/07/1414 Hegira [29/12/1993].

²⁰ NYC, art I (3); CCP.

²¹ Decree Law No 10 of 1978, approving the accession of the State of Kuwait to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

²² CCP, art 179; Iqbal Alqallaf, *Arbitration in the State of Kuwait* (Arab Renaissance House 2006) 150-152.

²³ League of Arab States, Riyadh Arab Agreement for Judicial Cooperation, 6 April 1983; Arab League Convention on the Enforcement of Judgments of 1952.

²⁴ *ibid.*

²⁵ NYC 1958.

of the NYC²⁷ and Western bilateral agreements.²⁸ A major feature of the Riyadh Convention is the rule that limits the court at the place of enforcement from subjecting the dispute to a reappraisal, provided the matter had been previously decided among the parties²⁹ which accords with the Vienna Convention.³⁰

The Riyadh Convention stipulates that an arbitral award granted in one of its member states shall not be rescinded in another;³¹ however, there are the following exceptions: (1) if the subject matter of the dispute cannot be arbitrated according to the law of the state where the arbitration is sought;³² (2) if inadequate notice concerning the arbitration procedures was provided to the party against whom the award was made;³³ (3) where the arbitral award is in respect of a dispute, which is extraneous to the arbitration provision conditions; (4) if the award depends on the other party to arbitration for verification and (5) if recognition of the award would violate the principles of the doctrine of unification, public order or relevant laws.³⁴

The researcher argues that the exceptions (in particular, the exception which allows for an arbitral award to be ignored if it is against public policy) reiterate the importance of policy issues in the effectiveness of arbitral awards in Kuwait. The Riyadh Convention has been ratified by

²⁶ See Chapter 2 on the legal framework in Kuwait.

²⁷ *ibid.*

²⁸ Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate 2010) 139.

²⁹ Riyadh Convention 1983, art 37.

³⁰ Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679 entered into force January 27, 1980; Riyadh Convention 1983, art 37.

³¹ Article 25 of the Riyadh Convention states that, subject to certain provisos: 'each contracting party shall recognise the judgments made by the courts of any other contracting party in civil cases including judgments related to civil rights made by penal courts and in commercial, administrative and personal statute judgments having the force of *res judicata* and shall implement them in its territory in accordance with the procedures stipulated in this Part ...'; Abdullah Alrumaih, *Arbitration in the GCC States, Arbitration General Framework in the GCC in Accordance with the Latest Amendments Including New Saudi Arbitration System 2012, Arbitration Development, Arbitration Agreement, Arbitration Panel, Arbitration litigation, Arbitral award* (Arab Renaissance House 2013) 368-393.

³² *ibid.*

³³ *ibid.*

³⁴ Riyadh Convention 1983, art 37.

some Gulf States such Saudi Arabia,³⁵ the Sultanate of Oman, the UAE and Kuwait.³⁶ However, to a limited extent the 1975 Convention for Judicial Cooperation between States of the Arab League, provides for the recognition and enforcement of arbitral awards among a few countries in the Middle East and North Africa (MENA). While the Riyadh Convention provides that contracting states must recognize judgments made by member states under article 25 (c), it does not cover judgments of bankruptcy, tax cases and civil matters. The Convention is ambiguous as it does not provide a definition of what is commercial and what is not. This state of affairs becomes problematic when the adjudication courts deliver a judgment in what it deems to be a commercial matter; while the contracting state where the award is to be enforced does not consider the matter to be commercial in nature.

It should be noted that the enforcement of arbitral awards is not uniform in this region, and domestic arbitral awards are in general much easier to enforce than foreign arbitral awards.³⁷ The possibility of enforcing a foreign arbitral award is greater in countries that have acceded to the NYC³⁸ than Islamic states that tend to view the Western legal framework with too much mistrust.³⁹ Such a framework has traditionally not accorded much importance to Islamic law, and the origins of its distrust can be traced to the arbitrations related to oil concessions in Middle Eastern countries, for example, between Kuwait and the multinational oil companies.⁴⁰ These

³⁵ The Riyadh Convention on Judicial Cooperation 1983; Saudi Arabia: Arbitration Law, art 2 and Arbitration Regulation, art 2.

³⁶ Kuwait Code of Civil and Commercial Procedure, art 173; Oman Law of Arbitration in Civil and Commercial Disputes, art 11; the UAE Code of Civil Procedure, art 203(4).

³⁷ Azemi Atiya, *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law* (University of Kuwait 2012) 417-521; Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (n 17) 66-160; Alqallaf (n 22) 150-152; MP, 'Country Focus: Arbitration in the Middle East' (MP, 15 March 2006) <http://www.mpmagazine.com/display.asp?articleid=CE4288F6-3701-4C13-8E29-C94BC0EAD513&eTitle=Country_focus_Arbitration_in_the_Middle_East> accessed 10 December 2015.

³⁸ Marshall J Breger and Shelby R Quast, 'International Commercial Arbitration: A Case Study of the Areas under Control of the Palestinian Authority' (2000) 32 Case Western Reserve J Intl L 185.

³⁹ Sami Fawzi, *International Commercial Arbitration, Comparative Study of the International Commercial Arbitration Provisions Set Forth in the International, Territorial and Arab Rules and Treaties with Reference to Arbitration Provisions in the Arab Legislations* (Culture Department 2009) 353-413.

⁴⁰ Ahmad Almusadah, 'Independence of Commercial Arbitration Condition from the Relevant Original Contract, Descriptive, Analytical Comparative Study' [December 2013] *Journal of Law* (published by the Academic Publication Council, Kuwait University) 272-307; Ahmad Almelhim, 'Commercial Arbitration Contract Concluded

arbitrations ignored the national laws (Islamic law-based) but imposed the laws of the Western world.⁴¹

Gradually, the situation changed and several countries, including Kuwait adopted the NYC⁴² and used the UNCITRAL Model Law as a reference point. In addition, several local centres of arbitration have also been established in these countries.⁴³ However, these initiatives have not succeeded in completely eliminating differences among the Arab states with regard to arbitration law. In addition, there is significant variation in the enforcement of arbitral awards. The situation is further complicated due to the variation between Western legal systems and Islamic law. Obviously there is a need to adopt a more uniform system in this region.⁴⁴ The arbitration mechanism in Kuwait is not mandatory and is subject to a number of limitations, making it difficult for foreign entities to conduct business in Kuwait because any arbitral award is examined, with the aim of discovering whether or not it complies with Islamic law.⁴⁵ Thus, ratification of the NYC⁴⁶ does not mean that foreign arbitral awards will be recognized and enforced. It is therefore essential to arrive at a balance between the Islamic law requirements and the principles of international law.⁴⁷

The Riyadh Convention provides for the enforcement of arbitral awards in the Arab states.⁴⁸ It replaces the Arab League Convention (1952) on the Enforcement of Judgments. Another agreement concerning arbitration is the 1980 Amman Convention on Arabic Commercial

Between Arbitrators & Litigant Parties' [June 1994] Journal of Law (published by Academic Publication Council, Kuwait University) 195-253; Ramzi Seif, 'Civil and Commercial Procedures Law in accordance with the Kuwaiti Law' (Kuwait University, Faculty of Law Journal 1974) 35-42.

⁴¹ *ibid.*

⁴² 330 UNTS 38; 21 UST 2517; 7 ILM 1046 NYC 1958.

⁴³ Shaistah Akhtar, 'Arbitration in the Islamic Middle East: Challenges and the Way Ahead' (*ICLG*, 10 March 2008 <<http://www.iclg.co.uk/khadmin/Publications/pdf/2201.pdf>> accessed 28 August 2011).

⁴⁴ *ibid.*

⁴⁵ Sayed Mahmoud, *Specialty of Judicial Arbitration: Combined Arbitration in accordance with Kuwait Law No 11 of 1995* (Bookshop House Est 1997) 195-213.

⁴⁶ 330 UNTS 38; 21 UST 2517; 7 ILM 1046, NYC1958.

⁴⁷ *ibid.*

⁴⁸ The Riyadh Convention on Judicial Cooperation 1983.

Arbitration.⁴⁹ The Amman Convention gives Arab states greater powers to enforce arbitral awards within their jurisdiction;⁵⁰ this has left the NYC⁵¹ in competition since the Amman Convention is based on Islamic jurisprudence which all Gulf States prefer.⁵² The revocation of arbitral awards is addressed by the Amman Convention. This occurs in the following situations:⁵³ exceeding jurisdiction by the tribunal, an illegal influence having been brought to bear on the arbitrator, which in turn affected the award. The existence of a new fact that would have significantly affected the award, if that fact had been known to the concerned party in due course, and that ignorance regarding this fact was not due to the negligence of that party.⁵⁴ In the case of an award that can be revoked on these grounds, a party must apply to the Arab Arbitration Centre no later than sixty days after receiving the award or from the date of coming to know about the relevant fact. Subsequent to receiving an application, the Centre is required to form a three-member committee from the list of arbitrators. It is the duty of this committee to provide a decision on the application.⁵⁵ The decision of this committee is final.⁵⁶ Such arbitral awards are enforceable in the contracting states. However, if an award is contrary to public policy in the nation where enforcement is to take place then it will not be enforceable. The absence of other provisions regarding the recognition and enforcement of the award in the Amman Convention makes it subject to other systems such as the Riyadh Convention.⁵⁷ The present Convention on Judicial Cooperation was signed in Riyadh in 1983. The members of this Convention are the Arab states which have made it very clear that an arbitral award containing

⁴⁹ S Akhtar, 'Enforcement of Awards under Inter-Arab Conventions' <http://www.lac.com.jo/_private/pdf/Enforcement%20of%20Awards%209-8.pdf> accessed 29 August 2011.

⁵⁰ Amman Convention of 1987, arts 38 and 39.

⁵¹ NYC 1958.

⁵² UiO Faculty of Law, 'Arab Convention on Commercial Litigation' <<http://www.jus.uio.no/english/services/library/treaties/11/11-05/arab-commercial-arbitration.xml#treaty-header1-2>> accessed 21 November 2014.

⁵³ Amman Convention of 1987, art 34.

⁵⁴ *ibid.*

⁵⁵ El Sayed Almarakebi *Arbitration in the GCC States and to What Extent it is Affected by State Sovereignty* (Arabian Renaissance House 2001) 103-121.

⁵⁶ Amman Convention of 1987, art 34.

⁵⁷ *ibid.*

provisions contrary to Islamic law will not be enforced.⁵⁸ Thus, a court or enforcing authority can reject an award even if the local non-religious law would have required enforcement.⁵⁹

The irony with the Riyadh Convention is that it stipulates that the enforcing party has to supply a translation of all the documents submitted to the court.⁶⁰ However, as stipulated in the Convention, Arabic is the main language of all GCC member states and it is the language used in the courts. The Convention should adopt the general principles of public policy, whereby non-Arabic documents can be submitted and a translator will be appointed to translate them. This will be an advantage to non-Arabic speaking states and hence an impetus to Kuwait in regard to recognition and enforcement of foreign arbitral awards. It is a requirement to all GCC courts that documents presented not in the official language,⁶¹ Arabic⁶² and under codes of procedure, the winning party must attach a translation thereto.⁶³ It should be noted that the courts have discretion to ignore a request for the translation of documents, on which they have based the judgment. This can lead to annulment of the exequatur. The translation should have the same meaning as the courts of GCC states understand,⁶⁴ and any defect or error in translation might affect the application.⁶⁵ There is a need under the Convention to satisfy requirements as to the type of translation which should be provided by the party seeking recognition and enforcement of arbitral awards. All GCC states stipulate such requirements to be met; however, such requirements differ from state to state in the GCC region. It should be noted that any translator

⁵⁸ *ibid.*

⁵⁹ Mark Hoyle, 'Specific Issues in Islamic Dispute Resolution' (2009) 75 *Arbitration* 219, 222.

⁶⁰ Riyadh Convention, art 37.

⁶¹ Art 14 on the organisation of the Judiciary in Bahrain, Article 4 on the organisation of Judiciary in Qatar, Art 16 on the Organisation of the Judiciary in the UAE.

⁶² Bahrain Code Civil and Commercial Code, art 74.

⁶³ Court Cassation decision in Egypt No 1497/22 of 19/7/1993, where Egypt laws include the same provisions adopted in the GCC states. The Court of Cassation provides that a lower court decision in which reliance was placed on documents not written in Arabic or where the court had ignored the request of the defendant to translate these documents will be annulled.

⁶⁴ Art 4 on Decree Law No 42 of 2002 promulgated Judicial Authority Law, Code Civil and Commercial Procedure Article 57.

⁶⁵ The law that governs translation in some GCC (for example, Oman and UAE) stipulates that a translator must have taken an oath in order to be licensed.

must be an expert in legal translation and more than one translator may be used.⁶⁶ This may be problematic for foreign investors who may find it too cumbersome to get not only a linguistic but also a legal expert.⁶⁷ If the New York Convention is applied, such impediments can be avoided since pursuant to article IV of the Convention the enforcing party has only to supply the award, the arbitration agreement, and the translation.

3.5 Arab League Convention on the Enforcement of Judgments 1952

Arab states promote regional cooperation in the area of enforcement of foreign judgments.⁶⁸ The major multilateral conventions concluded by Arab countries in the field of international commercial arbitration are the Arab League Convention⁶⁹ on the Enforcement of Judgments 1952⁷⁰ and the Riyadh Arab Convention on Judicial Cooperation 1983.⁷¹ These initiatives were followed by the Convention on the Enforcement of Judgments, judicial disputes and appeals in the GCC⁷² promoting regional cooperation in this area.⁷³ The Arab League Convention of 1952 deals with enforcement of judgments in commercial and civil areas even if these have been made by a criminal court. The Arab League Convention demands evidence to be supplied before an award may be enforced.⁷⁴ In order for a foreign arbitral award to be enforced, the following conditions must be satisfied:

- (a) A certified true copy of the judgment has been authorised by responsible quarters.
- (b) The original summons of the text of the judgment has been duly served.

⁶⁶ Saud Arabia law in regards to a translator under Procedure Rules before the Board of Grievances 2007 Article 13.

⁶⁷ Bahrain Code Civil of the Commercial Procedure, art 74. See also Oman Decree No 18 of 2003 on the promulgated law of the regulation of legal translation offices, and in the UAE the Federal Law No 9.

⁶⁸ Habib Mohd and Sharif Al Mulla, 'Enforcement of Foreign Judgments' (1999) 14 Arab LQ 33, 35.

⁶⁹ Kuwait is party to the Arab League Convention 1954 and has entered into bilateral treaty arrangements with Lebanon and Egypt.

⁷⁰ The Arab League Convention on the Enforcement of Judgments 1952.

⁷¹ The Riyadh Convention on Judicial Cooperation 1983.

⁷² *ibid.*

⁷³ Mohd and Al Mulla (n 68).

⁷⁴ Arab League Convention, art 3.

(c) A certificate has been granted stating that the parties have been duly served with summons to appear before the proper authorities or before the arbitrators in the event that the award was made by default.⁷⁵

Although the above three conditions must be complied with as per the Convention, states like Kuwait will not adhere strictly to the provisions of this article 5. It should be noted that the language used has been formulated to the evidence for enforcement of judgments.

The Convention provides that these documents should be submitted by the enforcing party, while the Court of Cassation is not required to supply the evidence.⁷⁶

The Convention⁷⁷ should have considered the arbitration agreement as a necessary tool in regard to enforcement. However, it is deemed as essential evidence, because national courts cannot refuse enforcement of an award without adducing and verifying the arbitration agreement because of the principle of party autonomy.⁷⁸

In this way, the Arab League Convention differs from the non-Arab conventions, which do not affect civil law issues.⁷⁹ The non-Arab conventions regard such issues as outside their purview, and that these should be addressed by special treaties such as The Hague Convention on the Recognition of Divorce and Legal Separation of 1970.⁸⁰ There are considerable similarities between the Arab League Convention and the Riyadh Convention.

3.6 Amman Convention on Commercial Arbitration 1987

The Amman Convention on Commercial Arbitration of 1987⁸¹ is a regional agreement⁸² and its membership is composed of fourteen member states. The main signatories are: Algeria (which

⁷⁵ *ibid.*

⁷⁶ The Egyptian Court Cassation decision No1136 of 28/11/1990, paras 818-826.

⁷⁷ Arab League Convention, art 3.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Hague Convention on the Recognition of Divorce and Legal Separation 1970.

⁸¹ Amman Convention on Commercial Arbitration 1987.

ratified this treaty in 1987), Djibouti, Iraq, Jordan, Lebanon, Mauritania, Morocco, Palestine, Sudan, Syria, Tunisia, North Yemen, and South Yemen.⁸³ The main aim of the Convention is to respect the arbitration agreement or party autonomy doctrine, so that final awards are enforced.⁸⁴

The Amman Convention is designed along the lines of the Washington Convention, which provides that an award shall be final and binding not subject to appeal and that all parties shall comply with the award.⁸⁵ Although the Amman Convention shares similarities with the Washington Convention, it does not enjoy much popularity because it limits all pleadings⁸⁶ and submissions to the Arabic language or Arab states.⁸⁷ Consequently, the majority of the parties involved in international commercial agreements experience difficulty with the procedures.⁸⁸

The Amman Convention on Commercial Arbitration serves as a forum for resolving commercial disputes among the Arab nations.⁸⁹ It has established an Arab Centre for Commercial Arbitration in Rabat, Morocco.⁹⁰ Only the Supreme Courts of the contracting countries can reject arbitral awards made by this Centre.⁹¹ Refusal to enforce these arbitral awards is permitted only if the award in question is contrary to the public policy of that nation.⁹² The chief conventions among the Arab states are the Amman Convention on Commercial Arbitration and the Riyadh Convention on Judicial Cooperation. The latter holds well between the Arab states and consequently is applied to foreign arbitral awards made in one of the member Arab states. On

⁸² Amman Convention, art 1, which limits the Convention to only Arab states that have acceded to it.

⁸³ *ibid.*

⁸⁴ *ibid* art 1(i) which provides that the agreement to arbitrate means the agreement to resort to arbitration before or after the dispute arose.

⁸⁵ Washington Convention on Enforcement of awards under arts 53-55.

⁸⁶ Art 37 of the Amman Convention provides that the Convention is subject to approval, acceptance and ratification of the signatory states.

⁸⁷ Amman Convention, art 2, which limits the Convention to signatory states.

⁸⁸ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 462.

⁸⁹ Amman Convention on Commercial Arbitration 1987.

⁹⁰ Mohammad Almemari, *Commercial Arbitration & National Courts intervention* (Arab Renaissance House 2014) 52-90.

⁹¹ Amman Convention, art 35.

⁹² Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 964; Amman Convention, art 35 (Public Policy).

referral for enforcement, a court is restricted to either rejecting or enforcing the award.⁹³ The Riyadh Convention provides an alternative for all the Arab states that have not become signatories to the NYC.⁹⁴ The signatories to the Amman Convention are all Arab states.⁹⁵ This Convention provides the Supreme Court of each of the member states with jurisdiction to enforce arbitral awards.⁹⁶ Entities belonging to the Arab countries can resolve their commercial disputes by utilizing the offices of the Arab Centre for Commercial Arbitration. The Amman Convention created this Centre and its awards have to be enforced by the supreme courts of the member states.⁹⁷ However, enforcement need not be approved if the award is contrary to public policy.⁹⁸ The Amman Convention has followed the same general provisions on recognition and enforcement of foreign arbitral awards, by providing that the recognition and enforcement is left to the jurisdiction of the supreme court of the country in question. When it comes to the application of the Amman Convention in Kuwait, one can envisage difficulties of enforcement, especially where there are conflicting issues relating to the moral or public duties that are perceived to be central to Kuwait and Islamic principles which are largely governed by the operation of the Kuwaiti courts.⁹⁹

A classification of the Arab nations on the basis of their enforcement of arbitral awards gives rise to the following categories: first, Arab countries that are not signatories to the NYC, these nations do not differentiate between international and domestic arbitrations; second, countries of the Arab world that have acceded to the NYC; and third, Arab countries that have enacted international arbitration legislation that distinguishes between national and international arbitration.¹⁰⁰ Moreover, there is the UNCITRAL Model Law which is representative of global unanimity on what should constitute the norms and cardinal issues in international commercial

⁹³ Amman Convention Article 34(5).

⁹⁴ Breger and Quast (n 38) 185.

⁹⁵ Amman Convention on Commercial Arbitration 1987, art 1(b).

⁹⁶ *ibid* art 35.

⁹⁷ *ibid*.

⁹⁸ *ibid*.

⁹⁹ See chapter 2 on the legal framework in Kuwait.

¹⁰⁰ *ibid* 223.

arbitration.¹⁰¹ The objective of the Model Law is to facilitate uniform practice and the development of harmonious economic relations. In particular, it aims to strengthen the legal mechanisms to ensure a fair and effective solution to commercial disputes.¹⁰²

The Model Law can be adopted as it is or it can be utilized as a guide for developing domestic legislation on dispute resolution. It incorporates globally accepted principles that pertain to the control and support of arbitration by domestic courts. It has now become commonplace for any country that desires to enact legislation in the area of arbitration to consult the Model Law.¹⁰³ Some countries do not adopt the Model Law provisions in their entirety. However, such nations adopt a framework that is based on the Model Law as this offers better access and transparency to non-domestic entities. The Model Law can be said to be best suited to the requirements of international commercial arbitration and enjoys considerable popularity. The researcher agrees that the Amman Convention is more liberal compared to other GCC conventions because of its inclusion of all Arab states in the region; with a composition of fourteen states, while other conventions are restricted to only six member states. One of the impediments in enforcement is the absurdity in interpreting the Convention in member states, due to different colonial regimes that have different legal structures and languages in place; for example, Kuwait and Sudan were colonized by the British, Tunisia and Algeria by the French, and Djibouti by the Italians. The colonial saga may however, be overcome since all states use the same language of communication. Compared to the NYC (which has over 156 members) the impact of the Amman Convention on the world market remains trivial.

¹⁰¹ UNCITRAL Model Law on International Commercial Arbitration 1985.

¹⁰² Breger and Quast (n 38).

¹⁰³ UNCITRAL Model Law on International Commercial Arbitration 1985.

3.7 Summary

This chapter examined the various international conventions to which Kuwait is a signatory, especially with Arab countries, namely the NYC, the Riyadh Convention,¹⁰⁴ the Arab League Convention on the Enforcement of Judgments and the Amman Convention on Commercial Arbitration. The examination in this chapter further showed that although Kuwait is a signatory to the NYC, it has made a reservation when it comes to enforcement of foreign arbitral awards. The thesis further showed that the Riyadh Convention's scope of application on the enforcement of foreign arbitral awards is too narrow, since only six member states are signatories to it. The Riyadh Convention supplements the NYC with Islamic law principles while the Amman Convention provides a wide scope of enforcement in the fourteen states. However, the Amman Convention is limited to awards made in signatory states, this proves that the scope of application of the Amman Convention compared to the Model Law and the NYC is much narrower than the internationally agreed NYC.

The thesis examined the problem of enforcement of convention awards and found that the evidence required for an award to be enforced differs between the conventions. For example, the NYC requires reasonable evidence, where it refers to the original arbitral award, where it only seeks the arbitration agreement or a copy thereof and a translation if not drafted in English language. This is central to other conventions; for example, the Riyadh Convention requires a translator and court oath certificate, such a translator should be an expert in the English language as well as a legal expert. Indeed, this restricted approach of GCC states is a hindrance to enforcement of foreign arbitral awards in Kuwait. Under the NYC a failure by a party to supply evidence does not lead to the application being declined as the enforcing party can complete or provide evidence as proceedings progress. The thesis examined how national laws provided conditions for the recognition and enforcement of foreign arbitral awards not found under the conventions. National courts are never entitled to grant enforcement of a foreign arbitral award unless the conditions are verified, namely that the parties were duly notified and legally

¹⁰⁴ Riyadh Convention 1983.

presented. There is reciprocity; the tribunal has jurisdiction to rule under the doctrine of competence-competence; the award has authority or res judicata according to the law applicable to the award; the award does not conflict with the judgment issued in member states; the award does not conflict with public policy; and the award must have been issued in an arbitrable matter under one of the state laws. The Amman Convention provides that an award must not include a request made on the basis of a breach of the laws applicable, which might lead indirectly to the requirement that parties have to choose Amman law as the applicable law governing disputes; otherwise the enforcement will be refused.

CHAPTER 4: THE ROLE OF KUWAITI COURTS IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

4.1 Introduction

The success of an arbitral regime in Kuwait depends too much on the efficiency and cooperation of the courts. The thesis in this chapter will focus on the need to achieve the optimum role of the courts in recognition and enforcement of foreign arbitral awards. Indeed, the relationship between courts and arbitration is a key to the success of any arbitral system. Arbitration is like a young bird that is running to fly, that needs the support of the courts to fly miles. This demonstrates how the courts help arbitral awards to be enforced;¹ without courts of arbitration,² arbitral awards do not have legal effect and will become meaningless, since awards will not be enforced in domestic courts.³

Indeed, courts are indispensable to the effectiveness of arbitral enforcement in Kuwait.⁴ While the role of courts is very important, it should not exceed the autonomy of the parties to arbitrate. The agreement to arbitrate should be given due respect, due to the doctrine of competence-competence.⁵ In Kuwait a foreign arbitral award cannot be enforced until it has been granted an exequatur by a competent court.⁶ The Civil Code and Commercial Procedures provides that an exequatur must be filed before the court of first instance (Al-Kuliyaya Court) located in the capital city of Kuwait).⁷ The court, according to the Civil and Commercial Procedural law, is the only place that has jurisdiction to enforce foreign judgments.⁸

¹ Albert Jan van den Berg, *International Arbitration in Changing World* ICCA Congress Series No 6 Bahrain, Deventer, Kluwer Law and Taxation Publishers, 1993, ICCA Congress Series No6 Bahrain 1993 13 at 15.

² NYC, art III.

³ Civil Code and Commercial Procedure, arts 184-185.

⁴ Michael Kerr, 'Arbitration and the Courts: the UNCITRAL Model Law' (1985) 34 ICLQ, 1.

⁵ Civil Code and Commercial Procedure, arts 240 and 241.

⁶ Civil Code and Commercial Procedures, art 199.

⁷ *ibid* art 9; art 7 of Law No 7 of 1996, amending some provisions of Law No 23 of 1990 on the organization of the judiciary.

⁸ *ibid*.

This chapter examines the role of courts in Kuwait. Addressing the role of courts, this chapter will be divided into sections consisting of first, an examination of foreign arbitral awards in the Kuwaiti context; second, the doctrine of party autonomy as a yardstick that governs arbitration proceedings and which factor domestic courts need to take into consideration, when considering enforcement of foreign arbitral awards; third, procedural requirements for enforcement of foreign arbitral awards; fourth, the recognition and enforcement of foreign arbitral awards; fifth, foreign investments in Kuwait; sixth, effects of recognition and enforcement of foreign arbitral awards, dominantly from foreign investors or other commercial entities, or people that prefer to settle their arbitration disputes in Kuwait; seventh, the importance of recognition and enforcement of foreign arbitral awards in Kuwait; and last, a summary of the chapter.

4.2 Definition of Foreign Arbitral Awards

Under Kuwaiti law, a foreign arbitral award is defined as a decision made outside Kuwait in a tribunal of competent jurisdiction.⁹ Kuwaiti arbitration administration now falls under the CCPL.¹⁰ Despite the recognition of arbitration by Kuwait, the CCPL which is the main law on arbitration, does not define arbitral awards. Similarly, the Judicial Arbitration Law (Law No 11/1995) (JAL),¹¹ which supplements the CCPL, does not provide a precise definition for a foreign arbitral award. It does however, set out a procedure whereby an arbitration panel within the Court of Appeal, consisting of three judicial officers and two arbitrators, may be selected by the parties.¹² The Quran equally has no definition of arbitral award.¹³ Since these are the main

⁹ CCPL, art 173; Sultan Rashed Al Atifi, *Development of Arbitration System in the State of Kuwait (Judicial and Voluntary Arbitration)* in accordance with Law No 11 of 1995 and Civil and Commercial Procedures Law No 38 of 1980 and 1995, pp 2-91, Ministry of Justice, Kuwait.

¹⁰ *ibid.*

¹¹ Law No 11/1995) (JAL).

¹² Sami Fawzi, *International Commercial Arbitration* (The House of Culture for Publishing and Distribution 1992) 17.

¹³ Azemi Atiya, *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law* (University of Kuwait 2012) 417-521; Sayed Mahmoud, *Specialty of Judicial Arbitration: Combined Arbitration in accordance with Kuwait Law No 11 of 1995* (Bookshop House Est 1997) 195-213; Ahmad Almelhim, 'Commercial Arbitration Contract Concluded Between Arbitrators & Litigant Parties' [June 1994] *Journal of Law* (published by

sources of Kuwaiti domestic laws¹⁴ and they provide no substantive definitions of the concept of arbitration, it is necessary to examine the definition of arbitration under international law by virtue of Kuwait's ratification of such law.¹⁵ Article II of the New York Convention (NYC) defines arbitration not only as awards made by arbitrators appointed for each case (by the parties) but also as those made by permanent arbitral bodies to which the parties agree to submit their disputes;¹⁶ this definition includes various types of arbitral awards which concern the participants.¹⁷

It is also helpful to further examine insights found in the conditions concerning the NYC's definition of arbitral award, the 'agreement in writing',¹⁸ which is the arbitration agreement signed by the parties or an arbitration clause included in an exchange of letters.¹⁹ The definition of arbitral award in article I(2) of the NYC is not limited to awards made by the arbitrators selected in each matter but also extends to that granted by permanent arbitral bodies.²⁰ Nevertheless, in the opinion of the researcher, Kuwait's recognition and enforcement of foreign arbitral awards is likely to be more limited than anticipated in the NYC for two reasons. First, Kuwait only enforces arbitral awards that can be reciprocated.²¹ Second, the arbitration laws in

Academic Publication Council, Kuwait University) 189-243; Ramzi Seif, 'Civil and Commercial Procedures Law in accordance with the Kuwaiti Law' (Kuwait University, Faculty of Law Journal 1974) 31-43; Sultan Al Atifi (n 9).

¹⁴ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

¹⁵ Mahmoud (n 13); Wajdi Raghay, *Memos on the Principles of Kuwait Civil Law* (Dar Al Fikar Al Arabi 1978) 464.

¹⁶ NYC, art II.

¹⁷ Mahmoud Mokhtar Prairie, *International Commercial Arbitration* (3rd edn, The Arab Renaissance House 2004) 80.

¹⁸ NYC, art II (2); *Anglo-Persian Oil Co v Ruler of Qatar* (1950); *Anglo-Persian Oil Co v Sheikh of Abu Dhabi* (1951); *Ruler of Qatar v International Marine Oil Co* (1953); *Saudi Arabia v Aramco* (1958); *Sapphire International Petroleum Ltd v NIOC* (1963); *BP v Libya* (1973); *Texaco v Libya* (1977); *LIAMCO v Libya* (1977); *AMINOIL v Kuwait* (1982); *DST v Ra's al-Khaimah* (1982); *NOC v Sun Oil* (1985); *Mobil v Iran* (1987); *Amoco v Iran* (1987); *Wintershall v Qatar* (1988); *Philips Petroleum v Iran* (1989).

¹⁹ *ibid.*

²⁰ NYC, art I (2).

²¹ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

Kuwait²² are guided by the provisions of the CCPL.²³ Kuwait has not adopted the UNCITRAL Model Law.²⁴ The researcher therefore supports the position that to mitigate the foregoing ambiguities, it may be useful for parties to incorporate in their contract a clear clause on choice of law so that the definition of an arbitral award would depend on the choice of law they agreed upon.

In this regard, the researcher argues that there is a need for Kuwaiti courts through its ratified conventions²⁵ to define clearly what is meant by foreign arbitral award within its legal framework. The NYC should also help by clearing up this ambiguity for signatory states like Kuwait, since its provisions do not provide a clear definition. This creates or gives domestic courts power to use their conservative approach of interpretation instead of the purposive approach, which in the end hinders recognition and enforcement due to Islamic principles. The NYC never intended to do this; rather, it aimed to promote international recognition and enforcement of foreign arbitral awards in all signatory states and was ratified by Kuwait.

4.3 The Kuwaiti Party Autonomy Doctrine

Party autonomy doctrine means that the arbitration parties are free to choose the ‘lex arbitri’, that is, the laws where arbitration will take place when considering enforcement of an arbitral award. This means that when courts are considering any arbitral proceedings they must consider the supremacy of party autonomy in arbitration agreements. Since courts are called in arbitration for host reasons, they should not go beyond this doctrine, because parties to arbitration chose arbitration over litigation.

²² *ibid*

²³ *ibid*.

²⁴ UN Doc A/RES/31/98; 15 ILM 701 (1976); Smith Herbert, *Country Factsheet* (2nd edn, Dlais Lutz and Stibbe 2009) 3; recently Kuwait adopted UNCITRAL Model Law on 13 November 2013-2019. However, it has not adopted it in the CCP.

²⁵ Amman Convention, Riyadh Convention, Arab League Convention, and New York Convention in regard to enforcement and recognition of foreign arbitral awards.

There is no uniform conflict rule used in identifying laws that govern a party's legal capability to enter into a contract. Legal capacity in a common law country will be governed by the laws governing the contract²⁶ since it is usually a matter that concerns contracts. In addition, the ability to enter into a contract regulates the parties' law applicable thereto.²⁷ The recognized rule has no provision for the law that governs the organization and institution of legal entities.²⁸ Kuwait is a sovereign state and a principal place of business in the Middle East with central administration of the legal entity.²⁹ Those who breach the law are punished depending on the place of registration of the company in which they work and the level to which such companies have adapted to the rules regarding the activities.³⁰

Countries that have adopted the rules and standards of some international bodies have called for amendments to some of the standards in Kuwait.³¹ The courts in Kuwait operate in ways that promote business. The Companies Act stipulates that the rules relating to the organization and capitalization of bodies should protect the shareholders in the company.³²

Both the European Free Trade Area³³ and the EU, support transnational businesses and have always supported the independence of companies.³⁴ This is what Kuwait should emulate so as to allow for more possibility for a company registered in Kuwait to bear the costs of its activity and

²⁶ Common law countries law of contract procedures eg England, Canada, the USA, Ghana, New Zealand.

²⁷ Hosni A-Msri, *International Commercial Arbitration* (Legal Library 2006) 215.

²⁸ Atiya (n 13).

²⁹ *ibid.*

³⁰ Mahmoud A Al-Tuhiawi, *Arbitration in Civil and Commercial Matters* (Dar University Publications 2006) 140.

³¹ Yaqoub Sarkhouh, *Arbitral Awards and their Enforcement in Accordance with the New York Convention, 1958: Comparative Study of Commercial Arbitration* (Arab Renaissance House 1996) 135-207.

³² Sayid Ahmed Mahmoud, *The Arbitration System* (Arab Renaissance House 2005) 185.

³³ Joshua Karton, *the culture international arbitration and the evolution of contract law* (OUP 2013) 78-99; The European Free Trade Association (EFTA) is an intergovernmental organization with the sole aim of promoting free trade and economic integration to the benefit of its member states, namely, Iceland, Liechtenstein, Norway, and Switzerland.

³⁴ The European company (SE) is a legal structure that allows a company to operate in different European Union (EU) countries under a single statute, as defined by the law of the Union and common to all EU countries: Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). Council Directive 2001/86/EC of 8 October 2001 supplements the Statute for a European company with regard to the involvement of employees. The Statute for a European Company was adopted in 2001 and entered into force in 2004, some 30 years after it was first proposed to the Commission. By creating this structure, the EU facilitated the operation of companies wishing to expand their business although at the community level but this is also international.

carry on its business.³⁵ This, on the other hand, does not indicate that the issue of seat has actually disappeared from consideration. It is up to national law to monitor the relevant factors each state wants to apply within its borders.³⁶ Therefore, it is important to establish a system of laws that applies across national boundaries.³⁷ However, the actual support given to businesses within a particular environment does not challenge the European legislation, when it requires that the company is structured accordingly under the law of the state.³⁸

Kuwait has joined forces with other Gulf States to create an enabling environment for businesses both local and foreign.³⁹ This is mostly in pursuit of a policy of cooperation in the Arabian Gulf and its efforts to develop the market.⁴⁰ Member states are urged to use their best efforts to ensure that businesses thrive in the region.⁴¹

The aim of international arbitration is to create business-supportive environments.⁴² On the other hand, disputes resolved through arbitration rules and laws provide a large number of solutions.⁴³ This is believed to be the most acceptable system of ADR or direct enforcement of the law

³⁵ Husain M Al-Baharna, 'International Commercial Arbitration in Perspective' (1988) 3 Arab LQ 10-15.

³⁵ Law No 78/1980.

³⁶ Mounir Mohamed Al-Ganbaha, *The Recognition of Foreign Arbitral Awards and Enforcement* (Dar University Publications 2005) 178.

³⁷ Bayoumi Abdel Fattah Hijazi, *The Legal System for Enforcement of Foreign Judgments* (Dar University Publications 2004) 180.

³⁸ Mahmoud (n 13) 241.

³⁹ Mahfouz Mir'aiIben-Mahfouz, *International Commercial Arbitration and the Rules of Islamic Law* (Arab Renaissance House 2002) 66.

⁴⁰ El Sayed Almarakebi, *Arbitration in the GCC States and to What Extent it is Affected by State Sovereignty* (Arabian Renaissance House 2001) 103-129; Abdullah Alrumaih, *Arbitration in the GCC States, Arbitration General Framework in the GCC in accordance with the latest amendments including new Saudi Arbitration System 2012, Arbitration Development, Arbitration Agreement, Arbitration Panel, Arbitration litigation, Arbitral Award* (Arab Renaissance House 2013) 368-393; Ahmad Abdultawab, *Arbitration Agreement and Related Pleas, Comparative Study of the GCC Laws* (Arabian Renaissance House 2008) 137-227; Mohei Alam Aldin, *Laws, Regulations and Rules of Arbitration & Reconciliation in the GCC States Compared with Arbitration Laws* (Arab Renaissance House 1998) 120-145.

⁴¹ Amr Al-Feqi, *The New Arbitration in the Arab Countries* (The Modern University Office 2003) 80.

⁴² Hafeza Al-Said Haddad, *Appeal Invalidity on the Provisions of the Arbitration of International Disputes* (Dar University Publications 2005) 142.

⁴³ Judicial Arbitration Administration, *The State of Kuwait Arbitration System: Relevant by Virtue of Law No 11 of 1995, organizing Ministerial Resolutions and the Civil and Commercial Procedure Code No 38 of 1980* (Judicial Arbitration Administration, Kuwait 2013).

without considering the practical selection of the rules of law.⁴⁴ This is viewed as a normal approach and is applied in a number of current pieces of arbitration legislation.⁴⁵ Taking the Kuwaiti Arbitration Law as an example, the modern trend appears to be to avoid unduly long hearings.⁴⁶

In the context of legal capacity which is examined here, the parties to a dispute will not be prepared to expect the legal capability of a party to be evaluated under a specific law, especially when that party is listed in Kuwait and has its actual seat in another country.⁴⁷ The researcher argues that the government should enact rules and procedures to remedy this gap in the law to enhance arbitration enforcement in Kuwait, bringing it into line with other international centres of arbitration such as New York, London, Hong Kong, Dubai, and Paris.

4.4 Procedure Requirements for Enforcement of Foreign Arbitral Awards in Kuwait

The Kuwaiti arbitration system distinguishes between domestic arbitral awards and foreign arbitral awards.⁴⁸ An application for enforcement of an arbitral award made in Kuwait must be filed with the president of the court that originally had jurisdiction over the case. The execution order will be issued only if the court has verified that there is a valid arbitration clause, that no right of appeal remains and that there is no justification for not enforcing the award. The judge may not, while examining the award, reconsider the merits of the dispute. If a foreign arbitral

⁴⁴ Pha'aeldinIben-Farhon, *Tabserat al-hukam of the Assets of the Districts and Curriculum Provisions* (Scientific Library 1995) 212.

⁴⁵ Alrumaih (n 40) 368-393; Abdultawab (n 40) 137-227; Nareman Abdulqader, *Arbitration Agreement* (Arabian Renaissance House 1996) 21-29; Abdulhameed Al-Zedyadah, *Commercial Arbitration Agreement* (Arab Renaissance House 2014) 161-223; Mahmoud Al-Tehawi, *Pillars of Agreement on Arbitration & the Conditions of Validity* (Arab Renaissance House 2014) 228-280; Mahmoud Al-Tehawi, *Technical Means of the Negative Impact of Arbitration Agreement & Scope* (Arab Renaissance House 2003) 339-360; Abdulbasit Abdulwasa, *Arbitration Agreement Legal System: Analytical Comparative Study* (Arab Renaissance House 2013) 160-177; Hat Al-Yusifi, *Impeding Effect of Arbitration Agreement & To What extent it Affects Jurisdiction* (Arab Renaissance House 2014) 249-275; Al-Ansari Al-Nidani, *Relative Impact of Arbitration Agreement* (Arab Renaissance House 2009) 168-176.

⁴⁶ Fatima Mohammed Al-Awa, *Arbitration and Shari'a Law* (Islamic Office 2002) 224.

⁴⁷ Abbas Aboudi, *Explaining the Provisions of the Law Enforcement* (The House of Culture 2005) 157.

⁴⁸ Kuwait Chamber <www.kcci.org.kw> accessed 9 October 2014.

award is rendered in an NYC member state, the courts of Kuwait will recognize and enforce it.⁴⁹ Awards issued in non-signatory countries are also enforceable provided there is reciprocity of enforcement between Kuwait and the jurisdiction in question.⁵⁰ Under article 200, the Kuwait courts will recognize and enforce the award, without retrial or examination of the merits of the case if the following conditions are met:⁵¹

- (a) The subject matter of the award is capable of settlement by arbitration under Kuwaiti law;
- (b) The award is enforceable in the jurisdiction in which it was rendered;
- (c) The procedural requirements have been satisfied.⁵²

For a Kuwaiti court to agree to recognize a previous judgment, article 199 of the CCP has to be complied with which requires the following conditions to be satisfied:⁵³

- There is a court ruling in the state on the subject;
- The judgment does not constitute a violation of public policy or public morals of the country where the enforcement is sought.⁵⁴

The researcher argues that the problem with article 199 in regard to foreign arbitral awards enforcement is that it does not offer explanation on what is public policy. This gives the court a discretion to limit enforcement by using a rigid approach rather than a purposive approach of interpretation, when it comes to enforcement of foreign arbitral awards. The words ‘public policy’ may be subject to Islamic law, which other non-Islamic states do not confer to. This may be a problem when one is seeking enforcement of foreign judgments in Kuwait. It is of great importance that Kuwait courts interpret this article in a manner that will enhance foreign

⁴⁹ CCP, arts 199 and 200.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid* 199.

⁵³ Ahlam Al Tamimi, *Enforcing Foreign Judgments and Arbitral Awards in Kuwait* (Al Tamimi & Co, Kuwait Office 2010) 6; Atiya (n 13) 417-521; Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (Arab Renaissance House 1999) 66-160; Akasha Abdulaal, *Civil & Commercial International Procedures and Enforcement of Foreign Arbitral Awards* (University of Kuwait 2010) 378-444.

⁵⁴ Ali Hassan, *International Jurisdiction by virtue of Arbitration* (Dar University Publications 2006) 215.

investments. The state court is a very important player in enforcing foreign arbitral awards. The court should adopt pro-arbitration policy by adopting a presumptive principle of enforcement. Courts in Kuwait promote the relationship between arbitration and courts in assisting enforcement, unless there is good ground not to do so. In other words, the term ‘public policy’ should not just be used in its form without critical analysis of the aim of arbitration. The law must make it clear that courts should favour enforcement of foreign arbitral awards to enhance business in Kuwait and also to be a centre of international arbitration.

Article 200 of the CCP also vests powers in the parties which could be the subject of a lawsuit under Kuwaiti law and shall be enforceable in the country.⁵⁵ However, despite what each party might claim under the principle of party autonomy, it is important that they base their claims on the law. Courts should support enforcement due to the doctrine of compatibility and complimentary approach.

4.5 Recognizing and Enforcing Foreign Arbitral Awards in Kuwait

The enforcement of foreign arbitral awards in Kuwait sometimes encounters challenges to the idea of arbitration as a means of resolving differences. If law enforcement is applied objectively to the NYC it will be difficult to encourage commercial entities to resort to arbitration as part of contractual arrangements. Even when the NYC was entered into, the Kuwaiti Government reserved the right to regulate the recognition and enforcement element in its own way, without necessarily accepting the international provisions fully.⁵⁶ While there may be good reasons for this, it does ultimately present a challenge to the acceptance of the use of arbitration if

⁵⁵ Essam El-Din Al-qusabi, *The Privacy of Arbitration in the Field of Investment Disputes* (Facility Knowledge 1994) 22.

⁵⁶ Sami Fawzi, *International Commercial Arbitration, Comparative Study of the International Commercial Arbitration Provisions Set Forth in the International, Territorial and Arab Rules and Treaties with Reference to Arbitration Provisions in the Arab Legislations* (Culture Department 2009) 353-413; Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Sharia and Statute Law* (Mid- country press, London, Graham and Trotman 1984) 252-274.

enforcement cannot be guaranteed.⁵⁷ It has been suggested that Kuwaiti courts actively enforce foreign arbitral awards regardless of whether the awards meet the consistent reciprocity and procedural criteria as foreign judgments under articles 199 and 200 of the CCP.⁵⁸ As a participant of the NYC, Kuwait can recognize and enforce foreign arbitral awards that are made in countries that are also members of the NYC.⁵⁹ Kuwait is also a member of the International Convention on the Settlement of Investment Disputes (1965) (ICSID).⁶⁰ The scope of the ICSID is limited to legal disputes regarding an investment between a host state (or any constituent subdivision or agency of a host state selected by that state) and a national of the host state.⁶¹ Furthermore, a condition of the ICSID is that a party is not under an obligation to mediate simply because of its approval of the ICSID.

However, if the reciprocity demand is met foreign arbitral awards are enforced in Kuwait, subject to the following conditions:⁶²

- (d) The foreign award is granted in a matter which can be the subject of arbitration and is enforceable within the country it was awarded;
- (e) The foreign award is granted by a competent mediator based on the laws of the country in which it was awarded;
- (f) The parties are immediately summoned to appear in court and should be represented;

⁵⁷ Hamza Haddad, *The Arbitration Rules of the Commercial Arbitration Centre of the Gulf Cooperation Council (GCC)* (Yemen Arbitration Center 1996) 60-68.

⁵⁸ Saleh Hassan, *Controls: The Legitimacy of Arbitration* (Riyadh Publishers 1997) 117-20.

⁵⁹ *ibid* 126.

⁶⁰ International Convention on the Settlement of Investment Disputes (1965), 17 UST 1270, TIAS 6090, 575 UNTS 159

⁶¹ Mohamed Fathallah Hassanein, *Explained: The Arbitration Act, Arbitration, Administrative Law* (Legal Library 2005) 68-74.

⁶² Al Tamimi (n 53) 6; Yaqoub Sarkhouh, 'Validity Terms of the Arbitral Award in the Kuwaiti Legislation Compared with the Contents of Arbitration Treaties issued under the Auspicious of the UN' *Journal of Law* (Academic Publication Council, Kuwait University, September 1994) 23-56.

- (g) The award on a subject is not against the laws of the country in which it has been awarded;
- (h) The award should not contradict judgments that have already been made in Kuwaiti courts or contain anything that violates Kuwaiti morality or public policy.

Kuwaiti law allows both parties to choose the jurisdiction, the terms of the agreement and the forum for resolving any dispute that occurs after the agreement. Although the CCP allows Kuwaiti courts to enforce judgments from foreign jurisdictions in exceptionally restricted circumstances, the Kuwaiti courts do not usually do so directly.⁶³ Article 199 of the CCP provides that foreign judgments may be worthless in Kuwait unless the foreign law in question offers mutual recognition and enforcement of judgments from Kuwait, by written agreement and depends entirely on the equivalent provisions in the laws of a foreign country regarding enforcement of orders made in Kuwait.⁶⁴ Without a written agreement allowing reciprocal enforcement, Kuwaiti law states that the court may issue a ruling on enforcement declining to grant a request for recognition and enforcement. Mutual enforcement can also be proven by a legal document issued by the state. However, Western countries do not have reciprocal enforcement with Kuwait.⁶⁵ In some respects, there are grounds for the researcher to argue that the Kuwaiti laws on arbitration are less tolerant with regard to arbitral award enforcement. This was stated by the High Court of Appeal in the following way:

The arbitrator's award is of a similar nature to that of a judge's award, however, it is not evaluated with the same criteria applied to the latter's decisions for many

⁶³ Hamza Haddad, *About the Arab Draft Model Law for Commercial Arbitration (ICCA)* (The Yemeni Centre for Arbitration, 2003) 130; Sarkhouh (n 62) 23-56; George Hazbon, 'Legal System of Foreign Arbitration under the Internal Law' (Journal of Law published by Faculty of Law, Kuwait University, December 1987) 151-199; Ahmed Hindi, *Enforcing Awards* (Arab University House 2009) 29; Ahmed Abu Al Wafa, *Arbitration under Arabian Laws* (Arabian Renaissance House 2009) 11-68.

⁶⁴ Fernando Téson, 'State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration' (1984) 24 Va J Intl L 323-324.

⁶⁵ Al Tamimi (n 53) 10.

reasons, one of which is that the arbitrator is chosen by the parties (party autonomy) and often lacks the legal knowledge that is available to a court judge.⁶⁶

Analysis of this indicates that there remains a problem when issues of enforcement are taken to the Supreme Court as there are still politics or public policy in regard to the authority of party autonomy. In most cases, the domination of the judiciary contradicts with the concept of arbitration, which is basically established on the free will of litigants to choose their arbitrators. Also, this could invoke concerns in terms of adhering to traditional formalities in the judicial practice, namely the time-consuming procedures.⁶⁷ The decision of the arbitrators passed by way of majority is subject to contention by the Kuwait Court of Cassation⁶⁸ on the ground that the Court does not agree to put arbitrators on the same footing as judges of municipal courts,⁶⁹ given the fact that parties under party autonomy chose the arbitrator to determine the subject matter of their disputes in lieu of the state judge.⁷⁰

4.6 Foreign Investment in Kuwait

Generally, many foreign investors prefer arbitration as a dispute resolution mechanism, mainly because they are wary of litigating in the other party's home court. An effective arbitration procedure builds confidence in parties dealing with one another and enhances trade.⁷¹ Therefore, to attract foreign investment in Kuwait, an encouraging legal environment must be available; investors would normally prefer arbitration mechanisms to resolve their disputes. This is because foreign investors are concerned about available procedures to resolve any such future disputes

⁶⁶ High Court of Appeal, Administrative Appeal No 1230/82, rendered 1 March 1983.

⁶⁷ Muhammad Al-Mogate'a, 'Difficulties Related to Judicial Arbitration According to Law No 11/1995' (Paper presented to Kuwait Convention on Commercial Arbitration-Kuwait, 27-29 April 1997) 2-3.

⁶⁸ Model Law, arts 6 and 13.

⁶⁹ *ibid.*

⁷⁰ Kuwait Court Cassation Commercial Appeal No 48/75, rendered on 29 December 1976.

⁷¹ Austin Amisshah, 'Judicial Aspect of the Arbitral Process' paper presented at the IFCA conference 24 October 1997, Geneva Switzerland; A. Okekeifere, 'Commercial Arbitration As the most Effective Dispute resolution Method, Still a Fact Now or A Myth' *Journal of International Arbitration* (1998) 15, 80-104; Jalal Mohammedain, *Arbitration between Foreign Investor and Investment Hosting State before International Investment Disputes Settlement Center* (New University House 2001) 20-40; Mansor Al Sayed, 'The Legal Regime of Foreign Investment under New Investment Law, Economic and Legal Comparison Studies' (*Journal of Law, Academic Publication of Legal Research and Studies*, September 2003) 255-348.

fairly and properly. Therefore, an arbitration system that is effective helps build confidence in transactions and boosts foreign investments. This in turn increases inflow of investments to Kuwait. In view of this, arbitration is the most favoured mechanism for the settlement of disputes in international commerce.

Thus, proper compliance with the UNCITRAL Model Law⁷² and the NYC, which are intended to facilitate the conduct of international commercial arbitration, is necessary.⁷³ In this regard, the Kuwaiti courts must maintain a level playing field and recognize the relationship between trade, commerce, and arbitration within the international community; enabling effective arbitration mechanisms which are crucial in establishing good investment opportunities in Kuwait. It should be noted that when the risk is increased because effective dispute resolution procedures are not available, international investors may refuse to enter into transactions with Kuwait because the risks are too great.⁷⁴ This ultimately hampers free flow of trade and investment in Kuwait. Unless courts in Kuwait build and boost the confidence of parties to arbitration agreements that their foreign arbitral awards will be enforced in Kuwait, progress of international arbitration will still be limited to GCC states,⁷⁵ resulting in losing out on trade and investment with almost the entire world.⁷⁶ Kuwaiti courts should consider and adopt the UNCITRAL Model Law, which was adopted to assist states in reforming and modernizing their laws on arbitration. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws of Kuwait, since it covers all the entire process of arbitral proceedings up to the enforcement of foreign arbitral awards and reflects a world-class consensus of the importance of

⁷² 24 ILM 1302 (1985).

⁷³ *ibid*; 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

⁷⁴ Michael F Hoellering, 'International Commercial Arbitration, A Peaceful Method of Dispute Resolution' (1985) 40(4) *Arb J* 19, 20.

⁷⁵ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

⁷⁶ Michael Kerr *Concord and Conflict in International Arbitration (The Keating Lecture) 1996*, Kings College, London at 7, cited in Hong-lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' *Changing Face of Arbitration (Journal of International Arbitration 1998)*145-148.

arbitration in world investment or economic systems.⁷⁷ Under international investment the relationship between arbitration and courts has been recognized for a very long time since 1698 in England. On such background the researcher further argues that Kuwait should recognize the relationship between arbitration and trade. An effective arbitration regime whereby foreign arbitral awards can be recognized and enforced is a vital factor in establishing a good investment environment in Kuwait. Kuwait aims to attract investment, but the irony is that it does not offer an attractive arbitral environment in regard to enforcement of foreign arbitral awards, due to its court system that is too rigid when applying the NYC. There is indeed an urgent need for reform in Kuwait to match the demands of commerce if it is to remain competitive in international business and investment. The main role of Kuwaiti courts should be exclusively to support and assist arbitral proceedings. In other words, the main focus of courts in Kuwait should be based on supporting the doctrine of party autonomy to the fullest extent possible. When courts in Kuwait achieve a proper balance in this relationship, the effectiveness of the Kuwaiti arbitration jurisdiction will attract investors, and Kuwait will become an international venue.⁷⁸

4.7 Effects of an Arbitral Award

The NYC provides that an arbitral award is a final and binding decision that has the force of law.⁷⁹ This is in accordance with the rules of procedure pursuant to which the award is relied

⁷⁷ Model Law on explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, Note on Model Law para3.

⁷⁸ Ahmed Alsamdan, 'Application of Foreign Arbitration Awards in Kuwait' (March 1998) Journal of Law, Kuwait University 13-80.

⁷⁹ NYC, art 1; Walter Mattli and Thomas Dietz, *international arbitration and global governance, contending theories and evidence* (OUP 2014) 1; Stuart Dutton, Andy Moody and Neil Newing, *international arbitration* (global law and business 2012) 7-8; Gary Born, *international arbitration, law and practice* (Kluwer Law International 2012) 5; Christian Buhning-Uhle, *arbitration and mediation in international business* (Kluwer Law International 1996) 39-55; In *Sucafina SA v Rotenberg* [2012] EWCA Civ 637 it was held that arbitration awards are either final or binding or they are not to be that labelled as 'appeal interim award', although the doctrine of res judicata in international arbitration is a complex and unresolved issue and its meaning differs in different jurisdictions. Also, *Essex County Council v Premier Recycling Ltd* [2006] EWHC 3594 stated that the words 'final and binding' in an arbitration clause were insufficient by themselves to amount to an exclusion of the right of appeal under the Arbitration Act. In *Shell Egypt West Qantara GmbH v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation)* [2009] EWHC 2097 (Comm), the parties had agreed that any arbitration decision shall be final, conclusive, and binding on all parties. However, Dana Gas sought to appeal the arbitral award relying on

upon.⁸⁰ For instance, once the arbitration is finalized as in the case of *Kuwait v Aminoil*,⁸¹ the other parties cannot seek a change in the award unless certain conditions have not been met. Article 185 of the CCPL provides that an award that is rendered by an arbitrator shall not be enforceable, save by order issued by a Chief Judge of the Court of the state in which it is sought to be enforced. Accordingly, an arbitral award that contains decisions on matters beyond the scope of the submission to arbitration, may give rise to a right of appeal or a total nullification of the award.⁸² It must be noted however, that an arbitral award is difficult to appeal against,⁸³ review, or change.⁸⁴

A presentation of an arbitral award and agreement starts the process of recognition of the award as binding, there can be no review based on the fact that the parties consented to the award in the first place. Basically, as long as there is reciprocity, then a foreign arbitral award is enforceable in Kuwait.⁸⁵ In this regard, both the UNCITRAL Model Law⁸⁶ and the NYC⁸⁷ provide that once the parties have arrived at an agreement to arbitrate the dispute, then the dispute is left entirely

section 69(1) of the English Arbitration Act 1996 which states: 'Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.' Dana challenged the UK court's jurisdiction on the basis that the parties had agreed that the arbitral award would be final, conclusive, and binding. Also, in an ICC arbitration (*Dyncorp (US) v International Industrial Trading and Investment Company* ('IITIC') (Qatari) where Dyncorp was resisting enforcement in the US, following a failed attempt by IITIC to enforce such in Qatar, the Qatari courts set aside the award and did not just refuse to enforce it. IITIC argued that the Qatari court was not entitled to review the merits of the award and, even if the Qatari court asserted such jurisdiction, article 28 of the ICC Rules provides that awards are binding. The NYC is also based on this premise.

⁸⁰ NYC, art III.

⁸¹ *Government of the State of Kuwait v American Independent Oil Company (Aminoil)*, Award of 24 March 1982 (1982) 21 ILM 976. For additional references to the award and to the literature related thereto, C Ziad, 'References on State Contracts' (1988) 212 ICSID Rev-FILJ 6-7.

⁸² NYC, art V(c).

⁸³ CCPL, art 185.

⁸⁴ *Folkways Music Publishers v Weiss* 989 F.2d 108, 111 (2nd Cir 1993)

⁸⁵ Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 Loyola of Los Angeles Intl & Comp L Rev 565.

⁸⁶ UNCITRAL Model Law, art 30, UNCITRAL Model Law on International Commercial Arbitration 1985 (United Nations documents A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

⁸⁷ NYC 1958; also *Scherk v Alberto-Culver Co* 417 US 506 (1974).

for the tribunal to consider.⁸⁸ An arbitral award is a private procedure and does not involve the public. Usually, the courts are empowered to scrutinize whether the proper procedure has been followed to ensure that it is enforceable and recognizable.⁸⁹

Therefore, the effect of an arbitral award would depend on whether it can be seen to be consistent with the laws and enforceable.⁹⁰ Ideally in Kuwait, an arbitral award is considered to be similar in nature to a judgment handed down by a judge of a competent court.⁹¹ The only difference between an arbitral award and a court judgment is how the law applies to the matters in dispute.⁹² Generally, judgments delivered by the courts can be challenged in the appellate court. However, an arbitral award can only be appealed against on grounds provided for by the law and on specific agreements.⁹³

The researcher advances his argument on the grounds that arbitral awards are binding once an arbitration agreement has been made; a court cannot have jurisdiction over the dispute that is governed by the arbitration agreement, unless where the court is called upon for host reasons to support the arbitral proceedings, for example, when recognizing and enforcing foreign arbitral awards.⁹⁴ A contractual agreement to arbitrate is not considered a public matter due to principle of party autonomy. However, it is governed by the contract⁹⁵ and the award rendered is deemed contractual in nature.⁹⁶ More importantly, the arbitral award or proceedings are intended to oust the jurisdiction of the courts and they cannot determine a dispute that is already in the process of arbitration.⁹⁷

⁸⁸ UNCITRAL Model Law, art 30.

⁸⁹ NYC, art V; UNCITRAL Model Law, arts 34-36.

⁹⁰ Radwan Abu Zeid, *The General Principles of International Commercial Arbitration* (Dar University 1981) 19.

⁹¹ Abdulaal (n 53) 378-444.

⁹² Muhammad Al-Mogate'a, 'Difficulties Related to Judicial Arbitration According to Law No 11/1995' (Paper presented to the Kuwait Convention on Commercial Arbitration, Kuwait, 27-29 April 1997) 2-3.

⁹³ *ibid.*

⁹⁴ Explanatory Memorandum to the CCPL.

⁹⁵ Khaled Abu Ghaba, *Arbitration & Its Impact of Settlement of Disputes* (University of Kuwait 2011) 87-101.

⁹⁶ Kuwait Court of Appeals, 'Judicial Arbitration Department' (2009) 4 *Journal of Arbitration* 333.

⁹⁷ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 60.

4.8 Importance of Recognition and Enforcement of Foreign Arbitral Awards

The significance of enforcing an arbitral award is firstly to show that a dispute has been resolved,⁹⁸ in a peaceful and amicable manner. Recognition implies that a party favoured by the arbitral award may go ahead and enforce it as long as it passes the test of reciprocity.⁹⁹

In Kuwait, reciprocity is governed by two pieces of legislation, namely, the Convention of the League of Arab States on the Enforcement of Judgments (1952) and Law No 44 of 1998, ratifying the Agreement for the Enforcement of Judgment and Judicial Notice in the Member States of the GCC.¹⁰⁰ These two are largely disregarded when enforcement actions are brought before the Kuwaiti court. Parties to a dispute, especially if they are foreigners, always choose arbitration as the appropriate means of settling their disagreements and disputes something which explains the importance of arbitral awards in settling disputes.¹⁰¹

Recognition and enforcement of foreign arbitral awards shows that an arbitration agreement is a binding contractual agreement, which cannot be totally disregarded in cases where a dispute arises, as the choice of law determines its enforcement.¹⁰² In international commercial arbitration,¹⁰³ the parties to the dispute have autonomy in determining the law of the place where the award is to be enforced.¹⁰⁴ This gives the parties an expectation that the arbitral award will be enforced expeditiously.¹⁰⁵ In Kuwait, courts actively enforce foreign arbitral awards,¹⁰⁶

⁹⁸ Cotula Lorenzo, 'Strengthening Citizens' Oversight of Foreign Investment: Investment Law and Sustainable Development' [2000] International Arbitration 90.

⁹⁹ CCPL, art 199.

¹⁰⁰ The Riyadh Convention on Judicial Cooperation 1983.

¹⁰¹ Redfern and Hunter (n 97) 1-10.

¹⁰² *J Smith Ltd v H & S International* (1991) 2 Lloyd's Rep 127.

¹⁰³ Redfern and Hunter (n 97) 106.

¹⁰⁴ *ibid* 107.

¹⁰⁵ Michael Hwang and Yeo Chuan Tat, 'Recognition and Enforcement of Arbitral Awards' in MC Pryles and MJ Moser (eds), *Asian Leading Arbitrators' Guide to International Arbitration* (Juris Publishing 2007) 407-64.

¹⁰⁶ Kuwait Court Cassation Commercial Appeal No 48/75, rendered 29/12/1976; Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial

notwithstanding that these awards should share the same reciprocity and practical standards as foreign judgments under articles 199 and 200 of the CCP.¹⁰⁷

Kuwait is a signatory of the NYC,¹⁰⁸ as such it pledges to recognize and enforce foreign arbitral awards, made in countries that are signatories to the Convention. Furthermore, Kuwait is also a participant in the 1965 International Convention for the Settlement of Investment Disputes (ICSID), which was officially ratified by it on 14 January 1989.¹⁰⁹ Legal differences arising from investments between contracting states (or any element of the subdivision or agency of a contracting state designated for settlement of investment disputes by that state) and nationals of the contracting states are limited by ICSID. Moreover, ICSID provides that a participant may not be entitled to partake in mediation or arbitration by arguing the ratification of the settlement of investment disputes only.¹¹⁰ Since it has the duty of reciprocity, foreign arbitral awards are enforced in Kuwait, given that the conditions for a foreign arbitral award and the way it is presented render it subject to arbitration and to being enforceable in the country. The parties are requested immediately to make an appearance. The award must be based on the principles of law agreeable to the parties.¹¹¹ Irrespective of the country where an award was issued, the subject matter of the arbitration must not be contrary to the law as stated in the Constitution of Kuwait. Finally, the award must not be contrary to morals or public policy.¹¹²

Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

¹⁰⁷ CCP; Essam El-Din Al-qusabi, *The Privacy of Arbitration in the Field of Investment Disputes* (Facility Knowledge 1994) 18.

¹⁰⁸ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

¹⁰⁹ By virtue of Law No 1/1979.

¹¹⁰ Al Tamimi & Co (n 53) 6.

¹¹¹ *ibid.*

¹¹² *ibid* 8-15.

4.9 Summary

In summary this chapter has examined the exposition of a foreign arbitral award, which is not well defined in the Kuwait legal system.¹¹³ This thesis has thoroughly examined the gap in literature vis-à-vis the interpretation of a foreign arbitral award in Kuwait. It has also examined that there is a need to further address and reform the law in this regard¹¹⁴ and what is required to deal with international definition of an arbitral award. The thesis also showed the problem of defining a foreign arbitral award internationally since even the NYC is silent.¹¹⁵

Further, the thesis examined the doctrine of party autonomy,¹¹⁶ which is the main reason why arbitration is considered over litigation, calling upon Kuwaiti courts to respect this doctrine due to the doctrine of competence-competence and the separability of arbitration from any other dispute resolution mechanism. The researcher, in examination of this chapter, attempted to explore the requirements that need to be met before a foreign arbitral award can be recognized and enforced in Kuwait.¹¹⁷ The research showed that the requirements are not very supportive of recognition and enforcement of foreign arbitral awards,¹¹⁸ this requires an urgent response from the Kuwaiti Government to match international commerce in regard to international arbitration.¹¹⁹

The thesis analysed the problems of recognizing foreign arbitral awards in Kuwait and showed that Kuwait, in terms of reciprocity provided in article 1(3), experiences difficulty in implementing the NYC. The researcher has provided solutions that will enhance Kuwait's arbitration system; for example, it should consider the Australian model which has avoided the reciprocity mechanism to attract more investment. The domestic courts of Kuwait need to initiate the modern system of arbitration, not limiting it to GCC states as is the case now. The effects of

¹¹³ CCP and the Civil Code.

¹¹⁴ NYC, art 1(2).

¹¹⁵ *ibid.*

¹¹⁶ English Arbitration Act 1996, arts 32, 40, 44; ISCID, NYC, art II.

¹¹⁷ CCP, arts 199 and 200.

¹¹⁸ *ibid.*

¹¹⁹ UNCITRAL Model Law.

enforcement of foreign arbitral awards are fully examined, which render a final award to be automatically enforced, without going through under rules of procedure as provided under the CCP.¹²⁰ And lastly the thesis examined and filled some gaps, that will benefit the state of Kuwait, as the research showed that parties choose arbitration in the expectation that in the case of dispute, their final awards will be given legal effect by the courts. The thesis showed that a denial by the Kuwait courts to recognize and enforce foreign arbitral awards is against the natural rules of justice that govern arbitration.

¹²⁰ Art 185.

CHAPTER 5: GROUNDS FOR REFUSING RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER THE NYC IN KUWAIT

5.1 Introduction

Assuming that the party who is successful in arbitral proceedings is able to meet the conditions for enforcement of the foreign arbitral award, the losing party may still be able to evade enforcement of the award as provided under the New York Convention (NYC) by invoking one of the grounds for non-enforcement. The same may be true even in a domestic arbitration among GCC states¹ which may add their own particular grounds for refusing the enforcement of a foreign arbitral award. It should be noted that the main aim of the NYC is to harmonize the enforcement of foreign arbitral awards in signatory states (such as Kuwait).

To support enforcement of foreign arbitral awards the NYC provides only a limited number of defences to enforcement, narrowly construed. An award which is not covered under the Convention can still be covered under UNCITRAL Model Law. There are five defences found in the Convention in article V (1) which this chapter will examine. This chapter in different sections will highlight the main defences to enforcement of foreign arbitral awards. The main defences to be examined are: incapacity and invalidity of arbitration agreement; unfair composition of the arbitral tribunal; setting aside of foreign arbitral awards. It should be noted that the most important characteristic of these defences is that they are not based on the merits of the case. Under the NYC a court cannot refuse enforcement of foreign arbitral award because the arbitrators or tribunal got it wrong, either on the facts or the law. Rather, these defences go to the integrity of the process, including fairness to the parties and a reasonable opportunity to be heard. In practice an award produced by an experienced competent arbitrator is unlikely to be

¹ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

enforced. Indeed, voluntary compliance combined with court enforcement results in 99% of international arbitration awards being paid or otherwise agreed.

5.2 Incapacity of Parties and Invalidity of Arbitration Agreement as Grounds for Refusing Recognition and Enforcement

5.2.1 Incapacity

In the GCC countries and the NYC, a losing party may apply to have the application for the recognition and enforcement of a foreign arbitral award dismissed, by proving that they were incapacitated at the time the arbitral agreement was established.² Hence, in this respect Kuwaiti law recognizes the ground provided in the NYC.³ The NYC acknowledges that enforcement of a foreign arbitral award can be rejected, if the losing party is able to show that the parties to the arbitration agreement were incapacitated in some way, as per the law.⁴ Furthermore, the Bahraini International Commercial Arbitration Law states that if a party can prove some form of incapacity,⁵ regardless of whether or not this party has been active in the arbitral proceedings despite knowing of their incapacity, an award will not be acknowledged.⁶ Some GCC legislation does, however, employ the principle⁷ of good faith to prohibit a party from relying on their own

² Abdullah Alrumaih, *Arbitration in the GCC States, Arbitration General Framework in the GCC in accordance with the latest amendments including new Saudi Arbitration System 2012, Arbitration Development, Arbitration Agreement, Arbitration Panel, Arbitration litigation, Arbitral Award* (Arab Renaissance House 2013) 368-393; Ahmad Abdultawab, *Arbitration Agreement and Related Pleas, Comparative Study of the GCC Laws* (Arabian Renaissance House 2008) 137-227; Nareman Abdulqader, *Arbitration Agreement* (Arabian Renaissance House 1996) 21-29; Abdulhameed Al-Zedyadah, *Commercial Arbitration Agreement* (Arabian Renaissance House 2014) 161-223; Mahmoud Al-Tehawi, *Technical Means of the Negative Impact of Arbitration Agreement & Scope* (Arabian Renaissance House 2003) 348-360.

³ NYC, art V.

⁴ NYC, art V(1)(a).

⁵ Alrumaih (n 2).

⁶ Fraser P Davidson, *Arbitration* (W Green/Sweet & Maxwell, Edinburgh 1991) 392.

⁷ Alrumaih (n 2); Steven Finizio and Christopher Howitt, 'When International Arbitration Meets Sharia' (Commercial Dispute Resolution 2013)

<http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication> accessed 15 May 2016.

lack of capacity if the other party continued with the arbitration agreement in good faith.⁸

As with all contracts an arbitration agreement must be valid.⁹ This means that the agreeing parties must have the legal capacity to enter into an arbitration agreement.¹⁰ National legislation generally does not impose limitations on the capacity to be a party to an arbitration agreement, and thus the general contractual capacity of the parties is adequate.¹¹ Nonetheless, in rare cases the necessary capacity may not be present, or special approval from an authority or relevant court may be required.¹²

The incapacity of a party may be raised as an issue at the outset of an arbitration process by a party seeking to stop arbitration¹³ or at the conclusion of an arbitration process; where incapacity can be used as grounds for dismissing an application for the recognition and enforcement of an arbitral award.¹⁴ Notwithstanding the general observation above, a number of issues are raised in relation to the grounds of incapacity.¹⁵ The first is the extent to which a party must lack

⁸ Abu Zaid Radwan, 'General Restrictions of International Commercial Arbitration, Part IV, Journal of Law and Sharia' (Academic Publication Council, Kuwait University, April 1980) 9-69; Award of 12 March 1984 of the Arbitral Tribunal of the Hamburg Commodity Exchange, *FR German Buyer v Thai Seller*, XVI YB C A 11 (1991); CA Paris, 4 January 1980, *Intercast v Ets Peschaud et Cie International*, cited in Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law 1999) para 470; Italian *Corte di Cassazione*, 15 January 1992, *Privilegiata Fabbrica Maraschino Excelsior Girolamo Luxardo SpA v Agrarcommerz AG*, XVIII YBCA 427 (1993).

⁹ NYC 1958.

¹⁰ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 462.

¹¹ *ibid*; A legally binding contract or valid agreement between parties must contain all of the following elements (offer and acceptance; an intention between the parties to create binding relations; consideration to be paid for the promise made; legal capacity of the parties to act; genuine consent of the parties; and legality of the agreement; *Balfour v Balfour* [1919] 2 KB 57; *Aminoil v Kuwait*, Award of 24 March 1982, 21 ILM 1982, s33 in the ICC case *Framatome v Atomic Energy Organization of Iran* (JDI) 1984; Dhisadee Chamlongrasdr, 'Tension in Domestic and International Law on Capacity to Enter into Arbitration Agreements: A Survey on Legal Restrictions' (2005) 16(2) *European Business Law Review* 275-310.

¹² *ibid* paras 3-28; Saudi Arbitration Law, art 6; Akasha Abdulaal, *Civil & Commercial International Procedures and Enforcement of Foreign Arbitral Awards* (University of Kuwait 2010) 378-444; Abu Zeid Radwan, *The General Principles of International Commercial Arbitration* (Dar University 1981) 19.

¹³ George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37(1) *Yale Journal of International Law*; Abdulqader (n 2) 309-342.

¹⁴ Redfern and Hunter (n 10) paras 3-25.

¹⁵ Al-Zedyadah (n 2) 345-380.

capacity,¹⁶ that is whether the party must have no capacity or simply diminished capacity. The second concerns what legislation covers the incapacity element. Finally, there is the question of what kinds of ‘parties’ can be said to be governed by the relevant law.¹⁷

The first issue in relation to incapacity is translation-oriented, namely the Arabic text which is different from English text. The Arabic text makes reference to ‘incapacity’ only, whereas the English text refers to ‘some incapacity’.¹⁸ It is submitted here that the inconsistency between the two texts may have major consequences for the extent to which this ground can be relied upon.

Typically, the GCC legislation holds that the level of capacity of a natural person dictates the legal competence they require to enter into a contract. Thus, under the GCC legislation, a natural person’s capacity falls within one of three categories: full capacity, diminished capacity, and incapacity.¹⁹ Therefore, the effectualness of the grounds of incapacity is dependent on whether the capacity issue is understood as per the English or the Arabic legal text. If the Arabic text is used, it is arguable that a party with diminished capacity will not be able to have a rejected award enforced. This can be distinguished from the English text which merely requires ‘some’ incapacity, which this researcher considers to be akin to diminished capacity. As a result, the refusal of the enforcement of an award is more likely in a court that applies the English legal text.²⁰ It follows that it can be concluded that Kuwaiti laws can be more supportive of foreign award enforcement than the NYC as applied in many countries relying on the English text.²¹ No clear guidance is given by the NYC, which simply makes reference to the ‘applicable’ law and as

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ UNICTRAL, New York Convention (UNCITRAL).

http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/NYConvention.html accessed 20 November 2012.

¹⁹ Bahrain Civil Code, arts 72-83; Kuwait Civil Code, arts 84-146; Qatar Civil Code, arts 50-52 and 190-129; UAE Civil Transaction Law, arts 85-88 and 157-175; and Oman Personal Status Law No 32 of 1997, arts 138-157 and 143(a) (individuals with diminished capacity are able to enter into contracts in certain situations).

²⁰ Mahmoud Al-Tehawi, *Pillars of Agreement on Arbitration & the Conditions of Validity* (Arabian Renaissance House 2014) 228-280.

²¹ *ibid.*; Saad Badah, ‘Incapacity of Parties and Invalidity of Arbitration Agreement as Grounds for Refusing Recognition and Enforcement in Kuwait’ (2014) 3 AGORA International Journal of Juridical Sciences 44-49.

regards international arbitration this issue remains largely unsettled.²² The common sense approach is to use the law that is personally applicable to the relevant party. Again, the NYC is silent on this matter, but commentators have proposed that ‘personal law’ can be identified by referring to the conflict rules of the nation where enforcement is being pursued.²³ For a legal person, personal law is that of the location of its headquarters or where it is incorporated.²⁴ In the GCC,²⁵ the personal law of natural persons is that of their nationality and of legal persons, it is that of the location of their headquarters²⁶ except in Bahrain, where Bahraini legislation will only apply if a company has its headquarters in the country or was created in Bahrain.²⁷

Another issue is the types of ‘parties’ that are governed by incapacity grounds. In all GCC countries, capacities vary depending on whether a party is a legal person or a natural person.²⁸ As the focus of this thesis is on the enforcement of foreign arbitral awards in Kuwait a GCC nation, it is appropriate to explore the laws concerning the issue of capacity in GCC nations.²⁹

²² Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention* (Cameron May 2001) 144.

²³ Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 2785; Redfern and Hunter (n 10) paras 3-25; Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (2001) 276; Gaillard and Savage (n 8) para 1695; G Gaja, ‘Introduction’ in G Gaja (ed), *International Commercial Arbitration: New York Convention Vol I* (Dobbs Ferry 1978) para IC4, 1; Jean Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell Ltd 2007) 831; Ignacia Suarez Anzorena, ‘The Incapacity Defence under the New York Convention’ in Emmanuel Gaillard and Domenico Di Pietro *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (CMP Publishing 2009) 632; Abdulaal (n 12) 378-444; Radwan (n 12) 19.

²⁴ Born (n 23) 556-557; Julian D M Lew, Loukas A Mistelis and Stefan Michael Kroll, *Comparative International Arbitration* (Kluwer Law International 2003) para 6-51; van den Berg (n 23) 276-277; Gaillard and Savage (n 8) 454-460; Poudret and Besson (n 23) 234; Anzorena (n 23) 633-635; Patrick Dumberry and Erik Labelle-Eastaugh, ‘Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration’ in Jena D’Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law* (Routledge-Cavendish 2011) 360-371.

²⁵ Bahrain Code of Civil and Commercial Procedure, art 21(1); Qatar Civil Code, art 11; the UAE Civil Code, art 11(1); Kuwait Conflict Law No 5 of 1961, art 33.

²⁶ Qatar Civil Code, art 11; Kuwait Civil Code, art 20; the UAE Civil Transaction Law, art 11(2).

²⁷ Commercial Companies Law, art 4.

²⁸ *Fougerolle S A v Ministry of Defence of the Syrian Arab Republic*, XXYBCA 515 (1990) (explains that the issue of capacity may arise in relation to states and state agency).

²⁹ Ayser Sulaiman, *Impeding Effect of Arbitration Agreements in International Commercial Contracts* (Arab Renaissance House 2014) 92-127.

5.2.2 The Capacity of a Natural Person

The civil codes of Kuwait³⁰ contain rules relating to the capacity of natural persons. In Oman these regulations are found in the country's Personal Status Law, while in Saudi Arabia they are found in Islamic law. The GCC nations with civil law legal systems are typically, heavily influenced by Islamic law. In Islamic law capacity is separated into two types: first, *Ahliyyat Al-Wujub*, which is the capacity to obtain rights such as inheritance but not obligations and second, *Ahliyyat Al-ida*, which is the capacity to obtain rights and to acquire obligations.³¹ Generally speaking, the GCC nations' civil codes provide that all people of full capacity have the legal competence to enter into a contract.³² Arbitration legislation provides that only those persons with the legal capacity to dispose of their rights are able to agree to arbitration.³³ Consequently, a natural person must belong to the *Ahliyyat Al-ida* category of capacity in order to be a party to arbitration.³⁴

As a preamble to discussing limitations on the capacity of natural persons, it is necessary to distinguish between capacity and defective consent, that is, mistake, fraud, and duress. This distinction may have an important impact on whether the grounds of incapacity can actually be invoked in a given enforcement proceeding. The civil law of GCC nations (namely, Bahrain, Qatar, the UAE, and Kuwait) makes a distinction between capacity and defects of consent. If incapacity is proven, then any contract entered into by the incapacitated person will be null and void.³⁵ In the researcher's opinion, a person with diminished capacity can use this to seek the refusal of the enforcement of a foreign arbitral award, even if they lied and claimed to have full

³⁰ Kuwait Conflict Law No 5 of 1961, art 33; Bahrain Code of Civil and Commercial Procedure, art 21(1); Qatar Civil Code, art 11; the UAE Civil Code, art 11(1).

³¹ Explanatory Memorandum of the Kuwaiti Civil Code; A Al-Sanhori, *Alwaseet Fi Sharah Al-Qunoon Al-Madani (Commentary in Civil Law)* vol 1 (Dar Ihya' Al-Turath Al-Arabi, Beirut 2001) 266-268.

³² Bahrain Civil Code, art 72; Kuwait Civil Code, art 84; Qatar Civil Code, art 49; the UAE Civil Transaction Law, art 157; Oman Personal Status Law, art 138.

³³ Bahrain Code of Civil and Commercial Procedure, art 233; Kuwait Code of Civil and Commercial Procedure, art 173; Qatar Code of Civil and Commercial Procedure, art 190; Oman Law of Arbitration in Civil and Commercial Disputes, art 11; Saudi Arabia Arbitration of 1983, art 2; Saudi Arabia Arbitration Law, art 2 and Arbitration Regulation, art 2; and in the UAE Code of Civil Procedure, art 203(4).

³⁴ *ibid.*

³⁵ Al-Sanhori (n 31) 271-272.

capacity or had fraudulently inferred this. In these circumstances, the other party is left with only one option, that is to seek compensation for any loss suffered.³⁶

In contrast, defects in consent (mistake, duress, fraud) do not automatically void an arbitration agreement although they could make it voidable due to the separability doctrine.³⁷ This means that the arbitration agreement remains in force until voided by the court of merits or arbitral tribunal. Therefore, any defects of consent issues must be highlighted at the beginning of arbitration and if not, it can be argued that the enforcing court of a GCC country will not consider a defence based on incapacity alone. This is another aspect concerning the ground of incapacity where, in the researcher's opinion, the law and practice of GCC countries including Kuwait actually leave less room for refusal to enforce foreign arbitral awards. The possible limitations put on the legal capacity of natural persons in terms of arbitration agreements involve various aspects.

5.2.3 Successfully Resisting an Arbitration Agreement

In the GCC countries a losing party to a foreign arbitral award can seek the rejection of the application for the enforcement of this award by proving that the arbitration agreement is not valid. The basis for resisting an agreement can be found in the Riyadh Convention,³⁸ the Arab League Convention,³⁹ the NYC⁴⁰ but not in the Convention for the Enforcement of Judgments, Delegations and Judicial Notices in the GCC or in the national legislation of GCC countries,

³⁶ Bahrain Civil Code, art 76; Qatar Civil Code, art 117(2); Kuwait Civil Code, art 97(1)(2); UAE Civil Transaction Law, art 175.

³⁷ A 'void' contract cannot be enforced by the parties. A void contract is as if it had never existed. A contract would be void when it requires one party to perform an impossible or illegal act. A 'voidable' contract is a valid contract and can be enforced; however, only one party is bound to the contract terms in a voidable contract. The party not bound is allowed to cancel the contract, making it void. While a void contract cannot be performed under the law, a voidable contract can be. However, the party not bound to the contract can choose to void it before the other party performs, for example where one party was forced or tricked into entering the contract or contracts were entered into when one party was incapacitated (drunk, insane, delusional): *Couturier v Hastie* (1856) 5 HLC 673 (void contract).

³⁸ The Riyadh Convention on Judicial Cooperation 1983.

³⁹ The Arab League Convention on the Enforcement of Judgments 1952.

⁴⁰ 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) (NYC).

concerning the enforcement of foreign arbitral awards.⁴¹ A notable exception to this situation is Bahrain which has incorporated the Model Law in its international commercial arbitration legislation.⁴² Nonetheless, although not provided for in law, the invalidity of an arbitration agreement may form the basis for resisting the enforcement of an award, if this award is deemed to be contrary to public policy.

The NYC states that a party to an arbitration agreement can use the invalidity of that agreement as a defence against an arbitral award if they have been incapacitated in some way in accordance with the law applicable to them⁴³ or if the agreement is invalid, as per the law the parties have subjected it to or the law of the nation in which the award was granted.⁴⁴ In contrast, there is no mention of governing legislation in the Riyadh Convention or the Arab League Convention despite both providing for the grounds of invalidity.⁴⁵ The Arab League Convention states that enforcement of an arbitral award may be rejected if it is not in line with the arbitration agreement.⁴⁶ The Riyadh Convention states that an arbitral award can be resisted if it was granted based on an agreement to arbitrate that has expired or is void.⁴⁷ Incapacity is not valid under the laws to which the parties have subjected to.⁴⁸ The award need not to be recognized if it went beyond the scope of the parties' submission to the arbitrators as provided by article V(1) (c) and article 5(1)c of the Inter-American Convention.⁴⁹

In terms of international commercial arbitration, an arbitration agreement is seen as the core of

⁴¹ El Sayed Almarakebi, *Arbitration in the GCC States and to What Extent it is Affected by State Sovereignty* (Arabian Renaissance House 2001) 103-121; Ahmad Almelhim, 'Commercial Arbitration Contract Concluded Between Arbitrators & Litigant Parties' [June 1994] *Journal of Law* (published by Academic Publication Council, Kuwait University) 195-223; Ramzi Seif, 'Civil and Commercial Procedures Law in accordance with the Kuwaiti Law' (Kuwait University, Faculty of Law Journal 1974) 35-43

⁴² Law of International Commercial Arbitration, art 36(1)(a)(1).

⁴³ 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) (NYC) Art II.

⁴⁴ NYC, art V(1)(a).

⁴⁵ Almarakebi (n 41) 103-121; the Arab League Convention on the Enforcement of Judgments 1952; Riyadh Convention 1983.

⁴⁶ Arab League Convention, art 3(b).

⁴⁷ Riyadh Convention, art 37(b).

⁴⁸ *ibid.*

⁴⁹ *First Options of Chicago v Kaplan* 334 F.3d (3rd Cir 2003).

the will of the parties to resolve their disputes through arbitration and not through the courts.⁵⁰ As with all contracts, in order to be valid an arbitration agreement has to fulfil various conditions. As a result, if the losing party to a foreign arbitral award is able to prove that the arbitration agreement is not valid, then the award cannot be enforced.⁵¹ An arbitration agreement may be invalid due to substantive inadequacies or the failure to satisfy formal requirements.

5.2.4 Legal Provisions on the Invalidation of Arbitration Agreements

A significant number of debates have ensued around the issue of what legislation should be applied to determine whether an arbitration agreement is valid, because the law regarding this issue is so uncertain.⁵² The Riyadh Convention⁵³ and the Arab League Convention⁵⁴ do not include any provision that deals with this subject, the provisions that exist (for example, in the NYC)⁵⁵ are unclear. Typically, provisions that cover both the form and substance of a matter are closely connected. However, they do sometimes differ and therefore need to be scrutinized independently. It should however, be noted that it was not the main objective of the NYC to allow awards to be subject to review by the courts. In other words, such defences should be construed by courts in Kuwait in promotion of foreign arbitral awards, to match a new dimension in the GCC states. It is of great importance to note that under UNCITRAL,⁵⁶ it is explicitly clear that the tribunal has the jurisdiction to rule on its jurisdiction (competence-competence doctrine), including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of the contract shall be treated as an agreement independent of other contracts (by virtue of the separability doctrine). The decision by

⁵⁰ Redfern and Hunter (n 10) para 3-1.

⁵¹ Stefan Michael Kroll, 'Recognition and Enforcement of Foreign Arbitral Award in Germany' (2002) 5(5) Intl Arb LR 165; Lew, Mistelis and Kroll (n 24) paras 7-5 to 7-32 and 7-34 to 7-58; 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) (NYC) Art II.

⁵² Born (n 23) 95; Lew, Mistelis and Kroll (n 24) paras 6-26; Di Pietro and Platte (n 22) 144; Gaja (n 23) 1; V Veeder, 'Summary of Discussion in the First Working Group' (ICC Congress Series No 9, Paris 1998) 45.

⁵³ The Riyadh Convention on Judicial Cooperation 1983.

⁵⁴ The Arab League Convention on the Enforcement of Judgments 1952.

⁵⁵ Lew, Mistelis and Kroll (n 24) paras 6-26.

⁵⁶ UNCITRAL, art 16(1) and (2).

the tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Hence courts should avoid non-enforcement of foreign arbitral awards.

5.2.5 Legal Provisions Governing Substantive Invalidity

The substantive invalidity of arbitration agreements is handled differently by different international conventions. According to the Arab League Convention, the enforcement of an arbitration agreement can be resisted on the grounds of invalidity.⁵⁷ However, the Convention does not clarify what law is applicable in this situation, or the conflict of laws rules that can be used to establish applicable law.⁵⁸ The Riyadh Convention's provisions are also ambiguous, it simply describes that an award will not be enforced if founded on a void arbitration agreement or clause.⁵⁹

Given such lacunae, the national courts of GCC countries have no choice but to depend on their own national conflict rules to determine decisions on the validity of arbitration agreements, if appropriate guidance cannot be found in international conventions. Discussion of this issue in this thesis is limited to the rules governing commercial and civil cases.

The rules on conflict of laws in the UAE and Qatar are found in their respective civil codes,⁶⁰ whereas in Kuwait a distinct law deals with these rules.⁶¹ It is provided by these legal provisions, that it is only the law of the country that has the power to decide upon which law will be applied, if a conflict between different laws arises. Provided that no enacted laws or conventions include provisions that prohibit this.⁶² Thus, if there is no international convention or special law that establishes what law covers the validity of arbitration agreements, the GCC nations' own respective general conflict of laws rules, must be applied by the enforcing court. As this is indeed the case (as the Riyadh Convention, the Arab League Convention and general arbitration law

⁵⁷ The Arab League Convention on the Enforcement of Judgments 1952, art 3(b).

⁵⁸ *ibid.*

⁵⁹ Riyadh Convention, art 37(b); also 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) (NYC) Art II.

⁶⁰ UAE Transaction Law, arts 10 and 28; Qatar Civil Code, arts 10-38.

⁶¹ Law No 5 of 1961.

⁶² Qatar Civil Code, arts 10 and 33; the UAE Transaction Law, arts 10 and 22; Kuwait Law, arts 31 and 68.

offer no clear guidance as to what law to apply), general rules on conflicts of law will be applied in GCC nations to deal with the issue of the validity of arbitration agreements.⁶³

The general rules governing conflict of laws in GCC nations provide that the legal provisions dealing with the substantive invalidity of an arbitration agreement are different based on whether the agreement in question relates to contractual responsibilities. The UAE Civil Code for instance,⁶⁴ states that if contractual obligations lead to an arbitration agreement then both the form and the substance of the contractual responsibilities, are governed by the law of the country the parties reside in; assuming they reside in the same country or, if this is not the case, the law of the country in which the contract was made. These provisions may be put aside where the conditions of the contract illustrate that a different law was intended to apply or if the parties agree on the application of a different law.⁶⁵ The substantive invalidity of an arbitration agreement is, therefore, established by an enforcing court based on one of the following: the law as decided upon unanimously by the contracting parties; a suitable law given the conditions of the contract; the law of the common place of residence of the parties or the law of the nation in which the contract was made. In Qatar and Kuwait these rules do apply but only in relation to substantive invalidity.⁶⁶ However, in the case of non-contractual duties, the law to be applied is that of the country in which the act that led to these duties occurred.⁶⁷

There are some situations however, in which the aforementioned rules do not apply. For example, the validity of arbitration agreements concerning real property is governed by the legislation of the country where that real property is situated.⁶⁸ In regard to intellectual property, in Kuwait the arbitration agreement is governed by the legislation of the nation in which the publication of the intellectual property occurred.⁶⁹ Additionally, if the foreign legislation and

⁶³ Swedish Arbitration Act 1999.

⁶⁴ The UAE Civil Transaction Code, art 19.

⁶⁵ *ibid.*

⁶⁶ Qatar Civil Code, arts 25(1) and 27; Kuwait Law No 5 of 1961, arts 51 and 59.

⁶⁷ Qatar Civil Code, arts 30-31; Kuwait Law, arts 66 and 67; UAE Civil Transaction Code, art 20.

⁶⁸ Qatar Civil Code, art 25; Kuwait Law, art 59; UAE Civil Transaction Code, art 18.

⁶⁹ Kuwait Law, arts 57-58.

rules to be applied contravene the moral codes or public policies of a GCC nation, then they will not be used.⁷⁰

It is important to highlight that prior conditions will be assumed in cases where the parties to an arbitration agreement use national legislation regarding, the enforcement of awards or international conventions that do not include clear and practical conflict of laws rules, to bring an application to the GCC courts concerning the enforcement of foreign arbitral awards in GCC nations.⁷¹

According to article V(1)(a) of the NYC, an arbitration agreement can be deemed invalid as per the law that the parties have agreed will be applied,⁷² or if no such decision has been reached, as per the law of the nation in which the arbitral award was granted.⁷³ The issue of capacity is also governed by this provision but it is only in relation to validity that the governing law is referenced.⁷⁴ The Model Law's article 36(1)(a)(i) similarly acknowledges the contracting parties' right to decide upon the law to be applied regarding an arbitration agreement's validity.⁷⁵ Again, if no decision about an applicable law has been made by the parties, then the law of the country in which the arbitration occurred is applied.⁷⁶ This defence is narrow in application of the Model Law. The main function of the Model Law was to fill in the gaps of the NYC⁷⁷ in regard to enforcement. This means that the party agreed that *lex arbitri* should not be halted in enforcement of a foreign arbitral award.

A great deal of debate has been sparked by the NYC in terms of what it says about the invalidity

⁷⁰ Qatar Civil Code, art 38; UAE Transaction Law, art 27; Kuwait Law, art 73.

⁷¹ *ibid.*

⁷² *Buckeye-Cheke Cashing Inc v Cardegena*, 126 Sct 1204 (2006), where it was held that challenging an arbitral award is against the wishes of the parties to an arbitration agreement.

⁷³ NYC, art V(1)(a).

⁷⁴ van den Berg (n 23) 282.

⁷⁵ *ibid* 276.

⁷⁶ *Parsons and Whitmore Overseas v Societe General D'elinfustrie Papier* 508 F.2d 969 (2nd Cir 1974).

⁷⁷ UNCITRAL Model Law, art 36(1) a(iv).

of arbitration agreements, notwithstanding the apparent clarity of its provisions in this regard.⁷⁸ This debate has largely been concerned with, whether it is necessary for the parties to make an express decision about which law they will subject arbitration to or whether a decision can be implied. For instance, if the parties have agreed upon their primary contract being subject to a particular law, the issue arises whether this decision carries over to any arbitration agreement and also whether the decision of a seat for the arbitration can be seen to determine the applicable law for the agreement. It is necessary to take some time to explore these ideas as the law in the GCC nations does not expressly deal with them.⁷⁹ The question that needs analysis is, should courts review arbitral procedures under article V (1) (a)? If the parties agree to arbitration, why should courts intervene? It is explicitly clear in the arbitration agreement; that law (*lex arbitria*) will be of the seat of arbitration. This does not need the court to intervene in enforcement of foreign arbitral awards on grounds of the seat of arbitration. One perspective holds that the law to which the primary contract is subject unless otherwise stated, is the law to which the arbitration agreement will be subject.⁸⁰ This perspective is supported by the simple fact that while it is common practice for a contract to include provisions concerning which law will be applied, this is rare in arbitration agreements. Additionally, no specific applicable law is given in the standard ICC arbitration clauses.⁸¹

Furthermore, article V(1)(a) of the NYC refers simply to an ‘indication’ of the law to be applied, which can be interpreted in a wide-ranging way and suggests, as highlighted by Davidson,⁸² that

⁷⁸ *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ICSID Case No ARb/84/3 award of 20 May 1992.

⁷⁹ Azemi Atiya, *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law* (University of Kuwait 2012) 417-521; Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (Arab Renaissance House 1999) 66-160; Iqbal Alqallaf, *Arbitration in the State of Kuwait* (Arab Renaissance House 2006) 150-152.

⁸⁰ Redfern and Hunter (n 10) 157-158; Davidson (n 6) 291; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Abdulaal (n 12) 378-444; Gaja (n 23) 1; Di Pietro and Platte (n 22) 144; Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths 1989) 63; Lew, Mistelis and Kroll (n 24) para 6-24; A Dicey, J Morris and L Collins, *Conflict of Laws* (13th edn, Sweet & Maxwell 2000) 592; *Italian Company v German F R firm* (1980) V YBCA 262 (Germany Court of First Instance 24 Apr 1979) 264; *Cia Maritima Zorroza SA v Sesostris SAE* [1984] 1 Lloyd’s Rep 652 (UK QBD Com Ct) 652.

⁸¹ ICC, ‘Arbitration’ <<http://www.iccwbo.org/court/arbitration/id4114/index.html>> accessed 21 July 2012.

⁸² Davidson (n 6) 393.

such a decision on applicable law can indeed be implied.⁸³ It is also stated by Gaja that the NYC gives no indication that a decision about applicable law needs to be explicit.⁸⁴ In a situation where a direct decision has been made regarding the law to which a primary contract is subject, the arbitration agreement will overwhelmingly be seen to be subject to this same law.⁸⁵ In particular, if an arbitration clause is included in the contract, then it is assumed that arbitration will be subject to the same law as the contract unless otherwise indicated.⁸⁶

In addition, as the connection between where arbitration geographically occurs and the law applied to that arbitration is not strong, this goes against the idea that the location where arbitration takes place should determine applicable law.⁸⁷ The issue of invalidity of an arbitration agreement was given effect in the case of *National Iranian Oil Co v Ashland Oil Inc.*⁸⁸ The defendant refused to participate in the arbitration proceedings in Iran in 1979 because it was dangerous for Americans at the time. The US court held the circumstances were insufficient to render the agreement incapable of being performed despite the political tension with Iran; with the Islamic Revolution of Iran. Many countries have avoided such pathological situations that may deny enforcement of grounds of invalidity in relation to an arbitration agreement; in order to maintain the doctrine of party autonomy.⁸⁹

In international commercial arbitration processes it is common to find that arbitration occurs in a location where neither party nor their business resides.⁹⁰ Issues of convenience or neutrality can dictate where arbitration occurs,⁹¹ and a third party may in fact decide upon the location of arbitration.⁹² It is often the case therefore, that the law to which the arbitration is subject is in fact

⁸³ *ibid.*

⁸⁴ Gaja (n 23) 2.

⁸⁵ Davidson (n 6) 291.

⁸⁶ Redfern and Hunter (n 10) 157.

⁸⁷ Gaillard and Savage (n 8) para 433.

⁸⁸ 817 F2d 326, 328,335 (5th Cir 1987).

⁸⁹ *Lucky Star v Ng Moo Kee Engineering, High Court Ct Hong Kong* [1993] 2 HKLR 73 (May 1993).

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *ibid*; Redfern and Hunter (n 10) para 2-5.

different from the law of the country in which the arbitration is being held.⁹³ One commentator has stated that⁹⁴ where the parties have not made a choice regarding applicable law, using geography as a connecting factor is at odds with the Institute of International Law's 1957 and 1959 resolutions which cite the seat of arbitration as a compulsory connecting factor.⁹⁵

In line with the doctrine of the separability of an arbitration agreement, it can be suggested that it may prove problematic if the law applicable to the primary contract is also applicable to the arbitration agreement.⁹⁶ Thus, if no explicit decision on this issue has been made by the parties, then the law of the seat of the arbitration should be the applicable law.⁹⁷ Nonetheless, it must be remembered that the principal goal of the doctrine of separability⁹⁸ is to give an arbitral tribunal authority, when it is alleged that the primary contract is invalid and thus, when it comes to applicable law, the arbitration clause is not completely severed from the primary contract.⁹⁹

Therefore, it can be concluded that where there is no decision by the parties on the applicable law for arbitration, then it will typically be assumed that the law to which the primary contract is subject also governs both the arbitration clause and the arbitration agreement.

According to Lew,¹⁰⁰ the firm position is that an arbitration agreement is subject to the same law to which the substantive agreement containing the arbitration clause is subject and this has been borne out in a number of court cases.¹⁰¹ Lew continues that a decision on applicable law for a primary contract can even be considered to constitute an implied decision on the law to be

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ Gaillard and Savage (n 8) para 433.

⁹⁶ *ibid.*

⁹⁷ *Activial International SA v Conservas EI Pilar SA* (2002) XXVII YBCA 528 (Spain, Supreme Court 1996) 530; *X v X* (1998) XXIII YBCA 754 (Switzerland, Court of First Instance, 26 May 1994) 756-7; *Conceria GDe Maio & F snc v EMAG* (1996) XXI YBCA 602 (Italy, Supreme Court 20 January 1995) 604; *X v X* (1999) XXIV YBCA 645 (Germany, Court of Appeal 17 September 1998) 646; van den Berg (n 23) 293; Albert Jan van den Berg, 'Consolidated Commentary' (2003) XXVIII YBCA 654.

⁹⁸ *ibid.*

⁹⁹ Di Pietro and Platte (n 22) 145.

¹⁰⁰ Julian D M Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' (ICCA Congress Series No 14, 1998, Paris) para 136.

¹⁰¹ *ibid.*

applied to an arbitration agreement.¹⁰² The case of *Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd*¹⁰³ is one of many cases that support this position. An English court determined that where a direct decision regarding applicable law has been made in the principal contract and the arbitration agreement indicates no separate decision regarding applicable law, then this agreement will typically be subject to the same law as the principal contract.¹⁰⁴

5.2.6 Legal Provisions Governing Formal Invalidity

In GCC nations, even in terms of international arbitration, establishing the applicable law for the formal validity of arbitration agreements, when it comes to the enforcement of foreign arbitral awards, has been dealt with in a different way to the substantive validity of agreements. As stated above, neither the Riyadh Convention nor the Arab League Convention contains provisions governing this issue.¹⁰⁵ As a result, the conflict of laws rules that exist in the national legislation of each GCC country will govern this issue.

The NYC does not clarify the issue of which law to apply regarding the formal validity of an arbitration agreement. Article V(1)(a) of the NYC opens with a vague reference to the parties, to the agreement mentioned in article II as subject to incapacity and only then refers to the issue of an agreement's invalidity. As the formal requirements for an arbitration agreement are given in article II, it must then be discussed whether the rules in article II differ from the conflict of laws rules found in article V(1)(a);¹⁰⁶ which attempt to establish the applicable law as regards an arbitration agreement's validity. In simple terms, is article V (1) (a)¹⁰⁷ limited in its application because it refers to article II, and thus are issues regarding formal validity the sole purview of the

¹⁰² *ibid.*

¹⁰³ [2002] 1 All ER (Comm) 627.

¹⁰⁴ *Italian Company v German F R Firm* (1980) V YBCA 262 (Germany, Court of First Instance, 24 April 1979) 264; *Cia Maritime Zorroza ST v Sesostris SAE* [1984] 1 Lloyd's Rep 652 (UK, QBD Com Ct) 652; *Germany Assignee of a German Shipping Company v Japanese Shipping* (1990) XV YBCA 455 (Germany, Court of Appeal 17 February 1989) 457.

¹⁰⁵ The Riyadh Convention on Judicial Cooperation 1983; Arab League Convention on the Enforcement of Judgments 1952.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

article II rules?

The response to this dilemma has been varied. It is believed by some that article II is the authority on an arbitration agreement's formal requirements. This is because the reference back to article II in article V(1)(a) of the NYC is seen to demand that an enforcing court look at the formal elements of an arbitration agreement in light of article II.¹⁰⁸ Sanders¹⁰⁹ has asserted that in the face of an application to enforce an arbitral award, the court should apply the criteria for formal requirements for an arbitration agreement found in article II only, as article V(1)(a) refers directly to article II.¹¹⁰ A number of court rulings agree with this viewpoint. For instance, the Court of Appeal in Germany¹¹¹ determined that for a foreign arbitral award to be recognized, the award must be granted on the basis of a valid arbitration agreement under article II of the NYC. This decision was based on the wording found in article V(1)(a), the German court determined indicated that the arbitration agreement in question had to have been made in line with the article II requirements.¹¹²

On the other hand, numerous legal experts have supported the concept that article V of the NYC governs the formal validity of arbitration agreements; that contracting parties can choose the applicable law for arbitration agreements and if they do not, the law of the location where the arbitration takes place will apply.¹¹³ However, only Italy's Supreme Court¹¹⁴ has ruled in line with this view, stating that article II only applies in terms of the enforcement of the arbitration

¹⁰⁸Van den Berg (n 23) 284; Pieter Sanders, 'Consolidated Commentary' (1981) VI YBCA 211; Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' (2002) 3 Melbourne Journal of International Law 104; Kroll (n 51) 160; G Alvarez, *Article II (2) of the New York Convention and the Courts* (ICCA Congress Series No 9 (1999 Praise) 71.

¹⁰⁹ *ibid* Sanders; *ibid* Garnett.

¹¹⁰ *ibid*.

¹¹¹ *X (UK) v X (Germany)* YBCA XXIX (2004) 736; YBCA XXXI (2006) 680 (Federal Supreme Court 21 September 2005); *Czechoslovakian Export Organization v Greek Shipping Co* (1989) XIV YBCA 636 (Greece, Court of Appeal 1982) 636.

¹¹² *ibid*.

¹¹³ Lew, Mistelis and Kroll (n 24) paras 26-77; Di Pietro and Platte (n 22) 83-87.

¹¹⁴ *Lanificio Walter Banci SaS v Bobbie Borooks Inc* (1981) VI YBCA 233; *Conceria G De Maio & F snc (Italy) v EMAG AG (Switzerland)* (1996) XXI YBCA 604-605.

agreement but not when it comes to enforcing the actual arbitral award.¹¹⁵ The legislative history of the NYC offers no comprehensible description of why article V (1) (a) makes mention of article II.¹¹⁶ One scholar has concluded that the article II reference found in article V is simply a redundant additional explanation of the arbitration agreement.¹¹⁷

The researcher leans towards the view that arbitration agreements are subject to the law, as determined by the parties or the law of the location of arbitration in accordance with article V(1)(a).¹¹⁸ This is because article V (1) (a) lays down unambiguous regulation on the question of applicable law while article II is silent on the issue. However, article II states that an arbitration agreement must be in writing; thus, this article may yet govern an arbitration agreement's validity when it comes to enforcing an arbitral award. It is questionable how an enforcing court in a GCC nation could allow the enforcement of an arbitral award under the NYC¹¹⁹ if the enforcing party is not able to provide a copy of the arbitration agreement (which must be done under article IV) that is not completed in accordance with article II. It is stated in article IV(1)(a) that for an arbitral award to be enforced, the agreement as referenced in article II must be provided by the enforcing party. If this is not done, the application for enforcement will be dismissed by the court.¹²⁰ Article VII¹²¹ does permit the enforcing party to rely upon more lenient national legal provisions, but the GCC law contains no such provisions. Thus, the researcher further argues that for the present at least, an enforcing court in a GCC nation will have no choice but to rely upon the formal validity requirements found in article II.

Accordingly, the researcher recommends that when dealing with an application for the enforcement of a foreign arbitral award, a GCC enforcing court must review the application in

¹¹⁵ *ibid.*

¹¹⁶ Di Pietro and Platte (n 22) 84-85.

¹¹⁷ Lew, Mistelis and Kroll (n 24) paras 26-77.

¹¹⁸ NYC 1958.

¹¹⁹ *ibid.*

¹²⁰ The Cassation Court in Kuwait refused with article IV of the NYC.

¹²¹ NYC 1958.

light of both articles II and V of the NYC,¹²² in order to ensure a comprehensive and unified system that covers arbitration agreements and arbitral awards through the entire process of arbitration.¹²³ A corollary of the consensual nature of arbitration is the principle that awards which are not based on a valid agreement applicable to the parties are subject to non-recognition. The NYC provides only two provisions in relation to the requirements of a valid arbitration agreement: under article V (1) (a) and also article V (1) of the American Convention. Both provisions provide that an award need not to be recognized if it goes beyond the scope of the parties' submission to the arbitrators.¹²⁴ In other words, if the award does not comply with the terms of the agreement,¹²⁵ then the tribunal will have exceeded its power under the agreement.¹²⁶ This argument is further supported by UNCITRAL¹²⁷ which provides that such errors cannot render an award unenforceable.¹²⁸

In relation to the form of a contract in the GCC nations, only Kuwaiti and Qatari law¹²⁹ includes specific provisions that establish applicable law. These provisions state that if the validity of an arbitration agreement is questioned, then a Kuwaiti or Qatari enforcing court must establish the law to be applied in one of three ways: 1) according to the law of the country in which the contract was made; 2) according to the applicable law of the fundamental conditions of the contract or 3) according to the national law of the common country of residence of the parties.¹³⁰ In other GCC nations, the same rules that apply to the substantive validity of arbitration agreements also apply to validity as it relates to the form of arbitration agreements.

¹²² *ibid.*

¹²³ Born (n 23) 2787-88.

¹²⁴ NYC, arts IV (1) and V (1) C.

¹²⁵ Inter-American Convention, art 5(1) e.

¹²⁶ *ibid* art 5(1) C.

¹²⁷ UNCITRAL, art 36(a)(iii).

¹²⁸ Swiss Law on Private International Law, art 190(2).

¹²⁹ Qatar Civil Code, art 29; Kuwait Law, art 63.

¹³⁰ *ibid.*

5.2.7 Formal Grounds for Invalidating an Arbitration Agreement

Of all the international conventions to which the GCC nations are signatories, requirements for the formal validity of arbitration agreements are found only in the NYC. The Riyadh¹³¹ and the Arab League Conventions¹³² are silent on the issue. Consequently, any national legislation governing arbitration agreements and their formal validity will be applied by the GCC courts. It is a requirement of the NYC and all the GCC national legislation that an arbitration agreement shall be evidenced in writing.¹³³

It is an obvious requirement for an arbitration agreement to be in writing¹³⁴ because an arbitration agreement prevents the parties to the agreement from exercising their constitutional rights of taking the dispute to court. The requirement that the agreement shall be in writing illustrates the need for the parties to be in full and unequivocal agreement on using the arbitration process rather than the court system to settle disagreements.¹³⁵ The researcher argues that the arbitration agreement requirements as per article II of the NYC should also be the authority for the formal requirements of an arbitration agreement when it comes to enforcing an arbitral award. As such, a court cannot allow the enforcement of an award if an arbitration agreement does not meet the formal requirements found in article II. The failure to satisfy these requirements can result in an arbitration agreement being found invalid on formal grounds.¹³⁶ Therefore, the ‘in writing’ requirement found in the NYC deserves particular attention before the

¹³¹ Riyadh Convention on Judicial Cooperation 1983.

¹³² Arab League Convention on the Enforcement of Judgments 1952.

¹³³ NYC, art II (2); Kuwait Civil of Code and Commercial Procedure, art 173; Bahrain Code of Civil and Commercial Procedure, art 233(2); Qatar Code of Civil and Commercial Procedure, art 190(2); Oman Law of Arbitration in Civil and Commercial Disputes, art 12; Saudi Arabia Arbitration Regulation of 1983, art 5; the UAE Code of Civil Procedure, art 203(2).

¹³⁴ NYC 1958; UNCITRAL Model Law on International Commercial Arbitration 1985; International Centre for Settlement of Investment Disputes (ICSID); EAA 1996.

¹³⁵ Lew, Mistelis and Kroll (n 24) para 7-7; van den Berg (n 23) 171; Di Pietro and Platte (n 22) 67; Redfern and Hunter (n 10) para 3-7; Abdulaal (n 12) 378-444.

¹³⁶ *Vicere Livio v Prodexport*, (1982) VII YB Com Arb 345 (Corte di Cassazione, 26 May 1981, No3456); *Jassica SA v Ditta Gioacchino Polojaz*, (1992) XVII YB Com Arb 525 (Corte di Cassazione, 12 February 1987, No 1526); *Lezina Shipping Co SA v Casillo Grani Inc*, (1996) XXI YB Com Arb 585 (CA Bari, 19 March 1991) (evidence of the arbitration agreements at the time of application).

relevant provisions in the national legislation of the GCC nations are examined.

The NYC specifies that an agreement in writing can include an arbitration clause included in a contract, signed by the parties or concluded in an exchange of letters, as well as an arbitration agreement itself.¹³⁷ A number of questions can be raised about this: 1) should article II be considered a maximum standard or an absolute rule? 2) what line of interpretation should be taken here? and 3) does an arbitration agreement need to be signed by the parties in order to be valid? In other countries like the US¹³⁸ an arbitration award has been enforced even though the parties did not have the agreement signed. The Court considered the approach in *First Option of Chicago v Kaplan*,¹³⁹ that where parties have chosen arbitration courts should not impede this voluntary process.

In terms of whether article II should be considered an absolute rule or the maximum requirement for the validation of an arbitration agreement, current consensus holds that it is a maximum requirement.¹⁴⁰ Article 7(2) of the Model Law develops the definition of the term ‘writing’ much more fully than the NYC does, it can be seen that article II is not a minimum standard for the formal demands of arbitration agreements.¹⁴¹ If the concept is adopted that article II of the NYC is the authority for formal validity requirements of arbitration agreements even at the point of an application to enforce an arbitral award, then a court cannot deny the enforcement of such an award if the writing requirement of article II is satisfied. This is the case even where national legislation places more burdensome requirements of form on the parties.

In regard to how ‘in writing’ should be interpreted, it is important to note that the NYC was first

¹³⁷ NYC, art II (2).

¹³⁸ *China Materials Import & Export Co v Chi Mei Corporation* 334 F.3d (3rd Cir 2003).

¹³⁹ *First Option of Chicago v Kaplan* 514 US 938 (1995) at 215-18.

¹⁴⁰ Lew, Mistelis and Kroll (n 24) para 26-77; Alvarez (n 108) 71; Di Pietro and Platte (n 22) 81-84; Kroll (n 51) 166; Gaillard and Savage (n 8) para 271; Stuart Dutson, Andy Moody and Neil Newing, *international arbitration* (global law and business 2012) 37-39.

¹⁴¹ Keba Mbaye, ‘Arbitration Agreement: Conditions Governing Their Efficacy’ in AJ van den Berg (ed), *ICC Congress Series No 9 Paris 1998* (Kluwer Law International, the Hague 1999) 94, 100; Veeder (n 52) 44; Alvarez (n 108) 71; Lew, Mistelis and Kroll (n 24) para 26-77; *Compagnie de Navigation et Transports SA v MSC, Mediterranean Shipping Company SA* (1996) XXI YBCA 690 (Switzerland Supreme Court, 16 January 1995) 696; Di Pietro and Platte (n 22) 82; Abdulaal (n 12) 378-444.

drafted over fifty years ago. Back then, the idea of an agreement in writing was not understood in the same way as it is today. Article II did not anticipate modern-day modes of communication such as fax machines and email services. This has led numerous scholars to adopt a more liberal viewpoint on the writing requirement in article II and it is argued that modern-day communication methods would suffice. Kaplan suggests that it is time to review article II (2) as its focus on writing and exchange of letters is out of date.¹⁴² It is Kaplan's view that it would be beneficial to reconsider article II (2) in the context of contemporary commercial practices and international commercial law due to the changes that have occurred since the article was first drafted.¹⁴³

Given modern-day modes of communication, a 'dynamic' interpretation of the writing requirement has also been proposed.¹⁴⁴ In *Tradax Export SA v Amoco Iran Oil Co*, Switzerland's Supreme Court adopted a dynamic approach by ruling that mentioning general conditions to an agreement in written communications satisfies the article II writing requirement. The Court argued that it is necessary to interpret article II (2) in line with its object, the interests it is supposed to safeguard the aim of the Convention as a whole. The aim is to facilitate the settling of disagreements through arbitration with particular consideration given to what is best for international commerce.¹⁴⁵

A recommendation adopted in 2006 by UNCITRAL concerning articles II (2) and VII (1) of the NYC gives further weight to a liberal approach being taken in the GCC nations in regard to the writing requirement. In terms of the use of electronic commerce.¹⁴⁶ The recommendation takes

¹⁴² Neil Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' (1996) 12 Arb Intl 28, 44.

¹⁴³ *ibid.*

¹⁴⁴ Lew, Mistelis and Kroll (n 24) para 7-10.

¹⁴⁵ *Tradax Export SA v Amoco Iran Oil Co* (1986) XI YBCA (Federal Supreme Court, 7 February 1984) 534-535.

¹⁴⁶ Mousaed Alenazi, 'Specialty of Procedures in the Electronic Arbitration' (September 2012) Journal of Law (published by Academic Publication Council, Kuwait University) 45-89; Amina Khababa, *Electronic Arbitration in the E-Commerce: Comparative Study* (Arab Renaissance House 2010) 174-196; Amirah Al-Refaei, *Arbitration on Disputes Resulting from Electronic Contracts under International Conventions & National Legislations* (Arab Renaissance House 2012) 497-502; Nesreen Nabeeh, *Electronic Arbitration & Companies Amalgamation* (Arab Renaissance House 2011) 226-245; Radwan Al-Sheraifi, *Towards Electronic Arbitration System* (Arab Renaissance

into account the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended and with particular reference to article 7), the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts. In addition, national legislation and case law that are more lenient in terms of the formal requirements of an arbitration agreement and enforcing foreign arbitral awards than the NYC. Ultimately, any interpretation of the NYC should be in accordance with its goal to encourage the recognition and enforcement of foreign arbitral awards.

UNCITRAL thus recommends that article II (2) of the 1958 NYC, while valid and applicable, does not contain an exhaustive set of circumstances.¹⁴⁷ The most noteworthy element of the recommendation is that it refers to a new definition of the term ‘writing’ found in the amended article 7 of the UNCITRAL Model Law. The 2006 amendment brought the formal requirements for arbitration agreements up to date so as to be in line with common practice for international contracts.¹⁴⁸ The amended article 7 now deals with a number of matters regarding the writing requirement under article II of the NYC which has been hotly debated in the past.

Electronic communications now meet the NYC’s requirement that an arbitration agreement be set out in writing.¹⁴⁹ The term ‘electronic communication’ includes any data messages that the parties use to communicate.¹⁵⁰ In turn, a ‘data message’ is the information created, sent, received or stored using optical, electronic, magnetic or similar modes, for example, information sent by email, telecopy, telex, telegram or EDI (electronic data interchange).¹⁵¹ The amended article 7 also deals with the issue of an exchange of letters of claim and defence where one party alleges

House 2013) 104-154; Mohammad Al-Roumi, *Legal Electronic Arbitration System* (Arab Renaissance House 2006) 91-191.

¹⁴⁷ UNCITRAL, New York Convention (UNCITRAL) <http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/NYConvention.html> accessed 20 November 2012.

¹⁴⁸ UNCITRAL Model Law with amendments as adopted in 2006 <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 24 May 2013.

¹⁴⁹ UNCITRAL Model Law, art 7(4).

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

that an arbitration agreement exists and the other party denies it.¹⁵² Furthermore, it covers the issue of arbitration agreements allegedly created ‘by reference’; that is, created through a reference made in a contract to any document that contains an arbitration clause. This reference is deemed to establish an arbitration agreement (in writing) as long as the reference to the clause is strong enough for it to form part of the contract.¹⁵³ Although the European Convention on electronic commerce is mandatory within the signatories of the European Union,¹⁵⁴ it is not compulsory with signatory states of the NYC (for example, Kuwait). There is a need for the Convention to adopt this new mechanism under UNCITRAL. Unless the new technique is subject to the Arabic language, it will take a long time to be implemented in Kuwait.

Concerning the issue of whether an arbitration agreement needs to be signed by the parties to be valid, it can be seen that in current trade transactions contracts are not signed by the parties even when in writing.¹⁵⁵ The aforementioned recommendation and general consensus hold that an unsigned arbitration agreement can be valid as long as there is a record of the agreement’s contents.¹⁵⁶ Additionally, the NYC’s reference to the exchange of telegrams and letters has not been seen as requiring that these documents be signed by the parties.¹⁵⁷ The recommendation has taken into account a number of pertinent contemporary issues and is a point of reference under international commercial arbitration law. As such, it is suggested that enforcing courts adopt recommendations which will prevent the formal requirements for arbitration agreements under the NYC from presenting any difficulties.

Even in light of the aforementioned recommendation, the form of arbitration may be found not to comply with article II (2) of the NYC. The recommendation may still offer some assistance. The second section of the recommendation states that article VII (1) of the NYC should apply. Article VII allows a party to rely on more favourable rights concerning the validity of an arbitration

¹⁵² *ibid*, art 7(5); Redfern and Hunter (n 10) paras 3-8.

¹⁵³ *ibid* art 7(6).

¹⁵⁴ UNCITRAL; European convention; Kuwait CCP.

¹⁵⁵ Kaplan (n 142) 39.

¹⁵⁶ Di Pietro and Platte (n 22) 69-70; Redfern and Hunter (n 10) para 3-7.

¹⁵⁷ Fraser P Davidson, *International Commercial Arbitration* (W Green/Sweet & Maxwell, Edinburgh 1991) 50.

agreement that may exist under the treaties or laws of the nation in which the arbitration agreement is being enforced.¹⁵⁸ Therefore, if the lawmakers in the GCC nations were to introduce more liberal requirements regarding the formal validity of arbitration agreements than are contained in the NYC,¹⁵⁹ an enforcing party may be able to use these national laws to pursue and defend an application for the enforcement of a foreign arbitral award.¹⁶⁰

Nonetheless, a barrier to enforcement could still exist. An arbitration agreement must still be in writing to satisfy the article IV (1) requirement of the NYC. If the agreement is not in writing, it will not be possible for a court to enforce the award.¹⁶¹ It remains the case that it appears impossible for enforcing courts in the GCC nations to allow the enforcement of a foreign arbitral award under the NYC if an enforcing party does not fulfil the article IV requirement to provide a copy of the arbitration agreement in writing. It is required by paragraph 1(a) of article IV that an enforcing party must provide either the original or a certified copy of the arbitration agreement referred to in article II at the enforcement stage.¹⁶² If the agreement is not provided, then an enforcing court must reject the application for enforcement. The GCC legislation currently does not contain any more favourable provisions, as per article VII, that could enable parties to circumvent this requirement. Thus currently, formal validity as per the requirements in article II is required by a GCC court to enforce an arbitral award. The national laws of GCC countries have taken varying approaches to the issue of the formal validity of arbitration agreements. It is necessary to review some of the legal positions of the GCC nations regarding the proper form of such agreements.¹⁶³

¹⁵⁸ UNICTRAL, New York Convention (UNCITRAL) <http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/NYConvention.html> accessed 20 November 2012.

¹⁵⁹ NYC, art V(1)(a).

¹⁶⁰ Arbitration Act 1996, s 5(3); Lew, Mistelis and Kroll (n 24) para 6-44.

¹⁶¹ *Moscow Dynamo v Ovechkin*, 412 F Supp 2d 24 (DDC 2006) (a US court refused enforcement because the arbitration agreement failed to meet the requirements of article II of the New York Convention as required by article IV (1); *China Three Gorges Project Corp v Rotec Industries, Inc*, No Civ A 04-1510 JJF, 2005 WL 1813025 (D Del Aug 2, 2005)

¹⁶² Kuwaiti Cassation Court Decision No 67/85 (Commercial) 18 December 1985.

¹⁶³ Abdultawab (n 2).

As Bahrain's International Commercial Arbitration Act is founded on the Model Law,¹⁶⁴ the formal validity of arbitration agreements would not present much difficulty.¹⁶⁵ The codes of civil and commercial procedure of Bahrain, Kuwait, the UAE, and Qatar¹⁶⁶ are silent on the issue of the proper definition of the term 'writing'. The codes simply specify that an arbitration agreement must be evidenced in writing to be valid.¹⁶⁷ Given this clear requirement, numerous authors support the concept that to be valid an arbitration agreement must be in writing.¹⁶⁸ Nonetheless, it is the belief of the researcher that such a viewpoint is erroneous, as the requirement that an arbitration agreement is in writing¹⁶⁹ is clearly just an expression of the concept that there must be some form of proof that an arbitration agreement exists.

Furthermore, the Cassation Court¹⁷⁰ has taken the approach that the evidentiary requirements for civil and commercial issues have no bearing on public policy and thus agreements can be express or implied.¹⁷¹ Therefore, if the parties to an arbitration agreement have relied upon the national legislation of the aforementioned GCC nations as the applicable law for the agreement and have made the agreement orally, then a party that objects to forming an agreement in this way needs to present their argument to a tribunal of merit, which may be a competent court or arbitral tribunal in the country where the arbitration will take place. If a party does not raise any objections regarding the validity of the arbitration agreement and participates in the process of arbitration, then this silence will constitute acceptance of the form of the agreement.¹⁷² Therefore, unless a

¹⁶⁴ *ibid.*

¹⁶⁵ International Commercial Arbitration Act, art 7(2).

¹⁶⁶ Bahrain Code of the Civil and Commercial Procedure, art 233(2); Kuwait Code of Civil and Commercial Procedure, art 173; the UAE Code of Civil Procedure, art 203(2); Qatar Code of Civil and Commercial Procedure, art 190(2).

¹⁶⁷ *ibid.*

¹⁶⁸ Hassan Ali Radhi, 'Arbitration in Bahrain' (1987) 2 Arab LQ 267; Abdel Hamid El-Ahdab, *Enforcement of Arbitral Awards in the Arab Countries: Arbitration International* (LCIA 1995) 103 and 517.

¹⁶⁹ Bahrain Code of the Civil and Commercial Procedure, art 203(2); Kuwait Code of Civil and Commercial Procedure, art 173; the UAE Code of Civil Procedure, art 203(2); Qatar Code of Civil and Commercial Procedure, art 190(2).

¹⁷⁰ Kuwaiti Cassation Court, Decision No 205/86 (Commercial) 22 April 1987; Decision No 287/88 (Commercial) 26 March 1989.

¹⁷¹ *ibid.*

¹⁷² *ibid.*

party objects to an arbitration agreement being formed orally at the outset of the arbitration process, the agreement will be valid.

Saudi Arabian law does not contain any formal requirements for an arbitration agreement to be evidenced in writing.¹⁷³ Some authors,¹⁷⁴ however, argue that article 5 of the Arbitration Law of 1983 can be interpreted as imposing such a requirement. This article requires that the parties file the arbitration instrument with the appropriate authority, that it must be signed by the parties or their authorized attorneys as well as the arbitrators and that the details of the disagreement must be stated therein, as must the arbitrators' names and their acceptance to act as arbitrators in the case. The article also states that copies of the documents pertinent to the arbitration must be attached.¹⁷⁵ It is argued by some that these requirements constitute a requirement for arbitration agreements to be in writing and signed to be valid.¹⁷⁶ However, others argue that article 5 is only applicable to arbitration agreements and not to arbitration clauses.¹⁷⁷

It is the researcher's view that, regardless of whether Saudi Arabian legislation¹⁷⁸ is the applicable law regarding the formal validity of an arbitration agreement, it would be wrong to apply the article 5 requirements to an application for the enforcement of a foreign arbitral award. Firstly, it must be noted that the formal requirements for arbitration agreements in Saudi Arabian law, apply to arbitration that has occurred within the country itself. In addition, the objectives of article 5 clearly relate not to the circumstances of the validity of an arbitration agreement but to the circumstances of the procedure for the approval of authority of the instrument. This can be

¹⁷³ Lew, Mistelis and Kroll (n 24) 174.

¹⁷⁴ Nancy B Turck, 'Arbitration in Saudi Arabia' (1990) 6(3) *Arb Intl* 287-288; Nancy B Turck, 'Saudi Arabia' in AJ van den Berg and P Sanders (eds), *International Handbook on Commercial Arbitration* (Kluwer, Deventer 1994) 6-7; El-Ahdab (n 168) 569; Albert Jan van den Berg, 'National Reports: Saudi Arabia' (1984) IX *YCAB* 7, 15; Samir Saleh, *Commercial Arbitration in the Arab Middle East Sharia, Syria, Lebanon and Egypt* (Oxford and Portland, Oregon 2006) 304-307; G Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 *Univ Pennsylvania J Intl Econ L* 913-15; Abdulaal (n 12) *Civil & Commercial International Procedures and Enforcement of Foreign Arbitral Awards* (University of Kuwait 2010) 378-444.

¹⁷⁵ The Arbitration Regulation of 1983, art 5.

¹⁷⁶ Saleh (n 174) 304-307; Sayen (n 174) 218.

¹⁷⁷ Turck, 'Arbitration in Saudi Arabia' (n 174) 6-7; El-Ahdab (n 168) 569; van den Berg (n 23) 7 and 15; Turck, 'Saudi Arabia' in AJ van den Berg and P Sanders (n 174).

¹⁷⁸ *ibid.*

gleaned from the first line of the article which requires that the parties file the arbitration instrument ‘with the Authority originally competent to hear the dispute’ so that a decision concerning the approval of the arbitration instrument can be made.¹⁷⁹ Furthermore, as regards the effect of the article 5 requirements on arbitration that occurs within Saudi Arabia, if an arbitration agreement does not satisfy the requirement, it appears that this will not result in it being voided. It is a requirement of article 5 that the arbitration instrument be signed by the arbitrators involved, and their names listed along with their acceptance to arbitrate. The country’s arbitration regulations state that an arbitrator can be appointed by the authority originally authorized to hear the dispute if the parties have not appointed one already.¹⁸⁰

Also, the actual practice of Saudi Arabian courts illustrates that applications to arbitrate are accepted even when one of the parties refuses to sign the application.¹⁸¹ As a result, in the context of international arbitration, it is clear that the formal validity requirements for arbitration agreements under Saudi Arabian law are not workable. Given the impracticality of these requirements, Islamic law must be used by Saudi Arabian enforcing courts to make their determination on the formal validity of an agreement. According to Islamic law, even an oral arbitration agreement is valid as no particular requirements regarding the form of such agreements exist in Islamic law.¹⁸²

In terms of modern-day communication methods, the UAE and Dubai¹⁸³ as well as Bahrain¹⁸⁴

¹⁷⁹ The Arbitration Regulation of 1983, art 6.

¹⁸⁰ *ibid* art 10; 4th Review Committee, Decision No 22/T/4 dated 1413 H (1992).

¹⁸¹ 4th Review Committee, Decision No 105/T/4 dated 1413 H (1992), cited in Waleed Al-Tuwaigri, *Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention of 1958 with Special Reference to the Kingdom of Saudi Arabia* (Saudi House 2006) 122; Iman Al-Ajlan, *Compilation of Judicial Principles Confirmed by the Commercial Review Committee in the Board of Grievances from 1407 H (1987) to 1419 H (1999)* (Board of Grievances, Riyadh 2004) 56; Abu Zaid Radwan, ‘General Restrictions of International Commercial Arbitration’ Part III (June 1979) *Journal of Law and Sharia* (published by the Academic Publication Council, Kuwait University) 29-65

¹⁸² Syed Khalid Rashid, ‘Alternative Dispute Resolution in the Context of Islamic Law’ (2004) 8 *Vindobona J Intl Comm L & Arb* 95, 106; Zeyad Alqurashi, ‘Arbitration under the Islamic Sharia’ (2003) 1(2) *Oil, Gas & Energy Law Intelligence*.

¹⁸³ The UAE: Code of Civil Procedure, art 203(2).

¹⁸⁴ Bahrain Code of the Civil and Commercial Procedure, art 233(2).

have recently introduced new legislation. This legislation relates to transactions and electronic commerce and states that where it is a legal requirement for information to be provided in writing, then this will be satisfied by an electronic record as long as it can be accessed easily enough to be referenced, either by being transmitted, printed or so on. It is also provided that a contract will not be found to be invalid or unenforceable on the basis that one or more electronic communications were used to conclude it.¹⁸⁵ Arbitration agreements that comply with this new legislation are considered unofficial papers.¹⁸⁶ Consequently, it can be concluded that an electronic record is enough to satisfy the requirement that an arbitration agreement is in writing.

In Oman, it is a direct requirement of the Omani legislation¹⁸⁷ that arbitration agreements be in writing. Oman's Law of Arbitration in Civil and Commercial Disputes states, that an arbitration agreement will be considered to be in writing if it is included in a document signed by the parties or in telegrams, letters, or other written means of communication that have been exchanged by the parties.¹⁸⁸ The inclusion of the phrase 'other written means of communication' can be invoked to include modern-day communication methods and thus, these will be seen to meet the writing requirement.¹⁸⁹

Currently, no legislation governs the use of modern-day communication methods to create contracts in Qatar, Saudi Arabia, or Kuwait.¹⁹⁰ The drafting of new legislation concerning transactions and electronic commerce has only recently been completed¹⁹¹ (but not enacted) in Qatar and Kuwait.¹⁹² Despite this, in cases that rely on commercial custom, it is possible that current rules may in fact consider modern-day communication methods as constituting agreements in writing. Where a legal hardcopy text is not available, commercial custom is seen

¹⁸⁵ The UAE Federal Law No 1 of 2006 on Electronic Commerce and Transaction, arts 7 and 11; Dubai Electronic Transaction and Commerce Law No 2 of 2002, arts 9 and 13; Bahrain Decree No 28 of 2002, arts 5 and 10.

¹⁸⁶ *ibid.*

¹⁸⁷ Oman Law of Arbitration in Civil and Commercial Disputes, art 12.

¹⁸⁸ Law of Arbitration in Civil and Commercial Disputes, art 12.

¹⁸⁹ *ibid.*

¹⁹⁰ Qatar Civil Code, art 1(1) and Commercial Code, art 86; Kuwait Civil Code, art 1; Commercial Code, arts 2 and 96.

¹⁹¹ *ibid.*

¹⁹² *ibid.*

as an alternative legal resource.¹⁹³ In Saudi Arabia, Kuwait, and Qatar,¹⁹⁴ modern-day communication methods are widespread and are used in activities such as banking. As a result, the writing requirement for arbitration agreements may very well be satisfied by modern-day communication methods.

Islamic law is used as a legal source in Saudi Arabia¹⁹⁵ where modern legislation does not yet exist. In the context of Islamic law, it seems that contracts can be appropriately and validly concluded using modern-day communication methods.¹⁹⁶ Saudi Arabian courts¹⁹⁷ look to the Islamic *Fiqh* Academy (IFA)¹⁹⁸ in Jeddah¹⁹⁹ as a valuable resource. This institution has determined that when parties are not present together in the same geographical location then written communication methods, whether they be written correspondence via messengers, telegrams, telexes, faxes, letters, or emails, will constitute the conclusion of a valid contract as soon as the offer in question is accepted by the offeree. In addition, the IFA has determined that agreements made by people who are in different places but that can hear each other simultaneously (for example, over the telephone) can conclude a normal contract in this way, as these circumstances are deemed to be the same as if the contract had been concluded between attending parties.²⁰⁰

5.2.8 The Substantive Grounds for Invalidating an Arbitration Agreement

It is important to note that it is very rare for a party to attempt to have an arbitration agreement ruled unenforceable on the grounds of invalidity.²⁰¹ Excluding the NYC,²⁰² none of the

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ 2nd Review Committee, Decision No 235/T/2 dated 1415 H (1994).

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ Organisation of Islamic Conferences (OIC) 1981 and launched in February 1988.

¹⁹⁹ *ibid.*

²⁰⁰ The Islamic *Fiqh* Academy, 'Decision No 52 (3/6) (1990) 2(6) The Islamic *Fiqh* Academy Journal 785.

²⁰¹ Gaillard and Savage (n 8) para 525.

²⁰² *ibid.*

international conventions adopted by the GCC²⁰³ countries include any provisions that deal with the substantive grounds for invalidating an arbitration agreement and rejecting an application for the enforcement of a foreign arbitral award. The NYC does state that, the law governing this issue is that which the parties have determined will apply or if no applicable law can be seen to have been chosen by the parties, then the law of the nation in which the award was granted.²⁰⁴

It is nonetheless accepted that, as with all contracts, an arbitration agreement is subject to the circumstances of the validity of the main contract. Consequently, the validity of the arbitration agreement will be destroyed by the applicable law's substantive grounds of invalidity.²⁰⁵ The legal rationale behind international commercial arbitration proposes that there are three grounds of invalidity in this regard: 1) absence of consent, 2) a defined legal relationship existing between the parties and 3) inarbitrability.²⁰⁶

If a losing party successfully claims that their consent to arbitration is negated in some manner, then the application to enforce an arbitral award can be rejected. The applicable law regarding the substantive validity of an arbitration agreement will determine what can in fact negate consent.²⁰⁷ It should be highlighted here that a popular principle in international commercial arbitration is that of good faith, arbitration agreements are considered in light of this principle.²⁰⁸ The issue of consent as it relates to enforcing foreign arbitral awards does not appear to have been dealt with by the courts in the GCC nations. The GCC legislation holds that defects of consent arise from exploitation, lesion, duress, misrepresentation, or mistake.²⁰⁹ The provisions on defects of consent, however, are not an easy way out for a losing party, especially in civil law

²⁰³ The Riyadh Convention on Judicial Cooperation 1983.

²⁰⁴ NYC, art V(1)(a).

²⁰⁵ *ibid.*

²⁰⁶ Redfern and Hunter (n 10) paras 3-7 to 3-24; Lew, Mistelis and Kroll (n 24) paras 7-34 to 7-58; Abdulaal (n 12) 378-444; Gaillard and Savage (n 8) paras 452-592; Di Pietro and Platte (n 22) 90-104.

²⁰⁷ *ibid.*

²⁰⁸ Gaillard and Savage (n 8) para 477.

²⁰⁹ Bahrain Civil Code, arts 84-102; Kuwait Civil Code, arts 147-166; Qatar Civil Code, arts 130-147; UAE Civil Transaction Code, arts 167-189.

countries (the UAE, Qatar, Kuwait, and Bahrain).²¹⁰ A losing party may find it challenging to successfully seek the rejection of an application to enforce an award based solely on their lack of consent. There are a number of reasons for this.

In Kuwaiti, Qatari, and Bahraini law,²¹¹ a defect of consent will not result in the annulment of an arbitration agreement if that agreement is believed to be voidable. Unless ruled null and void, a voidable contract will stand and the tribunal of merits will be the authority for such a decision.²¹² Therefore, a losing party must raise a defect of consent defence before the arbitral tribunal or a competent court of the country in which the arbitration will take place.²¹³ A claim of invalidity due to a defect in consent can be raised in one of two ways.

The first is by raising the issue before the arbitral tribunal. The law of Bahrain and Oman²¹⁴ clearly states that a losing party can bring a defence of a defect in consent, before any arbitral tribunal that has jurisdiction as per the competence-competence²¹⁵ principle of arbitration. The Omani Law of Arbitration in Civil and Commercial Disputes²¹⁶ provides that only the arbitral tribunal has the authority to rule on claims of invalidity as regards arbitration agreements.²¹⁷ Bahraini legislation²¹⁸ on international commercial arbitration applies the same regulations as appear in the Model Law²¹⁹ holding that an arbitral tribunal is able to make rulings on invalidity pleas but only as a preliminary question or, in the case of an award on the merits of the plea, even though this must be done under the court's control. When an arbitral tribunal rules as a preliminary question and the losing party wishes to lodge an objection to this ruling, the party must raise a plea in front of a competent court no more than thirty days following the receipt of

²¹⁰ *ibid.*

²¹¹ Bahrain Civil Code, arts 113-117; Qatar Civil Code, arts 158-162; Kuwait Civil Code, arts 179-183.

²¹² *ibid.*

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ Law of Arbitration in Civil and Commercial Disputes, art 22.

²¹⁸ *ibid.*

²¹⁹ *ibid.*

the ruling notice.²²⁰ In contrast, Kuwaiti, Saudi Arabian, UAE, and Qatari²²¹ legislation contain no provision reflecting the principle of competence-competence. As a result, issues surrounding the validity of a contract that includes an arbitration clause can be examined only by the courts, especially as the laws of these nations do not acknowledge the concept that arbitration clauses can be severed from contracts. The alternative way a losing party can raise an objection concerning validity occurs after the arbitral award has been granted. Objections can be raised through the institution of recourse for the annulment of the arbitral award. This can also occur if the arbitral tribunal determines to dismiss invalidity pleas in an award on the merits or fails to do so.²²²

A further obstacle for a losing party seeking the rejection of an award based on lack of consent is the principle of good faith. According to this principle, a losing party cannot participate in the arbitration process and then enter a defence of invalidity. Bahrain's International Commercial Arbitration Law for instance, states that a party will not be able to raise an objection about the validity of an arbitration agreement when they were aware that the agreement did not satisfy the necessary requirements and still continued with the arbitration regardless (provided that they did in fact not object to any failure to comply either immediately or within a specified time period, if this is provided for).²²³ Omani arbitration law reflects the same state of affairs only this law requires that an objection be made no more than sixty days from the date the party becomes aware of non-compliance.²²⁴ The civil codes of Bahrain, Qatar, the UAE²²⁵ and Kuwait also refer

²²⁰ Law of International Commercial Arbitration, art 16(3).

²²¹ Bahrain Civil Code, arts 84-102; Kuwait Civil Code, arts 147-166; Qatar Civil Code, arts 130-147; UAE Civil Transaction Code, arts 167-189.

²²² Bahrain Code of Civil and Commercial Procedure, art 243(1) and Law of International Commercial Arbitration, art 34(2)(a)(1); Kuwait Code of Civil and Commercial Procedure, art 186(a); Qatar Code of the Civil and Commercial Procedure, art 207(1); Oman Law of Arbitration in Civil and Commercial Disputes, art 53(1)(a); the UAE Code of Civil Procedure, art 216(1)(a).

²²³ Law of International Commercial Arbitration, art 4.

²²⁴ Law of Arbitration in Civil and Commercial Disputes, art 8.

²²⁵ Bahrain Code of Civil and Commercial Procedure, art 243(1) and Law International Commercial Arbitration, art 34(2)(a)(1); Kuwait Code of Civil and Commercial Procedure, art 186(a); Qatar Code of the Civil and Commercial Procedure, art 207(1); Oman Law of Arbitration in Civil and Commercial Disputes, art 53(1)(a); the UAE art 216(1).

to the principle of good faith, in that a party that has mistakenly given their consent cannot use this mistake to nullify an agreement in a way that is not compatible with the good-faith principle.²²⁶ The situation is similar in regard to misrepresentation. A losing party that has wilfully practised misrepresentation cannot use this as grounds for nullifying a contract.²²⁷

If a defect of consent relates to exploitation, a time limitation for actions applies. The principle is that an action must be brought no more than one year from the date on which the contract was concluded, in situations where it would be impossible to obtain a ruling regarding the annulment of the arbitration agreement in less time.²²⁸

A claim of invalidity can also be brought on the grounds of there being a defined legal relationship between the parties. An arbitration agreement is the foundation of arbitration proceedings and so a defined legal relationship is inferred to exist between the parties.²²⁹ While common practice in international commercial arbitration is for an arbitration agreement to arise out of a contractual relationship, a non-contractual relationship is not a barrier to an arbitration agreement.²³⁰ It is a requirement of the NYC that a defined legal relationship exists, regardless of whether it is contractual or non-contractual.²³¹ Non-contractual relationships such as those arising out of unlawful acts (tortious liability) can result in valid arbitration agreements.²³² Davidson notes that in truth no interpretation difficulties have been posed by article II (1) of the NYC.²³³ Other international conventions adopted by the GCC nations do not include provisions on this issue. It can be assumed that the principles of the applicable law will be applied by the

²²⁶ Bahrain Civil Code, art 87; Kuwait Civil Code, art 149; Qatar Civil Codes, art 132; UAE Civil Transaction Code, art 198.

²²⁷ Bahrain Civil Code, art 93; Kuwait Civil Code, art 155.

²²⁸ Bahrain Civil Code, arts 97(a) and 102; Kuwait Civil Code, arts 161(1) and 166; Qatar Civil Codes, arts 124(1) and 147; UAE Civil Transaction Code, art 198.

²²⁹ *ibid.*

²³⁰ Redfern and Hunter (n 10) para 3-10; Samia Rashed, *Arbitration in Private International Relations* (Dar Al-nahdah Al-Arab, Cairo 1984) 390; Abdulaal (n 12) 378-444.

²³¹ NYC, art II (1).

²³² Albert Jan van den Berg, 'Scope of the Arbitration Agreement' (1996) XXI YBCA 415; *Kaverit Steel Crane Ltd v Kone Corporation* (1994) XVII YBCA 346; *American Bureau of Shipping v Tencara SpA*, (2002) XXVII 509 (Italian Corte di Cassazione, 26 June 2001); Redfern and Hunter (n 10) para 3-10.

²³³ Davidson (n 6)130.

GCC enforcing courts.

This research shows that the GCC countries' national legislation is more specific on the issue of the defined legal relationship between parties.²³⁴ The law of some nations states that the subject of the dispute must be stated in the arbitration agreement.²³⁵ As the wording is clear in its requirement that the matter of the dispute be specified, it appears that in terms of a submission agreement a broader interpretation cannot be applied by enforcing courts. The law is more malleable in Bahrain, the UAE, Qatar and Kuwait;²³⁶ the disputed subject matter may be clarified when the suit is heard.²³⁷ It is apparent that in terms of arbitration clauses it is not necessary for the subject of dispute to be specified as, of course, no dispute has yet occurred.²³⁸ Typically, it is sufficient for the object of the defined legal relationship to be established as the law provides that all disputes that arise out of a particular contract will be resolved through arbitration. This means that referral to arbitration will not cover disputes that arise between the parties under a different contract to the one in question.²³⁹

The final concept regarding the grounds for invalidity is arbitrability. Arbitrability demands that the arbitration agreement relates to the subject of the dispute to be settled by arbitration. According to the NYC, an arbitration agreement must concern a matter capable of resolution through arbitration in order to be valid.²⁴⁰ It is up to each country to decide what matters can and cannot be the subject of arbitration. This decision is made in line with the social, economic and

²³⁴ Riyadh Convention on Judicial Cooperation 1983.

²³⁵ Bahrain Code of Civil and Commercial Procedure, art 233(3); Kuwait Code of Civil and Commercial Procedure, art 173; Qatar Code of Civil and Commercial Procedure, art 190(3); Oman Law of Arbitration in Civil and Commercial Disputes, art 10(2); UAE Code of Civil Procedure, art 203(3); Saudi Arabia Arbitration Law, arts 1 and 5 and Arbitration Regulation, art 6.

²³⁶ Bahrain Code of Civil and Commercial Procedure, art 233(3); Kuwait Code of Civil and Commercial Procedure, art 173; Qatar Code of Civil and Commercial Procedure, art 190(3); Oman Law of Arbitration in Civil and Commercial Disputes, art 10(2); UAE Code of Civil Procedure, art 203(3); Saudi Arabia Arbitration Law, arts 1 and 5 and Arbitration Regulation, art 6.

²³⁷ *ibid.*

²³⁸ *ibid.*

²³⁹ Dubai Cessation Court, Decisions Nos 48 and 70 (23 May 1992) and No 91/89 (6 March 1999).

²⁴⁰ NYC, art II (1).

political circumstances of the country.²⁴¹ Thus, if non-arbitrability under the applicable law arises, then this will be sufficient grounds to invalidate the arbitration agreement and a court will reject the application for the enforcement of a foreign arbitral award.²⁴²

This research finds that the same condition can be found in the law of all the GCC nations. In relation to subject matters where compromise is available, arbitration is not allowed.²⁴³ Under both international conventions and the GCC nations' national legislation, non-arbitrability is seen as a key reason for rejecting the enforcement of a foreign arbitral award. It is important to note that alternative substantive grounds for invalidity of an arbitration agreement may be available under the pertinent applicable law. In the civil codes of Qatar, the UAE, Bahrain and Kuwait²⁴⁴ for instance, the legal capacity of the parties to enter into an arbitration agreement can constitute substantive grounds for invalidation of the agreement.

Also in Kuwait,²⁴⁵ arbitrators have the authority to resolve a disputed subject matter through compromise, although conversely, arbitration rules state that the arbitration agreement will be annulled if it does not include the names of the arbitrators.²⁴⁶ However, it has been ruled by Kuwait's²⁴⁷ Court of Cassation that in this situation an arbitration agreement can be annulled but this will not affect its validity, provided that an arbitrator is limited to deciding on the subject of the dispute in line with legislation.²⁴⁸ Nonetheless, commentators agree that the three grounds

²⁴¹ Redfern and Hunter (n 10) para 3-12.

²⁴² *ibid.*

²⁴³ Bahrain Code of Civil and Commercial Procedure, art 203(4); Kuwait Code of Civil and Commercial Procedure, art 173; Qatar Code of Civil and Commercial Procedure, art 190(2); Oman Law of Arbitration in Civil and Commercial Disputes, art 11; the UAE Code of Civil Procedure, art 203(4); Saudi Arabia Arbitration Law, art 2 and Arbitration Regulation, art 1.

²⁴⁴ Bahrain Code of Civil and Commercial Procedure, art 233(3); Kuwait Code of Civil and Commercial Procedure, art 173; Qatar Code of Civil and Commercial Procedure, art 190(3); Oman Law of Arbitration in Civil and Commercial Disputes, art 10(2); UAE Code of Civil Procedure, art 203(3); Saudi Arabia Arbitration Law, arts 1 and 5 and Arbitration Regulation, art 6.

²⁴⁵ Code of Civil and Commercial Procedure, art 176.

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ Yaqoub Sarkhouh, 'Validity Terms of the Arbitral Award in the Kuwaiti Legislation Compared with the Contents of Arbitration Treaties issued under the Auspicious of the UN' Journal of Law (Academic Publication Council,

examined above are the primary grounds of invalidity.

5.3 The Arbitral Proceedings Were Unfair in Terms of the Composition of the Arbitral Tribunal

5.3.1 Lack of Due Process and Applicable Law

In the GCC countries, a losing party may request to have an application for the enforcement of a foreign arbitral award rejected by proving that the arbitral proceedings suffered from a lack of due process.²⁴⁹ The NYC provides that the enforcement of a foreign arbitral award may be rejected if a losing party can show that they were not given proper notice of the arbitral proceedings, or the name of the arbitrator or if the losing party was not able to present his case for some other reasons.²⁵⁰ Similar to the NYC, the Riyadh Convention²⁵¹ and the Arab League Convention²⁵² also provide that an enforcement application can be rejected if the parties were not properly summoned to appear. The Convention on the Enforcement of Judgments, Delegations and Judicial Notices in the GCC, states that an application for enforcement will fail if passed in absentia and if the losing party was not provided with appropriate notice of the suit or the award.²⁵³ National legislation in GCC nations, including Kuwait, provides that an arbitral award can be enforced if the court is able to confirm that the parties involved were appropriately

Kuwait University, September 1994) 23-56; Kuwaiti Court of Cassation Decision No 146/85 (Commercial) 5 March 1986.

²⁴⁹ *Corporacion Transnacional de Inversiones, SA de CV v STET International SpA and STET International Netherlands NV*, Sup Ct Canada (3 May 2001) (the Canadian Supreme Court recognized that there is no single, universal definition for due process); *Parsons & Whittemore Overseas Co v Societe General de l'Industrie du Papier (RAKTA)*, 508 F2d 969 (2d Cir 1974) (rejecting argument of due process for refusal to accommodate a witness.)

²⁵⁰ NYC, art V(1)(b).

²⁵¹ Riyadh Convention, art 37(d).

²⁵² Arab League Convention, art 3(d).

²⁵³ The Convention on Enforcement of Judgments, Delegations and Judicial Notices in the GCC States, art 2(b).

summoned to the arbitral proceedings and were afforded appropriate representation.²⁵⁴

A lack of due process has been identified as the most significant grounds on which parties seek the rejection of an enforcement application.²⁵⁵ The requirement to follow due process is intended to guarantee that the parties involved receive a fair hearing.²⁵⁶ As a result, if a party seeks to have the enforcement of an arbitral award resisted on these grounds, then precisely how a lack of due process infringed upon the fairness of the hearing, must be proven.

Not all legal regimes adopt the same concept of due process. The NYC (article V (1) (b)) expresses the most advanced form of due process. Due process under the NYC covers two features, one concerning a party's right to receive fair notice and the other concerning how a party is able to present their argument.²⁵⁷ National legislation and other international conventions however, adopt a concept of due process that relates solely to a party's right to be appropriately summoned and represented.²⁵⁸ It must be considered here that 'proper representation' is referred to in provisions that relate to both foreign arbitral awards and foreign judgments in general. 'Proper representation' suggests that a defendant in cases held before a criminal court should be represented by a lawyer; this is not required in arbitral proceedings. Consequently, it can be concluded that this particular issue will not lead to any problems in regard to foreign arbitral award enforcement.

The general consensus holds that the concept of due process as it exists in the NYC forms part of public policy.²⁵⁹ Consequently, lack of due process under article V (1) (b) is now determined to

²⁵⁴ Bahrain Code of Civil and Commercial Procedure, art 252(2); Kuwait Code of Civil and Commercial Procedure, art 199(b); Qatar Code of Civil and Commercial Procedure, art 380(2); Oman Code of Civil and Commercial Procedure, art 352(b); UAE Code of Civil Procedure, art 235(c).

²⁵⁵ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (The Hague 1981) 297; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Redfern and Hunter (n 10) para 10-39.

²⁵⁶ Lew, Mistelis and Kroll (n 24) para 26-81; Redfern and Hunter (n 10) para 10-39.

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

²⁵⁹ United Nations Conference on Trade & Development, *Dispute Settlement: International Commercial Arbitration* (Module 5.7 Recognition & Enforcement of Arbitral Awards: The New York Convention), UN Doc UNCTAD/EDM/Misc.232/Add.37 (2003) 32.

overlap with article V (2) (b) which concerns the public policy defence.²⁶⁰ It is, therefore, common for parties to use either article to raise a defence of a lack of due process.²⁶¹ The same result occurs in other legal regimes in GCC countries.²⁶²

In GCC nations, due process standards may change depending on the applicable law for arbitration agreements or the law of the location in which the arbitration takes place. As a result, the issue of which law or court should apply may arise when a party raises lack of due process as a ground for the rejection of the enforcement of a foreign arbitral award.

Article V (1) (b) of the NYC is ambiguous as to what law should be applied to a lack of due process defence. Currently no GCC case law covering this subject exists. Different commentators and national courts have taken diverse perspectives on the matter.²⁶³ One particular perspective affirms that article V(1)(b) of the NYC establishes an international substantive rule on lack of due process, that in itself creates a due process standard.²⁶⁴ The wording of article V(1)(b) has led to this concept as it is written that the article is expressed ‘in terms of substantive rules’ rather than chosen legal terms. Consequently, the infringement of the rules laid out in article V (1) (b) is sufficient to allow the rejection of an application for the enforcement of a foreign arbitral award.

Others however, deny this interpretation as this would give rise to an ambiguous due process of

²⁶⁰ *Saint Gobain v Fertilizer Corp of India Ltd* (1976) I YBCA 184 (France Court of Appeal 1971) 185; van den Berg (n 23) 299-300; Lew, Mistelis and Kroll (n 24) para 26-82; Gaillard and Savage (n 8); *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para 1697; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Di Pietro and Platte (n 22) 149; X (Syria) v X (2004) XXIX YBCA 663 (Germant Court of Appeal 1998) 668.

²⁶¹ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 1 HKLDR 552 (Hong Kong Court of Final Appeal, 9 February 1999).

²⁶² Saad Badah, ‘Refusing the Recognition and Enforcement of Foreign Arbitral Awards on the Ground that the Arbitral Proceedings Were Unfair and Composition of the Arbitral Tribunal’ (2016) 23. *Currents Journal of International Economic Law*.

²⁶³ Alrumaih (n 2) 368-393.

²⁶⁴ Fernando Mantilla-Serrano, ‘Towards a Transnational Procedure Public Policy’ [2004] *Arbitration International* 333; Lew, Mistelis and Kroll (n 24) para 26-81; Gaillard and Savage (n 8) 1696; van den Berg (n 23) 298, with reference to case law in footnote 186; G Kaufman-Kohler, ‘Globalisation of Arbitral Procedure’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, 1322.

international standard.²⁶⁵ This perspective argues that the applicable law concerning due process standards can be found in the applicable law for the arbitration proceedings, as selected by the parties or if no such selection has been made, the law of the seat of arbitration.²⁶⁶

A further viewpoint, supported by numerous authors²⁶⁷ and applied by a large number of national courts²⁶⁸ argues that the law of the jurisdiction where enforcement of an award is being pursued is the applicable law.²⁶⁹ Thus, a national enforcing court can dismiss an enforcement application if its national legislation determines that there has been a lack of due process. Furthermore, certain courts bear in mind the law selected by the parties to arbitration as well as national law; for example, the Court of Final Appeal in Hong Kong has adopted this practice.²⁷⁰

The case law of GCC countries again does not deal with this issue. Also, excluding the UAE, the law of GCC nations does not contain any provisions concerning the applicable law for lack of due process standards. It is the researcher's belief that the national law of an enforcing court should not apply, regardless of whether enforcement is being pursued under national provisions or under an international convention. There are a number of reasons for this, first, national legislation does not include any provisions supporting that law's application. Second, the law

²⁶⁵ Lew, Mistelis and Kroll (n 24) para 26-81; Robert B Von Mehren, 'Enforcement of Foreign Arbitral Awards in the United States' (1998) 1 International Arbitration Law Review 198, 200.

²⁶⁶ Lew, Mistelis and Kroll (n 24) para 26-81; Garnett (n 108) 406; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes, International and English Law and Practice* (OUP 2007) 233 and 241; Ramona Martinez, 'Recognition and Enforcement of 1958: The Refusal Provisions' (1990) 24 Int'l Law 487, 499.

²⁶⁷ Di Pietro and Platte (n 22) 147; Redfern and Hunter (n 10) para 10-40.

²⁶⁸ *Dutch Seller v Swiss Buyer* (1979) IV YBCA 309 (Switzerland, Court of Appeal 1971) 310; *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 (English Court of Appeal); *Kanoria v Guinness* [2006] 2 All ER (Comm) 413 (English Court of Appeal); *Parsons and Whittemore Overseas Co v RAKTA I* YBCA 205 (1976) (US Court of Appeals 2nd Cir 1974) 975.

²⁶⁹ *ibid.*

²⁷⁰ *Hebei Import & Export Corporation (PR Chain) v Polytek Engineering Company Limited (Hong Kong)* [1999] 1 HKLRD 665 (Hong Kong Court of Final Appeal 1999) 685; *Ukrvneshprom State Foreign Economic Enterprise v Tradeway Inc* 1996 WL 107285 (US District Court SD NY 1996) 5; *Black-Clawson v Papierwerke Waldhof-Aschaffenburg AG*, (1981) 2 Lloyd's Rep 446 [483] (QB Comm Ct), (the English law clarified the English position, that it would be an exceptional case in which the law of the arbitration agreement was not the same as the law of the place or seat of arbitration).

gives arbitrators the liberty unless the parties decide otherwise, to select the *lex arbitri*.²⁷¹ Thus, provided that the parties or arbitrators have selected a different applicable law for arbitration, if national legislation does not apply to national arbitration then due process considerations (in relation to the enforcement of foreign arbitral awards), should not be viewed by an enforcing court in light of its own national legislation. Third, courts do not apply their own national laws when applying statutory provisions concerning the enforcement of foreign judgments,²⁷² including the enforcement of foreign arbitral awards. Last, it is highlighted in article V(1)(d) of the NYC that party autonomy to decide upon the applicable law for arbitration proceedings supersedes both the law of the location of arbitration and that of the forum in which enforcement is pursued. Therefore, enforcing courts in GCC nations would be advised to apply the law of the seat of arbitration, or the applicable law as chosen by the parties, when dealing with due process considerations in the context of the enforcement of an arbitral award.²⁷³ However, the national law of the UAE does include a conflict of laws rule.²⁷⁴ This rule provides that all procedural issues are subject to the law of the nation in which the action is brought or where the proceedings occur.²⁷⁵ Thus, the appropriate law for an enforcing court to apply in relation to issues of due process is that of the seat of arbitration.

The researcher argues that there should exist a basic standard of due process which includes, for example, the right to offer a defence, proper notice of all measures and equal treatment of the parties involved, regardless of what law is determined to apply to due process. It is the duty of an

²⁷¹ Bahrain Code of Civil and Commercial Procedure, art 238(1)(2) and International Commercial Arbitration Law, art 19; Kuwait Code of Civil and Commercial Procedure, arts 179 and 182; Qatar Code of Civil and Commercial Procedure, arts 198 and 200(1); Oman Law of Arbitration in Civil and Commercial Disputes, arts 25, 30 and 33; UAE Code of Civil Procedure, arts 208(2) (1) and 212; Saudi Arabia Implementation Rules of the Arbitration Law, art 39.

²⁷² Alrumaih (n 2).

²⁷³ Decision of the Cassation Court in Egypt No 2660 year 59 27 March 1996; *Black-Clawson v Papierwerke Waldhof-Aschaffenburg AG*, (1981) 2 Lloyd's Rep 446 [483] (QB Comm Ct), (the English law clarified the English position, that it would be an exceptional case in which the law of the arbitration agreement was not the same as the law of the place or seat of arbitration).

²⁷⁴ UAE Code of Civil Procedure, arts 208(2) (1) and 212.

²⁷⁵ UAE Civil Transaction Code, art 21; Hussein Nuaman Soufraki v The United Arab Emirates, ICSID Case No ARB/02/7.

enforcing court to refuse an enforcement application if arbitrators do not comply with basic due process doctrines.²⁷⁶ However, again the national law of GCC countries, including Kuwait, concerns only the due process in the context of the summons or notice to appear and not the right of the parties to present their case. It is submitted that such an aspect of due process can be dealt with under the broad concept of public policy.

5.3.2 Proper Notice

The above discussion has clarified that, except in cases where the national law of the location of enforcement, has been chosen by the parties as the applicable law for arbitration proceedings, enforcing courts of GCC countries will not apply their own national rules when determining due process issues. For the cases in which GCC national law is selected by the parties, it is worthwhile exploring GCC legal provisions.²⁷⁷ In terms of a lack of due process, the most significant aspect is the requirement that the losing party is able to firstly, provide a translated version of applicable law if not written in Arabic and secondly, prove a failure in due process.

As regards proper notice, each case will be determined on its own merit.²⁷⁸ The elements to be considered include general proper notice requirements, deadlines, disclosing the names of arbitrators, the delivery address and the language the notice is in.

5.3.3 Proper Notice Standards

Regardless of whether the party has been in attendance, proper notice must be provided.²⁷⁹ If this is not done, a foreign arbitral award will not be enforced by the courts.²⁸⁰ However, the issue

²⁷⁶ Abdultawab (n 2) 137-227.

²⁷⁷ Bahrain Code of Civil and Commercial Procedure, art 238 (1) (2) and International Commercial Arbitration Law, art 19; Kuwait Code of Civil and Commercial Procedure, arts 179 and 182; Qatar Code of Civil and Commercial Procedure, arts 198 and 200(1); Oman Law of Arbitration in Civil and Commercial Disputes, arts 25, 30 and 33; UAE Code of Civil Procedure, arts 208(2) (1) and 212; Saudi Arabia Implementation Rules of the Arbitration Law, art 39.

²⁷⁸ van den Berg (n 97) 655.

²⁷⁹ Abdultawab (n 2) 137-227.

²⁸⁰ *ibid.*

arises as to what standard of notice is acceptable. The general view is that the notice does not need to take any specific form.²⁸¹ Nonetheless, the standards as specified under applicable law will be the primary determinants of whether proper notice has been given.²⁸² As a result, it is necessary to examine the standards that exist under GCC nations' national laws and under international arbitration legislation. International arbitration law does not contain many details in terms of the standards of proper notice. Under the UNCITRAL Model Law²⁸³ for instance, parties that disagree on a particular procedure, proper notice will be considered to have occurred when delivered via written communication sent by registered or ordinary post²⁸⁴ or any other method where a record of attempted delivery exists, including electronic communication methods. The ICC Rules²⁸⁵ and the UNCITRAL Rules²⁸⁶ contain a comparable standard, whereas the Charter and Arbitral Rules of Procedure adopted by the GCC Commercial Arbitration Centre state that proper notice will only be made if sent by registered post.²⁸⁷ In GCC legislation, proper notice standards for arbitral proceedings differ from those that apply in the Code of Procedure that are used prior to court proceedings.²⁸⁸

The legal position is that where parties cannot come to an agreement on appropriate procedure or where procedure is decided by the arbitrators, then the arbitrators are constrained by the rules of

²⁸¹ *Presse Office SA v Centro Editorial Hoy SA* (1979) IV YBCA 301 (Mexico, Court of First Instance 1977); *Malden Mills Inc v Hilaturas Lourdes SA* (1979) IV YBCA 320 (Mexico, Court of Appeal 1977) 304; van den Berg (n 23) 303; Lew, Mistelis and Kroll (n 24) para 26-84; *Generica Limited v Pharmaceuticals Basics Inc* (1998) XXIII YBCA 1076 (Court of Appeals US 1997) 1130; *Shipowner v Charterer (Germany)* (2007) YBCA XXXII 381 (Germany Court of Appeal 14 December 2006) 372; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 299-300.

²⁸² *ibid.*

²⁸³ UNCITRAL Model Law, art 3.

²⁸⁴ Davidson (n 157) 34; Lew, Mistelis and Kroll (n 24) para 26-84.

²⁸⁵ ICC Rules, art 3(2).

²⁸⁶ UNCITRAL Rules, art 2(1).

²⁸⁷ Arbitral Rules of Procedure in the GCC Commercial Arbitration Centre, art 10.

²⁸⁸ Bahrain Code of Civil and Commercial Procedure, art 238(1); Kuwait Code of Civil and Commercial Procedure, art 179; Qatar Code of Civil and Commercial Procedure, art 200(1); Oman Law of Arbitration in Civil and Commercial Disputes, arts 7 and 30; Saudi Arabia Implementation Rules of the Arbitration Law, art 39; UAE Code of Civil Procedure, art 208.

the relevant section of the CCPL only.²⁸⁹ No mandatory regulations concerning proper notice currently exist in Kuwait.²⁹⁰ It is simply stated that the arbitrators will notify the parties of the date and location of the first sitting for a dispute hearing.²⁹¹ The Explanatory Memorandum explains this issue further by stating that proper notice will be deemed to have been given if it is sent by registered post or through a more simplified form, that can ensure that the parties receive the notification of the place and time of a hearing.²⁹² It is the fact that notification has been given rather than the form of this notification that is the concern. Provided that a party is notified of the hearing, the form this notification takes is irrelevant. Consequently, enforcing courts may take a broader approach to interpreting proper notice. UNCITRAL Rules and other international arbitration law standards relating to this matter will be highlighted. Furthermore, as it is possible for arbitration to take place when one party is not present, the fact that a losing party was aware of the arbitration denies them any grounds for seeking the dismissal of the enforcement of an award. An award can be granted even when the other party does not attend the hearing as notified.²⁹³ The section on arbitration in the Code of Civil and Commercial Procedure of Qatar and of Bahrain makes no reference to proper notice requirements.²⁹⁴ It is within the authority of arbitrators to decide on arbitration procedure as long as the parties' rights are guaranteed.²⁹⁵ In Bahrain and Oman notice does not need to take a particular form.

This is in line with the UNCITRAL Model Law.²⁹⁶ Arbitration law in Saudi Arabia does provide formal requirements for notification which are very close to the procedural rules adopted by the Board of Grievances. For example, notification of parties must be made by a clerk of authority

²⁸⁹ Qatar Code of Civil and Commercial Procedure, art 198; Oman Law of Arbitration in Civil and Commercial Disputes, art 25; Kuwait Code of Civil and Commercial Procedure, art 182; Saudi Arabia Implementation Rules of Arbitration Law, art 39; UAE Code of Civil Procedure, art 212.

²⁹⁰ *ibid.*

²⁹¹ UAE Code of Civil Procedure, art 208(1); Kuwait Code of Civil and Commercial Procedure, art 179.

²⁹² Kuwaiti Code of Civil and Commercial Procedure.

²⁹³ UAE Code of Civil Procedure, art 208(2); Kuwait Code of Civil and Commercial Procedure, art 179.

²⁹⁴ Bahrain International Law, art 36(1)(a)(4); Qatar Code of Civil and Commercial Procedure, art 198.

²⁹⁵ Hassan Ali Radhi, *Judiciary and Arbitration in Bahrain* (Arab Renaissance House 2002) 186-187; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160.

²⁹⁶ UNCITRAL Model Law, art 3.

and must include specific details.²⁹⁷ However, these rules do not apply outside of arbitration that occurs within Saudi Arabia regardless of whether the parties have agreed on this procedure or regardless of whether Saudi Arabian law has been selected as the law governing the arbitration process.²⁹⁸ Yet, article 36 of Saudi Arabia's Arbitration Regulations does make reference to the general due process principle of informing the parties of claim proceedings and states that an arbitration panel must observe the 'principles of litigation'. As a result, it can be concluded that an enforcing court is able to rely on the aforementioned text to apply a broad interpretation of proper notice so that the fact of notification is sufficient to satisfy this requirement rather than adherence to any particular formal demands.

Consequently, notice requirements would not result in any difficulties provided that the parties were aware of the time and place of the arbitration proceedings. Nonetheless, as arbitration can continue without the presence of all parties, it is uniformly advised that notice be made by registered post to prevent any assertion that notice was never received.

It should be noted that the role of the national court at the place of enforcement, in most cases is limited. Its function is not to decide whether or not the award is correct, as a matter of fact and law. The main work of the court in most cases is simply to decide whether there has been a fair hearing. One mistake in the course of proceedings may be sufficient to lead the court to conclude that there was a denial of justice. For example, in the US, a corporation which had not provided invoices had its claim rejected by the Iranian tribunal,²⁹⁹ for the failure to submit detailed invoices. German courts do not enforce awards where there is evidence of unfair due process.³⁰⁰ Similarly the English Court of Appeal,³⁰¹ in *Kanoria v Guinness*, decided that the respondent had not been afforded the chance to present his case when critical legal arguments were made by the

²⁹⁷ Arbitration Law, art 8; The Implementation Rules, arts 11-15.

²⁹⁸ *ibid.*

²⁹⁹ *Parsons Whittmore Overseas Co Inc v Societe Generale de l' Industries du papier (RAKTA)* 508 F2s (2nd Cir 197) 975.

³⁰⁰ See the decision of the Stuttgart Court of Appeal dated 6 October 2001 referred in Liebscher, *the Healthy Award, challenge in International Commercial Arbitration* (Kluwer 2003) 406.

³⁰¹ (2006) EWCA Civ 222 [2006] Arb Lr 513.

claimant at the hearing, which the respondent could not attend due to a serious illness. The court decided that this was an extreme case of potential injustice and resolved not to enforce the arbitral award. It should be noted that the above two cases' outcomes are rare in the normal practice of arbitration. For example, in the case of *Minerals Germany v Ferco Steel*,³⁰² the losing party opposed enforcement on the grounds that the tribunal had obtained evidence through its investigation. The English court enforced the award on the grounds that the party had a chance to request disclosure of evidence and comment on it but had declined to do so. In the US, where a party is given the opportunity but does not take this in time at an early stage, the respondent cannot refuse enforcement. In the case of *Jorfar Engineering Company SCA (Morocco) v AMCI Export Corporation*,³⁰³ the District Court of Pennsylvania held that AMCI had been given a full and fair opportunity to present its case and had to suffer the consequences of its own failure to present its case when given the opportunity. There is no evidence in GCC states or Kuwait to this effect; its application in the GCC is subjective rather than objective.³⁰⁴

5.3.4 Arbitration Proceedings and the Composition of the Arbitral Tribunal

A losing party may choose to seek the refusal of an application for the enforcement of a foreign arbitral award in a GCC nation on the basis that there has been an abnormality in the composition of an arbitral tribunal or during the arbitration proceeding itself. Only Bahraini law and the NYC permit this ground for invalidity; other GCC legal systems remain silent on the issue.³⁰⁵ The NYC stipulates that the enforcement of an arbitral award may be denied if it can be shown that the arbitral tribunal was not composed properly; if the arbitration proceedings were not carried out in line with the agreement as determined by the parties or, if such an agreement

³⁰² (1999) XXIV Ybk Com Arb 739.

³⁰³ (2007) XXX bk Comm Arb 713-718.

³⁰⁴ Civil Code and Commercial Procedure in Kuwait.

³⁰⁵ Qatar Code of Civil and Commercial Procedure, art 198; Kuwait Code of Civil and Commercial Procedure, art 182; Oman Law of Arbitration in Civil and Commercial Disputes, art 25; Saudi Arabia Implementation Rules of Arbitration Law, art 39; UAE Code of Civil Procedure, art 212.

does not exist,³⁰⁶ in line with the law of the nation in which arbitration took place.³⁰⁷

These same stipulations appear in the Bahraini International Commercial Arbitration Law.³⁰⁸ The most important remark to be made about this provision is that the agreement between the parties concerning arbitration proceedings and the composition of the arbitral tribunal takes precedence over other rules.³⁰⁹ It is only when such an agreement does not exist that the law of the state in which the arbitration took place will be deemed to govern the process.³¹⁰ Consequently, article V(1)(d) of the NYC is most commonly understood to indicate that the rules as set out in an arbitration agreement govern decisions on whether the proceedings or tribunal composition have suffered any irregularities, regardless of whether these rules are contrary to the law of the country where arbitration took place.³¹¹ Additionally, it must be considered that the parties' intentions may arise from an explicit agreement on rules or from a more oblique reference to specific arbitration rules or laws.³¹² This notion is further supported by the Geneva Convention of 1927, which provides that an award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitral agreement of the parties and the law of the place of arbitration. In the NYC the double requirement rule has been dropped. Hence the agreement of the parties comes first due to the doctrine of competence and separability of an arbitration. Unless there is no arbitration agreement, laws of the place of arbitration will be taken into account as evinced in the Supreme Court of Hong Kong case of *China Nanhi Oil Joint*

³⁰⁶ *Corte di Appello (CA)*, Trento, 14 January 1981 General Organisation of Commerce and Industrialisation of Cereals of the Arab Republic of Syria reported in Yearbook VIII (1983)386-388.

³⁰⁷ NYC, art V(1)(d); *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republics* XXYBCA 515 (1990).

³⁰⁸ Bahrain International Law, art 36(1)(a)(4).

³⁰⁹ Almarakebi (n 41) 111-129.

³¹⁰ UN Doc E/CONF 26/SR3, 4.

³¹¹ Gaja (n 23) 3; van den Berg (n 23) 324-31; Karl-Heinz Bockstiegel, Stefan Michael Kroll and Patricia Nacimiento, *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International 2008) 544; Poudret and Besson (n 24) 838; Davidson (n 6) 394; Di Pietro and Platte (n 22) 161; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Gaillard and Savage (n 8) para 1702.

³¹² *X v X* (2006) XXXI YBCA 640 (Germany Court of Appeal 30 September 1999) 646; R David, *Arbitration in International Trade* (Kluwer Law and Taxation Publishers 1985) 399; Gaillard and Savage (n 8) para 1702; Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (CMP Publishing 2009) 730; Abdulaal (n 12) 378-444; Gaja (n 23).

*Service Cpn v Gee Tai Holdings Co Ltd.*³¹³ It was argued that an award made in China should be refused because the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The arbitrators who had been appointed were not on the Beijing list. In most cases the burden to refuse enforcement is shifted to the defendant; in most cases even when the evidence has been adduced by the defendant, the court has residual discretion to enforce the award, as provided under article II2 of the NYC. Article V provides that it will be unfair for the defendant to advance the defence of composition if he has not supplied any evidence to the court; however, article V (I) (d) of the NYC³¹⁴ suggests the importance of arbitral composition.

The NYC plays a crucial part in establishing the legal setting for international arbitration proceedings, making the law of the location of arbitration less important than the agreement between the parties. Removing the role of the procedural regulations of other jurisdictions altogether.³¹⁵ Although the agreement between the parties takes precedence, the demands of due process must still be satisfied. If not, article V (1) (b) or article V (2) (b) of the Convention can be invoked to seek the refusal of the enforcement of an award.³¹⁶ It is clear from this that article V (1) (b) and article V (2) (b) overlap as they both concern alleged infringements of correct arbitration procedures. Even if it is the clear decision of the parties that the arbitrators' names should not be disclosed, this goes against the fundamental principle of due process. Therefore, article V (1) (b) or article V (1) (d) can be used to prevent an award from being enforced.³¹⁷

The courts seldom uphold an objection on the basis of article V (1) (d) despite the copious amount of academic writing this ground has generated.³¹⁸ One academic has commented that this is because a key advantage of arbitration is the capacity for the parties to decide upon panel members that specialize in the relevant area of dispute. As there are a limited number of such

³¹³ (1995) XX Ybk Comm Arb 672.

³¹⁴ *HSN Capital LLC v Productora Comercializatiozador de Television Sa de Cv Mexixo* (2007) XXX Ybk Comm Arb at 3-7.

³¹⁵ Born (n 23) 2765.

³¹⁶ Bockstiegel, Kroll and Nacimiento (n 311) para 95; van den Berg (n 23) 312-31.

³¹⁷ van den Berg (n 23) 301.

³¹⁸ Lew, Mistelis and Kroll (n 24) para 26-95; Di Pietro and Platte (n 22) 163.

experts, they may find themselves serving on a number of arbitration panels simultaneously, some of which may have parties in common. Also, courts will not take to broad claims of prejudice very well if these objections have not been brought before the tribunal itself but are used to try to prevent enforcement. This is because the promotion of arbitration and thus enforcement of awards is a key objective of the NYC.³¹⁹ Such assertions may even be considered by the court to be made in bad faith.³²⁰ Moreover, the majority of arbitration laws and rules as well as parties to arbitration give arbitrators significant discretion regarding the arbitration proceedings. This makes it challenging to successfully invoke this ground for invalidity.³²¹ The enforcement of foreign arbitral awards has only been denied under article V (1) (d) in a handful of cases,³²² mostly where the parties' agreed procedures or the laws of the seat of arbitration are violated.

The composition of the arbitral tribunal is the first defence against enforcement under article V (1) (d).³²³ An irregularity occurs when the composition of the tribunal does not adhere to the arbitration agreement or if there is no such agreement, the law of the country in which arbitration took place. A review of court applications reveals that raising a claim that the composition of an arbitral tribunal was irregular is seldom successful.³²⁴ There are four key situations that give rise to this defence being refused: 1) the irregularity is only minor, 2) the application of the doctrine of estoppel, 3) the court chooses to apply the law of the nation in which the arbitration took place to allow an award to be enforced and pays no heed to the arbitration agreement and 4) the court believes that the parties subsequently, and implicitly, agreed to the change in the composition of the arbitral tribunal.³²⁵

³¹⁹ NYC 1958; Badah (n 262).

³²⁰ Diana G Richard, 'Enforcement of Foreign Arbitral Awards under the United Nations Convention of 1958: A Survey of Recent Federal Case Law' (1987) 11 Md J Int & Trade 13, 32.

³²¹ Bockstiegel, Kroll and Nacimiento (n 311) 547-48; van den Berg (n 23) 323.

³²² *Corte di Appello (CA)*, Trento, 14 January 1981 General Organisation of Commerce and Industrialisation of Cereals of the Arab Republic of Syria reported in Yearbook VIII (1983) 386-388.

³²³ NYC 1958; *ibid*.

³²⁴ *ibid*.

³²⁵ Abdulaal (n 12) 378-444.

Regarding the first point, as a general rule courts do not consider minor anomalies in an arbitral tribunal's composition. For example, in a case heard in Hong Kong³²⁶ it was argued that the institute that granted the award, the China International Economic and Trade Arbitration Commission (CIETAC), was not the arbitral organization specified in the contract. However, China's international arbitration institute, the Foreign Economic Trade Arbitration Commission (FETAC), had changed its name to CIETAC. The Supreme Court determined that both institutes were the same legal entity and thus the defence that the arbitral authority was not that named in the agreement failed.³²⁷

In addition, the enforcing court can rely upon the application of the doctrine of estoppel to refuse this defence.³²⁸ The NYC makes no reference to estoppel; however, a number of court rulings have applied estoppel in relation to article V (1) (d).³²⁹ This has especially been the case where the parties have not raised any protest during the arbitration itself. In Hong Kong,³³⁰ a resisting party claimed that there were irregularities in the composition of the arbitral tribunal as the arbitrators were selected from the Shenzhen list, when the parties had agreed that they would be chosen from the Beijing list. The High Court recognized that this defence against enforcement had been proved but nonetheless refused it on the basis of the doctrine of estoppel, the reason being that the party had made no protest during arbitration.³³¹ This doctrine has also prevented the ground of improper composition of a tribunal from succeeding in a case where the arbitration agreement stated that the third arbitrator should not have any connection with either party³³² and in a case where an arbitrator was not able to speak German, contrary to the agreement.³³³

³²⁶ Bockstiegel, Kroll and Nacimiento (n 311) 547-48; van den Berg (n 23) 323.

³²⁷ *Shenzhen Nan Da Industrial & Trade United Company Limited v FM International Limited* (1993) XVIII YBCA 377 (Hong Kong Supreme Court 1991) 379.

³²⁸ *Combee v Combee* [1951] 2 KB 215.

³²⁹ *ibid.*

³³⁰ *ibid.*

³³¹ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* (1995) XX YBCA 671 (Hong Kong High Court 1994) 673-77. Similarly, *Tongyuan International Trading Group v Uni-Clan* [2001] 4 Int ALR N-31, citing Redfern and Hunter (n 10) para 10-43 footnote 105; Abdulaal (n 12) 378-444.

³³² *X v X* (2004) XXIX YBCA 673 (Germany Court of Appeal 20 October 1998) 675-76.

³³³ *Imperial Ethiopian Government v Baruch- Foster Corp* 535 F2d 334, (US Court of Appeal 5th Cir 1976).

Moreover, courts have accepted an application for the enforcement of an award when the composition of the arbitral tribunal was in accordance with the law of the seat of arbitration, rather than the agreement between the parties. In the US for instance, a resisting party protested that one lone arbitrator had granted the award when the agreement had required three arbitrators. The US Court of Appeals³³⁴ allowed the enforcement of the award, as the composition of the arbitral tribunal was in line with the law of the seat of arbitration, specifically, English arbitration law.³³⁵ This approach has also been taken by other national courts³³⁶ which view this issue in a way that promotes the enforcement of awards.³³⁷ Nonetheless, this interpretation appears to go against the unequivocal wording of the NYC which gives an agreement between parties, precedence over the law of the seat of arbitration, especially in cases where this agreement is in line with the mandatory regulations of the seat.³³⁸

Furthermore, courts can reject the defence of irregularity in the composition of an arbitral tribunal if it is believed that the parties later and implicitly, accepted the changes. The German Court of Appeal allowed enforcement where the tribunal was not composed as per the initial agreement because it determined that the conclusion of a contract with the arbitrator indicated consent to future changes in the tribunal's composition.³³⁹ It appears that this defence has succeeded in just two instances where the courts gave the parties' agreement precedence. The Italian Court of Appeal did not allow enforcement when the agreement had required three arbitrators to make the award determination and only two did so, regardless of the fact that the

³³⁴ *ibid.*

³³⁵ *Al Haddad Bros Enterprises Inc v M/S AGAP* 635 F Supp 205 (D Del, 1986), *aff'd* (3d Cir, 1987); *Associated Bulk Carriers of Bermuda v Mineral Import Export of Bucharest* (1984) IX YBCA 462 (US District Court 30 January 1980) 463-64.

³³⁶ *Efxinos Shipping Co Ltd v Rawi Shipping Lines Ltd* (1983) VIII YBCA 381 (Italy Court of Appeal 1980) 382; *X v Naviera YSA* (1986) XI YBCA 527 (Spain Supreme Court 1982) 528.

³³⁷ *ibid.*

³³⁸ *ibid.*

³³⁹ OIG Naumburg, *Intl Arb L Rev* 2006, N-61 (Naumburg Court of Appeal, Germany), cited in Patricia Nacimiento 'Article V(1)(d)' in Herbert Kronke, Patricia Nacimiento and Dirk Otto (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) fn 45.

use of two arbitrators complied with the law of the seat of arbitration.³⁴⁰ The US Court of Appeals also decided similarly when a third arbitrator was not appointed by the Commercial Court in Luxembourg³⁴¹ in contravention of the parties' agreement.³⁴²

The courts of GCC nations have thus far not dealt with this matter save for one notable exception. In 1981, the Kuwaiti Court of Cassation enforced a foreign arbitral award in a case where the agreement of the parties regarding the composition of the arbitral tribunal had not been respected.³⁴³ It was stipulated in the agreement that three arbitrators from the London Maritime Arbitrators Association would make up the arbitral tribunal, one chosen by each party and the final one by both parties together. Despite these requirements, a single arbitrator granted the award in London. Enforcement was objected to by the resisting party on the ground that the tribunal composition did not comply with the agreement.³⁴⁴ It was highlighted by the Court of Cassation that English arbitration law³⁴⁵ provides that a single arbitrator appointed by one party can determine a dispute when the other party has not appointed an arbitrator, despite being asked to do so, thus the Court allowed enforcement and rejected the resisting party's objection.³⁴⁶ This illustrates that the Court of Cassation used the law of the seat of arbitration to limit the effectiveness of this defence. In this way, it was determined that the objecting party could not protest against enforcement based on their own lack of participation in the arbitration process. It is of course too early to judge the stance of Kuwaiti courts based on just one decision but in the researcher's view it can be concluded that this decision accords with the primary goal of the NYC to encourage and promote enforcement. This approach should be followed in future cases by Kuwaiti courts when interpreting the NYC in issues or matters regarding enforcement of foreign arbitral awards.

³⁴⁰ *Rederi Aktiebolaget Sally v Srl Termarea* (1979) IV YBCA 249 (Italy Court of Appeal 1978) 295-96.

³⁴¹ *Encyclopaedia Universalis SA v Encyclopaedia Britannica* 403 F3d 85 (US Court of Appeals 2nd Cir 2005).

³⁴² *ibid.*

³⁴³ Almarakebi (n 41) 37-47; Kuwait Cassation Court Decision No 62/1980 dated 27 May 1981.

³⁴⁴ *ibid.*

³⁴⁵ Arbitration Act 1996, ss 42 and 44.

³⁴⁶ Kuwait Cassation Court Decision No 62/1980 dated 27 May 1981.

5.3.5 The Arbitration Proceedings

Under article V(1)(d) of the NYC, a further ground for resisting the enforcement of an award is the rules governing the arbitration proceedings as per an arbitration agreement or in its absence,³⁴⁷ the law of the nation in which arbitration occurred. Arbitration proceedings are inclusive of all parts of the arbitration process from the filing of the complaint to the determination of the arbitral award.³⁴⁸ As a result, the courts must handle a huge range of different procedural infringements, such as tribunals not making an award within the deadlines set by the applicable agreement or law, tribunals not making a logical award, tribunals not applying the correct rules for procedure, tribunals not carrying out arbitration in the agreed location, and tribunals that do not either address or set aside requests regarding evidentiary issues.

The question arises whether every infringement of procedural rules results in non-enforcement. It has been highlighted by Fouchard, Gaillard and Goldman³⁴⁹ that there is a flaw in article V(1)(d) of the Convention in that it offers no guidance regarding what procedural infringements are severe enough to warrant the non-enforcement of an award. The courts and legal commentators have dealt with this issue by taking the view that non-enforcement should only occur if a procedural infringement was substantial or resulted in a party suffering significant prejudice.³⁵⁰ It is thus required by the courts that a resisting party should prove this state of affairs if the enforcement of an award is to be denied. It is understood by jurisprudence that a procedural infringement is serious if it has an impact on the arbitration proceedings to such an extent that

³⁴⁷ Saad Badah, 'Incapacity of parties and invalidity of Arbitration Agreement as Grounds for Refusing Recognition and Enforcement in Kuwait' (Malayan Law Journal, July- August 2014, LexisNexis) ix.

³⁴⁸ Gaillard and Di Pietro (n 23) 730; Poudret and Besson (n 24) 840.

³⁴⁹ Gaillard and Savage (n 8) para 1701.

³⁵⁰ Gaillard and Di Pietro (n 23) 741-41; Born (n 23) 2776; Richard Garnett, Henry Gabriel, and Jeff Waincymer, *A Practical Guide to International Commercial Arbitration*, (Ocean Publications, Dobbs Ferry NY 2000) 106-07; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Tweeddale and Tweeddale (n 266) 417-18; Kroll (n 51) 171; *K v F AG* (2008) XXXIII YBCA 354 (Austria Supreme Court 23 October 2007) 359; *Licensor (Finland) v Licensee (Germany)* (2008) XXXIII YBCA 524 (Germany Court of Appeal 31 May 2007) 531-32.

the tribunal would have made a different decision had the infringement not occurred.³⁵¹ Given the above approach, a procedural violation committed by an arbitral tribunal will not be enough per se to result in the non-enforcement of an award. The majority of courts, for example, have decided that an award will still be enforced where an arbitral tribunal has exceeded the relevant deadlines established by the agreement.³⁵² Furthermore, in situations where these elements are not demanded by the applicable arbitration law, granting an unreasoned award or granting an award without holding an oral hearing does not constitute a procedural infringement as per article V(1)(d).³⁵³

A court may still apply the doctrine of estoppel to enforce an award even when a substantial and unequivocal infringement of procedure has occurred. Numerous courts have refused this defence where the resisting party made no protest to the procedural violation when it arose, especially in cases where the applicable procedural requirements demand that objects be raised sufficiently early.³⁵⁴ Procedural violations as grounds for the non-enforcement of an award have mostly been unsuccessful. There are, however, a few examples of success. A Swiss Court of Appeal rejected an application for the enforcement of an award because arbitration was carried out in two stages, which were not provided for in the law governing this arbitration procedure.³⁵⁵ A Turkish Court of Appeal did not allow the enforcement of an award in a case involving an award made in Switzerland and subjected to Switzerland's procedural law.³⁵⁶ It was decided that Turkey's procedural law should have been applied by the arbitral tribunal as demanded by the arbitration

³⁵¹ *Compagnie des Bauxites de Guinée v Hammermills Inc* 1992 WL 122712 (US District Court DC 1992); *PT Reasuransi Umum Indonesia v Evanston Insurance Company and others* (1994) XIX YBCA 788 (US District Court 21 December 1992) 790; Gaillard and Di Pietro (n 23) 742; Poudret and Besson (n 24) 840-41.

³⁵² *Laminoirs Trefileries-Cableries de Lens, SA v Southwire Co* 484 F Supp 1063, 1066-67 (ND Ga 1980); *La Societé Nationale Pour La Recherche, etc v Shaheen Natural Resources Co* 585 F Supp 57 (SDNY 1983) *aff'd* 733 F 2d 260 (2d Cir 1984).

³⁵³ *German Buyer v English Seller* (Germany Court of Appeal 27 July 1978) 267; *Shipowner v Time Charterer* (2002) XXV YBCA 714 (Germany Court of Appeal 30 July 1998) 716.

³⁵⁴ *China Agribusiness Development Corp v Balli Trading* [1998] 2 Lloyd's Rep 76 (UK QBD Com Ct 1997) 80; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* pp 1281-82; *Mondial Grain Distributors Com Inc v Atlantica Canarias SA* (1991) XVI YBCA 599 (Spain Supreme Court 1984) 601.

³⁵⁵ *Firm in Hamburg (buyer) v Corporation AG in Basel (seller)* (1976) I YBCA 200 (Switzerland Court of Appeal 1968).

³⁵⁶ *ibid.*

agreement.³⁵⁷ Also, a Dutch court denied enforcement in a case where the arbitration panel chairperson in Moscow had made inappropriate contact with a party which included advising the party on how to make a counterclaim.³⁵⁸

In Kuwait and Saudi Arabia, there is case law addressing the defence but this is not the situation in other GCC nations. An intriguing decision regarding article V (1) (d) was handed down in Kuwait in 1986.³⁵⁹ In this case, the parties agreed that contractual disputes would be arbitrated by a three-arbitrator panel in London, one party deciding on one arbitrator, the other party on the second arbitrator and the two parties together deciding on the third arbitrator. Upon reading the award, it was determined by Kuwait's Court of Appeal that the third arbitrator had acted as an umpire in the arbitration proceedings and had instructed the other two arbitrators to decide the issue. As a result, the arbitral award was granted by only two arbitrators, which was seen by the Court to contravene the applicable procedural rules and thus led to a successful defence against enforcement under article V(1)(d) of the Convention.³⁶⁰

However, in a Saudi Arabian case,³⁶¹ a losing party sought to have the enforcement of a foreign arbitral award refused on the grounds that the arbitral tribunal had violated Saudi Arabian procedural rules and that the arbitration had not been carried out in the agreed location. It was decided by the Board of Grievances that the agreement between the parties was for the dispute to be resolved in Paris by ICC arbitration.³⁶² Consequently, the arbitration proceedings were not governed by Saudi Arabian procedural rules. In addition, the Board of Grievances highlighted that the ICC decided the arbitration³⁶³ even though it was carried out in Jordan, making the issue of the seat of arbitration less important. The objection was thus refused and the award

³⁵⁷ *Osuuskunta METEX Andelslag VS v Turkiye Elektrik Kurumu Genel Mudurlugu General Directorate* (1997) XXII YBCA 807 (Turkish Court of Appeal, 1 February 1996) 811-12.

³⁵⁸ *Goldtron Limited v Media Most BV* (2003) XXVIII YBCA 814 (Netherlands Court of First Instance 27 August 2002) 818-19.

³⁵⁹ Kuwait Court of Appeal Decision No 1091/1986 dated 9 December 1986.

³⁶⁰ *ibid.*

³⁶¹ Alrumaih (n 2).

³⁶² *ibid.*

³⁶³ *ibid.*

enforced.³⁶⁴

From these cases, the researcher asserts that the courts in Saudi Arabia and Kuwait will only reject an application for the enforcement of an award if substantial procedural infringements have occurred. It is suggested here, however, that the GCC courts should take a variety of factors into account when deciding this issue. A first consideration is that procedural infringements should seemingly have an impact on the award issued in order for the enforcement to be denied. This view is in line with the general principle that a procedure will not be deemed null and void unless the procedural irregularity caused damage to the other party.³⁶⁵ Thus, the enforcement of a foreign arbitral award should only be refused if, but for the procedural irregularity, the arbitral tribunal would have made a different determination.³⁶⁶ A second consideration that the courts should bear in mind is whether the party objected to the infringement in the seat of arbitration. If such objection was made and was unsuccessful, then the same objection should not be allowed to be heard again. Additionally, it should be confirmed that the objecting party had not surrendered their right to object to a procedural infringement when it arose, particularly in cases where applicable rules on procedure govern the relevant issues.

³⁶⁴ The Board of Grievances, the 25th Subsidiary Panel, decision No 11/D/F/9 dated 1417 H (1996), and the 2nd Review Committee, Decision No 208/T/18 dated 1418 H (1997).

³⁶⁵ Qatar Code of Civil and Commercial Procedure, art 16; Kuwait Code of Civil and Commercial Procedure, art 19(2); Oman Code of Civil and Commercial Procedure, art 21; UAE Code of Civil Procedure, art 13.

³⁶⁶ *ibid.*

5.4 Grounds for Refusing Recognition and Enforcement of a Foreign Arbitral Award Which was Set Aside Abroad

5.4.1 Where the Arbitral Award Has Been Suspended, Set Aside or Is Not Legally Binding

In Kuwait,³⁶⁷ a losing party can seek to have the enforcement of a foreign arbitral award refused if it can be shown that the award has been suspended,³⁶⁸ set aside or is not binding.³⁶⁹ Article 186 is stipulated by the CCP as establishing the viability of the grounds of refusal in Kuwait in the following way:

- (a) If the award was not made according to an arbitration agreement, if avoidance of said agreement constituted the basis of the award, or if the provision of the award exceeded the bounds of said agreement;
- (b) If a rehearing of the court judgement can take place;
- (c) If the award is invalid or if a court's decision regarding nullity impacted the award.

Article 187 provides that an appeal for revocation ought to be initiated prior to the court's initial receipt of jurisdiction regarding a certain dispute. Furthermore, such an appeal cannot viably be registered if thirty days have passed since the enforcement of the arbitral award. While Article 188 specifies that the appeal for revocation ought not to result in the temporary stopping of the judicial proceeding regarding the implementation of the foreign arbitral award, such a stay can be provided by the court if adverse effects would result from the converse and moreover, if revocation is a possibility. The Second Commercial Circuit Court of Kuwait by Court Cassation examined this matter,³⁷⁰ specifically with regard to a case in which a sales contract relating to corporate real estate shareholdings and investment portfolios, unregistered with the Kuwait Market for Financial Instruments, infringed on public policy. Here, the arbitral award was revoked based on the court's decision to consider the contract invalid. In Kuwaiti courts, a

³⁶⁷ Saad Badah, 'Grounds For Refusing Recognition and Enforcement of a Foreign Arbitral Award Which Was Set Aside Abroad' (2015) 41(1) *The North Carolina Journal of International Law* 59-82.

³⁶⁸ Civil Code and Commercial Procedure of Kuwait, arts 186-188.

³⁶⁹ Gary Born, *international arbitration, law and practice* (Kluwer Law International 2012)383; Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Sharia and Statute Law* (Mid- country press, London, Graham and Trotman 1984) 270-271; *Chromalloy Aeroservices Inc v Arab Republic of Egypt* (1996).

³⁷⁰ Kuwait Court Cassation, Second Commercial Circuit Court (4 June 2008), (2009) I J of Arab Arb 269.

prevalent process regarding the revocation of arbitral awards occurs in situations where empirical justification is lacking. Nevertheless, the Court of Cassation held that it is not possible to revoke arbitral awards based on a rationale that constitutes and moreover, is the product of erroneous legal rationalisation.³⁷¹ At present, this process is legitimate in GCC nations where the grounds for award revocation are restricted to the arbitration organisation's regulations. Taking the Kingdom of Saudi Arabia (KSA) as an example, rulings regarding arbitral awards cannot be subject to a request for setting aside and this practice is aligned with the provisions of the 1927 Geneva Convention; specifically, this document states that the refusal of award enforcement, given the binding nature of awards, results in a double *exequatur*. In this way, as stipulated by Article 32(2) of the UNCITRAL RULES, such matters ought not to be determined by. In the KSA, practices whereby award revocation is considered can be started within sixty days from the enforcement of the arbitral award, and Article 50 of the KSA's 2012 Arbitration Law establishes the principles and standards according to which setting aside can take place:

- (a) If the agreement is held to be invalid or non-existent;
- (b) If one party to the agreement is incapable;
- (c) If due notice is not provided;
- (d) If certain mutually established rules between the parties have been excluded;
- (e) If arbitrators have been inappropriately appointed;
- (f) If the tribunal engages in activity contrary to the stipulations of the agreement;
- (g) If irregularities occur during the proceedings;
- (h) If the agreement is not arbitrable, which occurs where it infringes on KSA public policy or Shari'a law.

Another important ground for setting aside constitutes an extension of the eighth point in the above list, whereby an agreement is considered not to be arbitrable in cases where an arbitrator lacks a degree in Shari'a.³⁷² Courts in the KSA are required to restrict their analytical activity to the cancellation principles provided in Article 50 and furthermore, revisiting the detail of the case is not permitted. With a consideration of *Jadawel International v Emaar Property PJSC*

³⁷¹ Court Cassation Case No 9/91 of Commercial Circuit (10 January 1993).

³⁷² The office of the Enforcement Judge was created by the Judiciary Regulation, Royal Decree No M/78 of 19 Ramadhan 1428 Hejra corresponding to 1 October 2007 (Gregorian).

(UAE),³⁷³ the reader will note that the KSA has historically revoked arbitral awards, the rationale in this case stemming from Article 50(2), according to which an award must comply with Shari'a. Nevertheless, analysis of Article 54 demonstrates that an award's failure to comply with Shari'a is not constitutive of a *de facto* capacity to revoke said award. This provision specifies that an effective court holds the right to temporarily stop the award only if the appeal for setting aside is grounded in 'serious reasons'. This raises an ironic feature of arbitration law in the KSA in that what constitutes a 'serious reason' is not expressly stated, whereas, as per Shari'a under Article 54, such reasons stem from non-conformance to Shari'a or public policy. Despite this, a majority of the jurists in Kuwait contend that Shari'a law can only be cited as sufficient grounds for setting aside in cases where it is subject to *riba* (interest) or *Gharar* (uncertainty).

Kuwait provides for this defence in its CCP legislation dealing with foreign arbitral award enforcement.³⁷⁴ Under the NYC, enforcement may be rejected if a resisting party is able to show that the award has been suspended or set aside or is currently not binding on the parties as determined by the competent authority of the applicable law or the law of the nation in which the award was issued.³⁷⁵ Both the Riyadh Convention³⁷⁶ and the Arab League Convention³⁷⁷ provide that enforcement may be declined if in the country in which the decision was made the decision of the arbitrators is not considered final. The GCC Convention for the Enforcement of Judgments, Delegations and Judicial Notices states that enforcement will fail if, 1) the dispute is the subject of a suit yet to be heard in front of a court in the enforcing country³⁷⁸ or 2) the dispute was the matter of a previous judgment given and is *res judicata*.³⁷⁹ Moreover, the law in Kuwait states that only when an award has become *res judicata* under the law of the court that issued it,

³⁷³ Association of International Arbitration (5 February 2014), where the Saudi Arabia Court refused to enforce an ICC award against a Saudi Arabian party in *Jadawel International (Saudi Arabia) v Emaar Property PJSC (UAE)* April 2009 because the award was deemed not to be Sharia-compliant.

³⁷⁴ Kuwait Civil and Commercial Procedure Code No 38 of 1980.

³⁷⁵ NYC, art V(1)(e); *Creighton Limited v Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir., 1999).

³⁷⁶ Riyadh Convention.

³⁷⁷ Arab League Convention.

³⁷⁸ Convention on Enforcement of Judgments, Delegations and Judicial Notices in the GCC.

³⁷⁹ *ibid.*

will it be enforced.³⁸⁰ Under these legal regimes an award must also be enforceable in the nation in which it was made.³⁸¹ It can now be seen that the key variations between the above legal approaches relate to the scope of this defence, the law that should be applied to this ground and the burden of proof. According to applicable conventions, the resisting party must prove this defence whereas, according to national legislation, the party pursuing enforcement must prove that this ground fails. The breadth of this defence is broader as article V(1)(e) of the NYC includes three sub-defences against the enforcement of an award, specifically, that the award is suspended or has been set aside where the arbitration took place or that it is not yet binding. It should be noted that the NYC³⁸² dictates that the enforcing court may refuse enforcement if the party opposing implementation of the award can confirm that the award has been set aside or suspended by a competent court of the country of origin, in which or under the law of which that award was made. Such competent authority is provided in the second part of article V (1) (e) and VI as the country where the award was made.³⁸³ The researcher argues that articles V (1) (e) and VI show that the decision to set aside or suspend the award is completely provided by the judicial court of the location where the award was made.³⁸⁴

It should however be noted, that courts do not have the power to review the award but to enforce unless there are serious grounds not to do so. The NYC was clear that courts should not intervene in the arbitral proceedings. Parties agree to have their disputes resolved by arbitration tribunal, so why should courts scrutinize the awards made by the competent tribunal? Further, in GCC states its very unfortunate that although UNCITRAL adopted the same grounds of enforcement for non-enforcement or setting aside which mirrors the NYC, only Bahrain is compliant with the UNCITRAL Model Law approach. The main grounds (namely, (a) the composition of the tribunal and (2) the appointment of arbitrators) are common to only half of the GCC states. In all

³⁸⁰ Kuwait Code of Civil and Commercial Procedure, art 199(1)(c).

³⁸¹ *ibid* art 200.

³⁸² *ibid*.

³⁸³ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Interpretation of NYC 1958* (Cameron May 2000) 333.

³⁸⁴ *Norsolor v Pabalk* (1982) VIII YBCA 312 (Austria, Supreme Court 1980); *Gabon v Swiss Oil* [2004] (1989) XIV YBCA 621 (Cayman Grand Court 1988).

GCC states it is on record that Kuwait has the least number of grounds for refusal or setting aside of awards; perhaps this explains Kuwait's pro-enforcement history, while the UAE has the most grounds for setting aside an arbitral award.

The researcher argues that the non-uniformity of the grounds of setting aside an award among GCC states can be attributed to the divergence of additional grounds for setting aside as provided in GCC states. In order for the GCC to match modern trends of commerce, they should adopt the leading country in the region, which is Bahrain, in order to be compliant with the UNCITRAL Model Law. According to statistics, Bahrain scores 7.44 out of 10, UAE 7.43 out of 10 and Kuwait 3.44 out of 10. These figures show how friendly Bahrain is to arbitration due to its adoption of the UNCITRAL Model Law.

The issue of whether an award set aside should be enforced or implemented in another country under the NYC has led to debate among practitioners and academic scholars.³⁸⁵ In response to this contentious issue, four approaches have been advanced. The first is the conservative approach which seeks to be approved by a number of courts and commentators. This is that an award set aside in the place of origin is a generally accepted principle not accepted under the NYC;³⁸⁶ implementation of an award may be declined if the award is set aside in the country in which it was made. The NYC considers that the state in which or under which the award was made will have liberty to set aside or modify the award in accordance with domestic laws.³⁸⁷ Save for the Convention on the Enforcement of Judgments, Delegations and Judicial Notices, all applicable GCC law establishes the effect of an award through reference to the law of the nation of origin. In contrast, the aforementioned Convention specifies that the law of the country of

³⁸⁵ Emmanuel Gaillard, 'Enforcement of Awards Set Aside in Country of Origin: The French Experience' (ICCA-Congress Series No 9, Paris 1988); Emmanuel Gaillard, *legal theory of international arbitration* (martinus nijhoff publishers 2010)135-149.

³⁸⁶ Art V(I)(e).

³⁸⁷ David W Rivkin, 'The Enforcement of Awards Nullified in the Country of Origin: The American Experience' (ICCA Congress Series No 9, Paris 1998) 528; Ahmed S El Kosheri, 'The Enforcement of Awards Nullified in the Country of Origin (ICCA Congress Series No 9, Paris 1998) 544.

enforcement is also relevant in deciding whether an award should be enforced.³⁸⁸

5.4.2 Non-binding Awards under Article V (1) (e) of the NYC

Article V (1) (e) NYC³⁸⁹ stipulates that enforcement of a foreign arbitral award can be refused if the resisting party can prove that the award has not yet become binding. This thesis has generated debate concerning the definition of the word ‘binding’ as well as what law governs the award’s binding effect. The primary purpose of the word ‘binding’ in the NYC is to replace the word ‘final’ which appears in the 1927 Geneva Convention.³⁹⁰ Numerous courts have understood the word ‘final’ to indicate that it was a requirement for enforcement of the award in the country where enforcement was being pursued, that the successful party first had to seek some form of enforcement,³⁹¹ such as exequatur,³⁹² in the nation in which the award was rendered.³⁹³ This approach results in double exequatur and thus the NYC aimed to eliminate this practice by making reference not to a final award but to a binding one.³⁹⁴ In order to achieve this, the Convention moved the burden of proof from the enforcing party to the resisting party.³⁹⁵ Legal commentators³⁹⁶ and the courts generally agree that there is no requirement for a successful party to first obtain leave for enforcement, in the state where the award was rendered for an award to be enforceable in a different country.³⁹⁷ The avoidance of double exequatur is seen as one of the Convention’s key successes. However, no definition of ‘binding’ is provided in the Convention. The debate that has ensued in this regard primarily concerns whether ‘binding’ is to be

³⁸⁸ The Convention on Enforcement of Judgments, Delegations and Judicial Notices in the GCC.

³⁸⁹ NYC, art V(1)(e).

³⁹⁰ Geneva Convention, art 4(2).

³⁹¹ Nigel Blackaby and Constantine Partasides (with Alan Redfern and Martin Hunter), *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 649.

³⁹² UNCITRAL, art 32(2).

³⁹³ Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 2815.

³⁹⁴ UN Document E/conf.26/SR.17 P3.

³⁹⁵ Gaillard and Savage (n 8) 76.

³⁹⁶ Jan Paulsson, ‘The Case for Disregarding Local Standard under the New York Convention (1996) 7 Am Rev Intl Arb (Columbia University).

³⁹⁷ Born (n 23) 2815.

interpreted by the law of the nation of origin or whether it is an autonomous concept.³⁹⁸ Moreover, should the binding nature of an award be established by the law of the seat of arbitration?³⁹⁹

Three arguments supporting this view are proposed by Fouchard, Gaillard and Goldman.⁴⁰⁰ Firstly, it is argued that the structure of article V (1) (e) of the Convention essentially relies on the procedural rules of the state of origin. Therefore, enforcement of an award can be denied in cases where it has been suspended or set aside by the relevant authority of the nation in which, or under the law of which the award was rendered. Consequently, if the same concept did not also apply to establishing whether an award is binding, it could arise that an award is binding according to one regime but nevertheless has been set aside in another, resulting in enforcement being refused.⁴⁰¹ The second argument asserts that a binding character cannot exist independently of a specific legal regime,⁴⁰² including the Convention. The final argument highlights that the role of the arbitral seat was more important at the time the Convention was first drafted. Therefore, it is highly likely that the Convention never intended for an award to be binding in a way that was unrelated to a specific place and completely separate from the law of the seat of arbitration.

An alternative perspective, and one supported by a number of courts⁴⁰³ and most writers,⁴⁰⁴ asserts that ‘binding’ is an autonomous concept under article V (1) (e) of the Convention. This

³⁹⁸ Atiya (n 79) 417-521.

³⁹⁹ van den Berg (n 23) 341; Renato Nazzini, ‘The Law Applicable to the Arbitral Award’ (2002) 5(6) Intl Arb LR 179, 185; Robert Merkin, *Arbitration law* (Lloyd’s of London Press 2004) para 19-56; *Animalfeeds Intl Corp v SAA Becker & Cie* (France Court 1970); *Seller (Denmark) v Buyer (Germany)* (Germany Court of Appeal 16 December 1992) 541; *Oil & National Gas Commission v the West Comp of North American* (1988) XIII YBCA 473 (India Supreme Court 1987) 485-87; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Gaja (n 23); 4 and citations in fn 74; Gaillard and Savage (n 8) paras 1678 to 1681.

⁴⁰⁰ Gaillard and Savage (n 8) paras 1678-1682.

⁴⁰¹ *ibid*; Gaja (n 23) para IC4.

⁴⁰² *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (OTV) *Revue del arbitrage* 327; English excerpts in (1995) XX Ybk Comm Arb 663.

⁴⁰³ Redfern and Hunter (n10) 468; Nazzini (n 399) 186; Born (n 23) 2818; *Carters Ltd v Francesco* (1979) IV YBCA 275 (Italy Court of Appeal 1975) 277; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d’Investissements* (1999) XXIV YBCA 603 (Belgium, Supreme Court 1998) 610- 11; *Ab Gotaverken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden, Supreme Court 1979) 240.

means that the concept of a binding award is completely separate from the law of the nation in which the award was rendered.

It is argued here that the specific wording of this article refers only to the award being set aside, and if 'binding' was understood in line with the view expressed in the paragraph above, then double exequatur would again occur. As previously mentioned, the Convention was drafted directly to stop double exequatur from occurring, precisely through the use of the word 'binding' (as a replacement for 'final').⁴⁰⁵ In addition, an autonomous understanding of this concept will result in the requirements of national legislation being abolished, for example, the requirement that an award be deposited with a court or confirmed by a court. These requirements are generally redundant and unwieldy in the context of the international enforcement of awards.⁴⁰⁶ Therefore, one should examine the NYC itself in order to determine a true sense of 'binding'.

This research holds the view that an autonomous definition of 'binding' is preferred given that the drafters of the Convention sought to abandon the concept that the binding force of an award was an issue to be determined by the law of the state of origin (as stipulated in the Geneva Convention). Nonetheless, different views exist regarding when an award can be deemed to have become binding. To begin with, it is argued that regardless of potential or pending institutional, judicial, or other review, a foreign arbitral award is binding the moment it is granted.⁴⁰⁷

⁴⁰⁴ Sanders (n 108) 211; van den Berg, 'Consolidated Commentary' (n 97) 660; van den Berg (n 23) 341-45; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Gaillard and Savage (n 8) paras 1678-1679; Rene David, *Arbitration in International Trade* (Kluwer Law and Taxation Publishers 1985) 400; Lew, Mistelis and Kroll (n 24) para 26-101; Pietro and Platte (n 22) 166; Davidson (n 6) 395; Ahmed Alsamdan, 'The Applicable Law under International Commercial Arbitration' [March 1993] (Journal of Law published by Academic Publication) 173-212; Ahmed Alsamdan, 'Application of Foreign Arbitration Awards in Kuwait' (March 1998) (Journal of Law, Kuwait University) 13-80.

⁴⁰⁵ Gaillard and Savage (n 8) para 1680; Sanders (n 108) 275-76.

⁴⁰⁶ Van den Berg (n 23) 342.

⁴⁰⁷ Born (n 23) 2818; *Fertilizer Corp of India v IDI Management Inc* 957-958; *Rosseel NV v Oriental Commercial & Shipping Co Ltd* (UK QBD Com Ct 1990) 628; *Inter-Arab Investment Guarantee Corp v Banque Arabe Intl d'Investissements SA* (1998) XXIII YBCA 644 (France, Court of Appeal 1997) 610-11; W Michael Tupman, 'Staying Enforcement of Arbitral Awards under the New York Convention' (1987) 3(3) Arb Intl 209, 211-212.

It has also been argued by certain writers and courts that a foreign arbitral award can be deemed to have become binding when no further tribunal appeals are possible.⁴⁰⁸ In this case, a pending appeal has no impact on an award's binding character.⁴⁰⁹ A further view, and one held by the majority of writers and courts, is that for the purposes of article V(1)(e), an award is binding when no further appeals based on merits can be brought before another tribunal or a court.⁴¹⁰ An award would still be binding in the case of exceptional recourse channels that do not involve the award's merits.⁴¹¹ The *Travaux Préparatoires* suggest that the drafters of the Convention originally intended to distinguish between extraordinary means of recourse and ordinary ones but ultimately did not do so, as the distinction is not found in all legal systems or is understood differently between systems.

However, this original intention adds support to this view.⁴¹² This approach is given further support by article VI which states that enforcement proceedings can be suspended by an enforcing court when an application to suspend or set aside the award has been filed with a competent court. It is evident from this that while enforcement of an award that has not thus far become binding may be refused, an application to set aside the award is open to exceptional means of recourse and in this case will only result in enforcement being deferred.

⁴⁰⁸ Badah (n 367) 59-82.

⁴⁰⁹ Born (n 23) 2818; Gaillard and Savage (n 8) para 1679; Martinez (n 266) 505-06; *Seller v Buyer* (2007) XXXII YBCA 303 (Germany Court of Appeal, 2 October 2001) 308; *Jorf Lasfar Energy Company v AMCI Export Corporation* (2007) XXXII YBCA 713 (US District Court, 5 May 2006) 717; *Fertilizer Corp of India v IDI Management Inc* (US District Court) 957-58; David (n 404) 441; Dicey, Morris and Collins (n 80) para 16-117.

⁴¹⁰ Lew, Mistelis and Kroll (n 24) para 26-102; Di Pietro and Platte (n 22) 166; Davidson (n 6) 392; *French Seller v German (FR) Buyer* (1977) II YBCA 234 (Germany, Court 8 June 1967); *AB Gotavernken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden, Supreme Court 1979) 240; *Compagnie X SA v Fédération Y* (2009) XXXIV YBCA 810 (Switzerland, Federal Supreme Court, 9 December 2008); Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Sanders (n 108) 275; van den Berg (n 23) 354.

⁴¹¹ Van den Berg (n 23) 342; Sanders (n 108) 275; *Buyer v Seller* (2007) XXXII YBCA 619 (Switzerland Tribunal Federal Supreme Court, 21 January 2006) 627.

⁴¹² Van den Berg (n 23) 342.

In spite of the lack of a definitive interpretation of ‘binding’, only one court has chosen to refuse to enforce an award because it had not become binding (under article V (1) (e)).⁴¹³ In this case the validity of the arbitration agreement was questioned after the parties had agreed to submit the dispute to ICSID arbitration. The claimant referred the dispute to the American Arbitration Association (AAA) and was granted an arbitration award by default. However, a US Court of Appeals⁴¹⁴ determined that a district court did not have the authority to confirm the award due to the existing agreement to submit the dispute to ICSID arbitration. The claimant then pursued enforcement of the AAA award in the Swiss courts while also filing an application to the ICSID. It was the decision of the Swiss Federal Court that the claimant’s conduct had initiated a new arbitration process and thus the dispute had not been firmly resolved. The binding nature of an award is first and foremost an issue for the applicable law of the arbitration proceedings and the parties had expressly chosen the law that was to govern the arbitration process. The claimant’s actions were interpreted by the court as recognition that the AAA award was not binding and therefore enforcement was denied.⁴¹⁵

A Kuwaiti court has handed down decisions relating to the concept of ‘binding’ under article V (1) (e) of the Convention. In Kuwait, only one case on this issue has been heard.⁴¹⁶ Here, the defendant objected to the enforcement of an ICC award rendered in France, on the grounds that the award was not binding in France as an award must be confirmed by the competent court to become enforceable pursuant to article 1477 of France’s Code of Civil Procedure.⁴¹⁷ Article V(1)(e) of the NYC stipulates that enforcement of an award can be denied if the award is not yet binding, thus a non-binding award is not valid and subject to cassation. Nonetheless, Kuwait’s

⁴¹³ Albert Jan van den Berg, ‘New York Convention of 1958: Refusals of Enforcement’ (2007) 18(2) ICC International Court of Arbitration Bulletin 15; van den Berg, ‘Consolidated Commentary’ (n 23) Cases Reported in Volume XXXIV (2009) YBCA 371-1207.

⁴¹⁴ *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd* 191 F3d 194 (2nd Cir 1999).

⁴¹⁵ *Maritime International Nominees Establishment (MINE) v The Republic of Guinea* (1987) XII YBCA 541 (Switzerland, Court of First Instance, 13 March 1986) 520-22.

⁴¹⁶ Case No 2/2011 (Court of Appeal, Kuwait) 1-5; *IAIGC-Inter-Arab Investment Guarantee Corporation (Kuwait) v Ball-Banque Arabe et Internationale d’Investissements SA (France)*, the Court of Appeal of Paris, *Revue de l’Arbitrage* (1998-1), pp. 134-155, cited in YB 1998- XXIII, pp. 644-653.

⁴¹⁷ *ibid*; French Civil Code of Procedure, art 1477.

Court of Cassation rejected the defendant's objection as it determined that the issue of whether or not an award was binding was governed by the NYC only.⁴¹⁸ However, while the Kuwaiti case did concern the binding nature of awards, it did not expressly approach the issue of when foreign arbitral awards can be seen as binding in relation to article V (1) (e),⁴¹⁹ that is, whether an award should be deemed to be binding as per the Convention or the law of the state of origin of the award. The court did highlight however, that the defendant did not provide any evidence that the award was not valid as per article V (1) (e)⁴²⁰ and had thus not become binding in the nation where it was made unenforceable.

This determination may show that the court of cassation decides whether a foreign arbitral award is binding based on the law of the state of origin of the award. Therefore, there is still confusion as to the real position of Kuwaiti courts concerning the law applicable to determine the binding nature of an award.

The researcher suggests that one of the reasons for the confusion in Kuwait is the variations in formulation between the Arabic text and English text of article V (1) (e).⁴²¹ The English version includes two defences against enforcement: firstly, the award has not become binding thus far, or secondly, the award has been suspended or set aside. In terms of the applicable law for these defences, the Convention makes explicit reference to the law of the state in which the award was rendered but only in relation to the award being set aside or suspended. In contrast, the Arabic version refers to the law of the seat of arbitration in relation to the defences. As a result, it would appear that the courts in Kuwait would give preference to the approach whereby the law of the nation in which the award was rendered or the law under which it was made is applied to determine the binding character of a foreign arbitral award.

The enforcing court of Kuwait may take the above approach also, particularly if the Arabic text of the NYC is applied in order to determine the binding nature of awards. As far as a domestic

⁴¹⁸ Kuwait Cassation Court Decision No 78/88 dated 21 November 1988.

⁴¹⁹ NYC 1958.

⁴²⁰ *ibid.*

⁴²¹ *ibid.*

award is concerned, despite the lack of Kuwaiti case law in this area, the national provisions of Kuwait concerning the effect of arbitral awards indicates that an award will become binding when it is granted by the tribunal and will continue to be binding for its duration.

Two principles lie at the heart of this position. The first is the binding character of a decision which applies to all decisions concerning a dispute regardless of whether a court of first instance made the decision or if the decision was made in the absence of the parties.⁴²² The second is *res judicata* which applies where a final decision has been determined and an appeal is no longer an option.⁴²³ Decisions made by arbitral tribunals are equally binding.⁴²⁴ In addition, simply because a means of recourse is available to a court does not affect the binding nature of an award.⁴²⁵

It is important to note that the binding nature of an award is not dependent in any way on any procedural concerns that may occur at the enforcement stage as national legislation clearly differentiates between ‘enforceable’ awards and ‘binding’ ones. An arbitral award can be both unenforceable and binding; this is in contrast to a court judgment which is not inherently enforceable. A court must decide to enforce an award. Under the NYC,⁴²⁶ an award does not need to be either enforceable or final in the nation in which it was rendered and the enforcing party has no duty to prove this. Thus, a Kuwaiti court may view a foreign arbitral award as binding upon its submission to it, save in cases where the losing party is able to prove that the award has not yet become binding or has been suspended or set aside in the state of origin of the award.

⁴²² Kuwait Law of Evidence in Civil and Commercial Matters, art 53.

⁴²³ Kuwait Explanatory Memorandum of the Law of Evidence in Civil and Commercial Matters, art 53.

⁴²⁴ Sayed Mahmoud, *Specialty of Judicial Arbitration, Combined Arbitration in accordance with Kuwait Law No 11 of 1995* (Bookshop House Est 1997) 195-213.

⁴²⁵ Emmanuel Gaillard, ‘The Enforcement of Awards Set Aside in the Country of Origin’ <<http://www.shearman.com/~media/Files/NewsInsights/Publications/1999/01/The-Enforcement-of-Awards-Set-Aside-in-the-Count>>, accessed 30 March 2016.

⁴²⁶ NYC1958.

5.4.3 ‘Final’ Awards Under Other Kuwaiti Legal Systems (Ratified Conventions by Kuwait excluding the New York Convention)

In contrast to the NYC,⁴²⁷ other legal systems in Kuwait typically demand that an award be ‘final’ before it can be enforced. However, further requirements are imposed beyond that of finality in Kuwait. To be enforceable under the Riyadh Convention⁴²⁸ and the Arab League Convention,⁴²⁹ an award must satisfy the double exequatur requirement. It is required that an arbitral award is final in the country in which it is given and that this is proven by a certificate from the judicial authority, showing that the award is both final and enforceable in the nation in which it was rendered.⁴³⁰ Additionally, a certified copy of the award must contain an execution form under the Arab League Convention.⁴³¹ Consequently, a party seeking enforcement under one of these two conventions must acquire leave for enforcement from the court of origin of the award, as a means of verifying that the arbitral award is final and enforceable before seeking judicial enforcement in a different country’s enforcing court.⁴³² The national law of Kuwait also contains the double exequatur requirement. The law requires that a foreign arbitral award has become *res judicata* as per the law of the seat of arbitration for an order of enforcement of a foreign arbitral award to be granted.⁴³³ Additionally, the award must be enforceable in the country where it was issued.⁴³⁴ The reference to *res judicata* illustrates that the award must be final.⁴³⁵ The term ‘final’ in the context of Kuwaiti law refers to an award decision where all appeal channels regarding the merits of the award have been exhausted or are otherwise not available.⁴³⁶ As a result, under these legal regimes exceptional means of recourse would have no

⁴²⁷ *ibid.*

⁴²⁸ Riyadh Arab Convention on Judicial Cooperation 1983.

⁴²⁹ Arab League Convention.

⁴³⁰ *ibid* arts 3(f) and 5(3); Riyadh Convention, Art 37(b).

⁴³¹ *ibid* art 5(1).

⁴³² Almarakebi (n 41) 111-129; UAE High Federal court decision no 29, year 19, dated 28/6/1997; Decision no 135 year 24 m date 7/4/2004.

⁴³³ Kuwait Code of Civil and Commercial Procedure, art 199(1)(c).

⁴³⁴ *ibid* art 200.

⁴³⁵ Kuwaiti Law of Evidence in Civil and Commercial Matters, art 53.

⁴³⁶ Atiya (n 79) 11-66, 95-147 and 217-340; Al Samadan, The Applicable Law under International Commercial Arbitration (n 404) 173-212; Alsamdan, Application of Foreign Arbitration Awards in Kuwait (n 404) 13- 80.

impact on the possible enforcement of a foreign arbitral award, provided that the arbitral award was enforceable in the country in which it originated.⁴³⁷ ‘Enforceable’ is understood as indicating that an order of execution of an award from the state of origin of that award has been given.⁴³⁸ This includes completion of all of the necessary procedural elements before the competent authority. The legal regimes of the abovementioned country indicate that in order to guarantee the enforcement of an award, the enforcing party must begin proceedings in the state in which the award was made.

Clearly, the above study demonstrates that Kuwait introduces more requirements in relation to enforcement than the NYC does. The Convention does not put parties under any obligation to initiate proceedings in the state of origin of the award.

The researcher argues that the NYC’s main aim was to ensure that the court purposively interprets the Convention in line with its aims, mainly the enforcement of foreign arbitral awards, as per its international objectives. It should, however, be noted that the NYC⁴³⁹ did not set an international vehicle for uniformity of interpretation; it was left to state judicial courts to determine the issue of recognition and enforcement of foreign arbitral awards. This causes a contentious issue in Kuwait which has two legal systems: Islamic law and civil procedure. This at times creates conflict in deciding a case or interpreting the NYC⁴⁴⁰ in line with domestic laws.

The NYC (article V(1)(e))⁴⁴¹ states that enforcement can be denied by a court if the resisting party is able to show that the award has been suspended or set aside by a competent authority in the state in which it was rendered or under the applicable law of which the award was granted. This defence against enforcement is not available under Kuwaiti domestic law.⁴⁴² Therefore, the following discussion will focus on the various issues concerning the NYC.

⁴³⁷ Kuwaiti Code of Civil and Commercial Procedure, art 185.

⁴³⁸ Al-Zedyadah (n 2) 161-223 and 345-380.

⁴³⁹ *ibid.*

⁴⁴⁰ *ibid.*

⁴⁴¹ *ibid.*

⁴⁴² Kuwait Code of Civil and Commercial Procedure, art 199(1)(c).

An association is made in article V (1) (e)⁴⁴³ between the international enforcement of an award and its review by a court of the state in which it was made. However, no guiding criteria for an enforcing court are provided by the NYC and it does not limit the grounds on which an award may be set aside in the country of origin.⁴⁴⁴ Thus, only the laws of the state of origin govern these grounds.⁴⁴⁵ As a result, a number of grounds for denying enforcement that reflect the idiosyncrasies of the law of the seat of arbitration may be included, not simply those the Convention refers to.⁴⁴⁶ This situation results in concerns about whether the Convention should be applied in regard to, the degree to which setting aside an award in the country where it was made, affects enforcement in the enforcing country. Specifically, the issue is whether a foreign court's decision to set aside an award is binding on an application for enforcement. Two key viewpoints are adopted here. The customary viewpoint, adopted by a number of writers and courts⁴⁴⁷ is that if an arbitral award is set aside in the country in which it was made, then it cannot be enforced internationally. This approach is founded on the concept that the decision to annul an award in one jurisdiction results in the non-existence of the award, making it impossible for it to be enforced elsewhere. It has been observed by van den Berg,⁴⁴⁸ that the very fact that an award has been set aside indicates that it was subject to the laws of the country in which it was granted, making it impossible for the award to be deemed valid in another jurisdiction. He notes that legal philosophy may offer some guidance as to how this seemingly paradoxical situation of the enforceability of an annulled award may occur, but that legal practitioners would find such a

⁴⁴³ *ibid.*

⁴⁴⁴ Redfern and Hunter (n 10) para 10-46; Di Pietro and Platte (n 22) 169.

⁴⁴⁵ *ibid.*

⁴⁴⁶ Redfern and Hunter (n 10) para 10-46; Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (CMP Publishing 2009) 765; van den Berg (n 23) 355; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; Sanders (n 108) 276.

⁴⁴⁷ Pierre Mayer, 'Revisiting Hilmarton and Chromalloy' (ICC Congress Series No 10, New Delhi 2000) 165; *Supplier v State Enterprise* (2008) XXXIII YBCA 510 (Germany Court of Appeal, 31 January 2007) 610-16; *Claude Clair v Louis Beradi* (1982) VII YBCA 319 (France Court of Appeal 1980); *X v X* (2002) XXV YBCA 717 (Germany Court of Appeal 28 October 1999) 719; Eric Schwartz, 'A Comment on Chromalloy-Hilmarton, à l'américaine' (1997) 14(3) J Intl Arb 141; Dicey, Morris and Collins (n 80) para 16-118; Ena-Marlis Bajons, 'Enforcement Annulled Arbitral Awards: A Comparative View' (2002) 7 Croat Arbit Yearb 55.

⁴⁴⁸ Albert Jan van den Berg, 'Annulment of Awards in International Arbitration (International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?)' (The Hague 1992) 161, cited in HG Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* 84.

situation unfathomable.⁴⁴⁹ He concludes that it appears that the annulment of an award in the country in which it was made can only be endowed with a unique status by an international treaty.⁴⁵⁰

Furthermore, it would be contrary to the public policy of an enforcing state and the principle of judicial community to enforce an annulled award.⁴⁵¹ It should be noted that as much as the NYC aims to promote enforcement of awards, there is still a lacuna in regard to the definition of public policy under domestic courts, which is worse in Islamic states which have different approaches compared to an Islamic state like Kuwait.

This sentiment is reflected in the UNCITRAL Model Law which states that article V(1)(e) of the NYC and article 36(1)(a)(v) of the Model Law, demand that an award that has been set aside cannot be enforced in any other jurisdiction.⁴⁵² Additionally, if the court decisions of the country of origin of an award are ignored, then parties will be likely to ‘shop around’ for a jurisdiction that is favourable to enforcement.⁴⁵³ With harmonization of the NYC and purposive interpretation, domestic courts will not impede enforcement of foreign arbitral awards. This creates tension for litigants who have to go to another forum and seek enforcement. This increases costs to litigants, which the NYC wanted to avoid. In contrast, a more contemporary perspective holds that a foreign arbitral award can still be enforced even when the courts of the country of arbitration have set it aside. The proponents of this perspective argue that it is justified as the wording of article V (1) is not obligatory but in fact accommodating. Specifically, the appearance of the word ‘may’ in the English version of the article indicates that the relevant

⁴⁴⁹ *ibid.*

⁴⁵⁰ *ibid.*

⁴⁵¹ Tweeddale and Tweeddale (n 266) 443; Andrew Rogers, ‘The Enforcement of Awards Nullified in the Country of Origin in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No 9, Paris 1999) 548; Pieter Sanders, ‘New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1955) 6 *Netherlands Intl LR* 43, 55.

⁴⁵² Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, UN Doc A/40/17 (United Nations ed, 1994) 7(b) (24).

⁴⁵³ Gaillard and Di Pietro (n 23) 766.

authority is entitled to a degree of discretion regarding enforcement.⁴⁵⁴

In addition, article VII (1) of the NYC permits a foreign arbitral award to be enforced where national law is more supportive of enforcement and in spite of article V(1)(e). The rulings in *Hilmarton* in France and *Chromalloy* in the US have led to this approach. The decision in *Hilmarton* was made by a French court which ruled that an award could be enforced in France under article VII(1) of the NYC despite being set aside in Switzerland.⁴⁵⁵ A US court made a similar decision in *Chromalloy* where article VII (1) was used to enforce an award granted and then subsequently annulled in Egypt.⁴⁵⁶ Courts in several other states have followed these decisions to permit annulled awards to be enforced.⁴⁵⁷ Nonetheless, the conditions that permit a court to ignore the fact that a competent authority has set aside an award in order to enforce it have not yet been clarified. There are three arguments surrounding this issue. The first advocates using the permissiveness of article VII, which permits states to introduce regulations that are more favourable to enforcement, and to completely disregard article V(1)(e). Therefore, the rulings of a foreign court regarding an award should be ignored if the jurisdiction of the enforcing court would permit enforcement of the award.⁴⁵⁸ This approach is viewed by many as being too extreme given that it is not explicitly stated in the NYC, that, in cases of conflict article VII should take precedence over article V.

In addition, if different jurisdictions were prompted to create distinct criteria to determine whether a foreign arbitral award should be enforced, then the possibility of uniformity across model laws would be compromised and a barrier to international arbitration would be created.⁴⁵⁹

⁴⁵⁴ Gaillard and Savage (n 8) para 1687; Di Pietro and Platte (n 22) 170-76; Redfern and Hunter (n 10) para 10-47.

⁴⁵⁵ *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* (1994) XIX YBCA 655 (France Supreme Court 1994).

⁴⁵⁶ *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F Supp 907 (US District Court Colu 1996).

⁴⁵⁷ *SONATRACH v Ford Bacon & Davis Inc* (1997) XV YBCA 370 (Belgium Court of First Instance 1988); *Kajo-Erzeugnisse Essenze GmbH v Do Zdraviliscoe Radenska* (1999) XXIV YBCA 919 (Austria Supreme Court, 20 February 1998); *Radenska v Kajo* (1999) XXVI YBCA 919 (Austria Supreme Court, 20 October 1993).

⁴⁵⁸ *Hilmarton Ltd v Omnium de Traitement et de Valorisation OTV* (1994) XIX YBCA 655 (France Supreme Court 1994); *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F Supp 907 (US District Court Colu 1996); *SA Lesbats et Fils v Dr Volker Grub* (2007) XXXII YBCA 297 (French Court of Appeal, 18 January 2007) 298.

⁴⁵⁹ Gharavi (n 448) 87.

An alternative view holds that there is a distinction to be drawn between local and international standards. In this context, it is argued that the enforcement of a foreign arbitral award should be denied on the grounds that it has been set aside but only if the decision to annul the award was based on international standards. If an award has been annulled based on national standards, even if this occurred in the state in which the award was rendered, it is still enforceable.⁴⁶⁰ Article V(1)(a)-(d) of the NYC and article 34(2)(a) of the Model Law would form the foundation of applicable international standards.⁴⁶¹ However, this view has been scrutinized and condemned for making ground (e) of article V(1) superfluous, despite the NYC stipulating that this ground is intended to constitute a separate defence for losing parties against the enforcement of an annulled award.⁴⁶² The final viewpoint regarding this issue is that an enforcing court should use its discretion to enforce an award, regardless of whether it has been annulled in the state in which it was made.⁴⁶³

This approach is founded on article V which states that enforcement ‘may’ be denied and not that it ‘must’ be denied. The problem then arises as to when courts should use their discretion to enforce an annulled award. While numerous courts have done just this, it is challenging to infer a particular set of criteria from these rulings.⁴⁶⁴ It can be affirmed that in using their discretion the courts should not be ignorant of the meaning of the regulation that article V(1)(e) seeks to safeguard. As a result, there is a need for courts to strike a balance between recognizing the decision of the court of the country in which the award was annulled and encouraging enforcement as envisioned by the NYC. Consequently, it is argued that an award that has been set aside should only be enforced in extraordinary circumstances;⁴⁶⁵ protect against enforcement

⁴⁶⁰ Paulsson (n 396) 114.

⁴⁶¹ UN Doc A/CN.9/460 para 143.

⁴⁶² *ibid.*

⁴⁶³ *Steel Corporation of the Philippines v International Steel Services, Inc* (2008) XXXIII YBCA 1125 (US District Court, 6 February 2008) 1131; Di Pietro and Platte (n 22) 170-76.

⁴⁶⁴ Di Pietro and Platte (n 22) 175.

⁴⁶⁵ Redfern and Hunter (n 10) para 10-47; e *TermoRio SAESP v Electranta SP* 487 F.3d 928 (DC Cir 2007, Court of Appeals for the District of Columbia.); Ray Y Chan, ‘The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy’ (1999) 17(1) Boston Univ Intl L J 141, 146 and 213; Georgios Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) para 7.57; William W Park, ‘Duty and Discretion in

decisions that would offend public policy in the enforcing country or against an absence of due process, corruption, fraud⁴⁶⁶ or bias. It appears that this final perspective is the most appropriate to adopt as it does not create a problematic lack of conformity with the NYC, yet does provide the courts with sufficient freedom to encourage enforcement.⁴⁶⁷ Nonetheless, it has been observed by Poudret and Besson⁴⁶⁸ that the court rulings in this regard have never resulted in the courts enforcing a foreign arbitral award that has been annulled in the country in which it was made, excluding under article VII.⁴⁶⁹

It is the researcher's suggestion that Kuwaiti courts would not follow the rulings handed down in *Hilmarton* and *Chromalloy*. Firstly, this is because the Arabic language version of the NYC is applied in Kuwait, and while the English version of article V (1) employs the word 'may' in terms of refusing an award based on the listed circumstances, the Arabic version instead uses the word 'must' imposing a clear obligation on courts. Consequently, the Kuwaiti court has no discretion to allow the enforcement of a foreign arbitral award when that award has been annulled in the country in which it was granted. Secondly, the national legislation of Kuwait does not appear to be more supportive of the enforcement of awards than the NYC. Therefore, a foreign arbitral award must be able to be enforced in its country of origin to be enforceable in Kuwait state. Thus, it is reasonable to expect that an award will not be enforceable in Kuwait if it is set aside by the relevant court or if the resisting party has filed an application to have the award annulled.

International Arbitration' (1999) 93 Am I Intl L 805, 813 and 823; Gary H Sampliner, 'Enforcement of Nullified Foreign Arbitral Awards: 'Chromalloy Revisited' (1997) 14(3) J Intl Arab 141.

⁴⁶⁶ Oman Code of Civil and Commercial Procedure, art 352(a).

⁴⁶⁷ Stephen T Ostorowski and Yuval Shany, 'Chromalloy: United States Law International Arbitration at the Crossroads' (1998) 73 NYLJ 1682.

⁴⁶⁸ Poudret and Besson (n 24) para 942.

⁴⁶⁹ *ibid.*

5.4.4 Suspended Awards

Article V(1)(e) of the NYC goes on to state that an enforcing court can refuse to acknowledge or enforce a foreign arbitral award, that has been suspended by the relevant authority of the country in which it was granted or under the law of which it was rendered. The conditions that could give rise to such a suspension are not elucidated. They have been understood, however, to include situations where an award is suspended in the state in which it was rendered until such time as an application to have the award annulled is dealt with by the courts.⁴⁷⁰ It would appear that the article V (1) (e) requirement would be satisfied by a provisional order for suspension given by the court of the arbitral seat.⁴⁷¹ Thus, an application to have an award suspended in the country in which it was granted, should not result in the award being denied enforcement under article V (1) (e) of the NYC.⁴⁷² Furthermore, it is not a ground for the denial of enforcement if an award has been automatically suspended under the law of the seat of arbitration.⁴⁷³ To adopt a contrary position would mean that the procedural regulations of the arbitral seat would govern the NYC.⁴⁷⁴ However, there are two examples of cases in which the automatic suspension of the enforceability of a foreign arbitral award, under the law of the seat of arbitration was deemed to satisfy the article V (1) (e) requirement for denial of enforcement. In one case, a Swiss Court of First Instance decision rejecting an application to enforce an award made in France was confirmed by the Swiss Court of Appeal, as the resisting party had filed an application to have the award annulled in France. Under the French law, this application results in the automatic

⁴⁷⁰ Gaillard and Savage (n 8) para 1690; Tweeddale and Tweeddale (n 266) 420; van den Berg (n 23) 17.

⁴⁷¹ Gaillard and Savage (n 8) para 1690.

⁴⁷² *AB Gotaverken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden, Supreme Court 1979) 241.

⁴⁷³ Gaillard and Savage (n 8) para 1690; R Doak Bishop and Elaine Martin, *Enforcement of Foreign Arbitral Awards*, Houston, Texas -117281 v1. 28; Dicey, Morris and Collins (n 80) para 16-120; Atiya (n 79) 417-521; Alsamdan (n 79) 66-160; K Sajok, 'The New York Arbitration Convention of 1958 from the Yugoslavia Point of View: Selected Issues' in Sarcevic, p.(ed) *Essays on International Commercial Arbitration* (Graham and Trotman, London 1989)212 fn 46; *AB Gotaverken v General National Maritime Transport Co* (1981) VI YBCA 237 (Sweden, Supreme Court 1979) 241-42; *SPP Ltd v Egypt* 489-90; *White Knight ISA v Nu-Swift* (English High Court, 14 July 1995, unreported) cited in Davidson (n 6410) 397.

⁴⁷⁴ Gaillard and Savage (n 8) para 1690.

suspension of the award.⁴⁷⁵ A US court⁴⁷⁶ was faced with a comparable set of circumstances and equally utilized the French approach to deny enforcement in the case of *Creighton v The Government of Qatar*.⁴⁷⁷ Van den Berg suggests that these two decisions are judicial mistakes.⁴⁷⁸ This is because it is a requirement of the NYC that an award be suspended not under the law of the seat of arbitration but by a ‘competent authority’.⁴⁷⁹

5.4.5 Adjourning Enforcement Proceedings

When a party applies to have the arbitral award set aside in the country in which it was granted, this will mean that an enforcing court must then determine what impact this process should have on the enforcement process. Under Bahrain’s International Commercial Arbitration Law⁴⁸⁰ and the NYC, courts have the authority to suspend their decision regarding enforcement until the application to have the award set aside is dealt with in full.⁴⁸¹ The laws of the GCC states other than Bahrain make no reference to this particular eventuality. Given that article V (1) (e) of the NYC permits courts to deny the enforcement of an award that has been set aside, it is provided by article VI that courts have the discretionary power to delay a ruling regarding enforcement. This power applies, when a party has filed an application with the relevant court in the seat of arbitration to have an award annulled or suspended. The courts are also empowered to require that the losing party provide suitable security when the successful party makes an application for such.⁴⁸² Bahrain’s International Commercial Arbitration Law includes provisions to the same effect.⁴⁸³ Therefore, a court has the power to either suspend an enforcement decision or make this

⁴⁷⁵ *Continaf BV v Polycoton SA* (1987) XII YBCA 505 (Switzerland Court of Appeals, 25 April 1985) 508-09.

⁴⁷⁶ *AB Gotaverken v General National Maritime Transport Co (GMTC), Libya* (1981) VI YBCA 237 (Swedish Supreme Court, 13 Aug 1979).

⁴⁷⁷ *Creighton Ltd v The Government of Qatar* (1996) XXI YBCA 751 (US District Court, District of Columbia, 22 March 1995) 751-58.

⁴⁷⁸ van den Berg (n 23) 18.

⁴⁷⁹ *ibid.*

⁴⁸⁰ Bahrain Civil Code, art 109.

⁴⁸¹ Kuwait Civil Code and Commercial Procedure.

⁴⁸² NYC, art VI.

⁴⁸³ Bahrain International Law, art 36(2).

decision on the grounds that the losing party has provided sufficient security.⁴⁸⁴ Nonetheless, the NYC offers no guidance in terms of the criteria to be observed by the courts, when using the aforementioned discretionary powers and no internationally recognized standards are currently being applied by the courts in this context.⁴⁸⁵ The traditional approach taken by the courts has been to base their decision to adjourn an enforcement ruling on whether or not the application to suspend the award is likely to be successful;⁴⁸⁶ also on the likelihood of the annulment proceedings being conducted relatively quickly.⁴⁸⁷

A court in England has provided its perspective on this issue, stating that it would be wrong to limit the courts' broad discretionary powers available under the NYC. The same court enumerated a list of pertinent questions in this regard: 1) is the application to suspend/annul the award (in the state in which it was granted) a genuine application or is it a way of delaying the enforcement of a foreign arbitral award? 2) does the application to suspend/annul the award (in the state in which it was granted) have a realistic chance of succeeding? 3) would the adjournment be short or long and would it result in bias?

In addition, any decision to adjourn proceedings should be based upon the facts of the particular case in question rather than general practices.⁴⁸⁸ Given the above observations, no court should delay an enforcement decision in situations where the application to suspend an award does not satisfy the requirements of article VI of the NYC⁴⁸⁹ or where the application to annul an award has no effect in the state in which the award was rendered. For example, when a party makes an application to have an award set aside that cannot, in fact be set aside,⁴⁹⁰ or when a party makes an application for an award to be reconsidered.⁴⁹¹ In situations where there does not appear to be

⁴⁸⁴ Gaillard and Savage (n 8) para 1691.

⁴⁸⁵ Gaillard and Di Pietro (n 23) 766.

⁴⁸⁶ Van den Berg, 'Consolidated Commentary' (n 97) 670.

⁴⁸⁷ *ibid.*

⁴⁸⁸ *IPCO (Nigeria) Ltd v Nigerian Natl Petroleum Corp* [2005] EWHC 726 15 (QB).

⁴⁸⁹ NYC1958.

⁴⁹⁰ US FAA, 9 USC, s 10; Swiss Law on Private International Law, art 190(1); Bahrain Civil and Commercial Procedure Code, art 242.

⁴⁹¹ Qatar Civil and Commercial Procedure Code, art 206.

any real reason for setting aside an award,⁴⁹² or finally, when the party seeking to suspend or annul an award was not a party to the proceedings in the state in which it occurred.⁴⁹³ It is also important to discuss the matter of providing security under article VI of the NYC.

The court is required to establish the time frame in which a respondent must provide security and it must also clarify the precise type of security needed.⁴⁹⁴ If this is not done, the enforcing party would find it difficult to continue with the enforcement of the arbitral award. These issues have not yet been broached by the GCC courts. Nonetheless, when ruling on whether to adjourn enforcement proceedings, the courts should bear in mind the factors pertinent to suspending proceedings concerning the recognition of the award.

⁴⁹² *Company A v Company B & C* (2008) XXXII YBCA 517 (Germany Court of Appeal, 23 February 2007) 520; *Film Distributor v Film Producer* (2004) XXIX YBCA 754 (Germany Higher Court of Appeal, 22 November 2002) 760.

⁴⁹³ *Yugraneft Corporation v Rexx Management Corporation* (2008) XXXIII YBCA 433 (Canada Court of Queen's Bench, 27 June 2007) 445.

⁴⁹⁴ *Gesco Ltd v Han Yang Corp* (1986) XV YBCA 575 (US Court for the District, 21 November 1986); *Spier v Calzaturificio Tecnica SpA*, No 86 Civ 3777 (CSH) 12 September 1988 (1988 WL 96839 (SDNY)).

5.5 Summary

This chapter focuses on incapacity and the invalidity of an arbitration agreement; it addresses the defences against the application to enforce a foreign arbitral award that are available in Kuwait. Under the NYC, the burden of proof for these grounds rests on the party seeking to have the enforcement refused. In contrast, the relevant legal provisions found in the laws of Bahrain, the UAE, Qatar, Oman, and Kuwait⁴⁹⁵ place the burden of proof on the enforcing party. Moreover, it has been argued that it is necessary to interpret narrowly the defences against enforcement found in the NYC. This research finds that there are reasons to conclude that the application of this particular aspect of the NYC in Kuwait is comparatively narrow, resulting in more limited instances of the defence of incapacity and invalidity of the arbitration agreement. The reasons for this will be set out below.

In terms of the validity or invalidity of an arbitration agreement, the NYC stipulates that the applicable law for this matter is determined by an enforcing nation's conflict of laws rules. However, article V (1) (a) of the Convention does contain conflict of laws rules in relation to this matter. If the parties to arbitration have not chosen and agreed on the law to be applied to the arbitration proceedings, then it will typically be assumed that the law that has been applied to the main contract will also be applied to the arbitration agreement.⁴⁹⁶ In relation to the law applicable to the formal validity of the arbitration agreement, it is firmly argued that the conflict of laws rules contained in article V (1) (e) of the Convention be applied. That is, the applicable law should be that agreed upon by the parties or, if no agreement has been reached, the law of the state in which arbitration occurs. This leads to the second reason for the narrower application in Kuwait, namely, the operation of Islamic law and jurisprudence. Kuwaiti law considers some agreements to be *haram* or voidable agreements, which cannot be given any authority under

⁴⁹⁵ Bahrain Code of Civil and Commercial Procedure, art 233(3); Kuwait Code of Civil and Commercial Procedure, art 173; Qatar Code of Civil and Commercial Procedure, art 190(3); Oman Law of Arbitration in Civil and Commercial Disputes, art 10(2); the UAE Code of Civil Procedure, art 203(3); Saudi Arabia Arbitration Law, arts 1 and 5 and Arbitration Regulation, art 6.

⁴⁹⁶ *ibid*; Badah (n 21) 44-49.

Islamic jurisprudence, to which Kuwait adheres. It should be noted that, in terms of international contract law, it is widely accepted that no country under the NYC will enforce any arbitral agreement where evidence is adduced that the parties to the agreement are victims of duress, misrepresentation, fraud, or coercion. Therefore, in this respect Kuwaiti law has followed international standards, and the Islamic jurisprudence does not present an obstacle. In fact, it can be argued that Kuwaiti law again applies this aspect of the NYC⁴⁹⁷ more narrowly because of the operation of the good-faith principle, where a losing party cannot participate in the arbitration process and then enter a defence of invalidity. The composition of a tribunal is not viewed favourably by courts, and even in cases where irregularity under article V (1) (d) is shown to exist, a court may still rule in favour of enforcement.⁴⁹⁸

This research finds that there are four reasons why courts choose enforcement in these situations: 1) the irregularity is minor, 2) the doctrine of estoppel applies, 3) the court disregards the arbitration agreement and applies the law of the location of arbitration and 4) the court finds that the parties have implicitly agreed to changes in the composition of the tribunal. This is another instance of Kuwaiti law narrowly applying the ground for refusing enforcement of foreign arbitral awards. Thus, this would in no small way encourage foreign partnership and investment in Kuwait and particularly if other instruments are well galvanized on the issue of public policy.

As regards the annulment or setting aside of awards by the court at the seat of arbitration, this study finds that the Kuwaiti court would not second-guess the ground or reasoning for the annulment. Instead, the majority of the debate surrounds the issue of whether the decision to annul a foreign arbitral award is binding and whether it should be enforced by Kuwait courts. Article V(I)(e) of the Convention states that the ‘recognition and enforcement of an award may be refused only if the award has been set aside or suspended by a competent authority of the country in which the award was made’, while article VII(I) provides that the Convention shall not ‘deprive any party of any right he may have to avail himself of an arbitral award in this

⁴⁹⁷ *ibid.*

⁴⁹⁸ NYC, art V.

manner and to the extent allowed by the law or treaties of the country' where such award is sought to be relied on.⁴⁹⁹

⁴⁹⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention), 330 UNTS 38 (1959), arts V(1)(e) and VII (1).

CHAPTER 6: REFUSAL OF RECOGNITION AND ENFORCEMENT ON GROUNDS OF NON-ARBITRABILITY AND PUBLIC POLICY

6.1 Introduction

The New York Convention (NYC) states that recognition and enforcement of a foreign arbitral award could be for one of the following reasons: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of the country or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.¹ A strong foundation of the NYC's commitment to the enforcement of international arbitration in the Member States, is where it stresses the importance of recognition and enforcement of foreign arbitral awards within the signatory States to the Convention.² The NYC provides that the successful part in an international commercial arbitration expects the award to be performed or complied with without delay.³ There is an implied obligation to the parties to the NYC to abide by the award, under the arbitration agreement. This is further supported by the UNCITRAL Model Law, which provides that 'the award shall be final and binding on the parties and that the parties undertake to carry out the award in urgency'.⁴ Kuwait, being one of the signatory States to the NYC, is committed to the recognition and enforcement of foreign arbitral awards in Kuwaiti courts,⁵ especially when one of the parties to the case has established a special law applicable to international commercial arbitration law, with particular reference to international arbitral awards.⁶ This chapter focuses on the circumstances that may justify the refusal of recognition and enforcement of foreign arbitral awards on the grounds of non-arbitrability and

¹ NYC1958, art V(2)(a) and (b).

² Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 510-535.

³ *ibid.*

⁴ UNCITRAL Model Law, art 32(2).

⁵ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

⁶ Radwan Abu Zeid, *The General Principles of International Commercial Arbitration* (Dar University 1981) 80.

public policy. Public policy will be highlighted as a significant ground for refusal of recognition. This chapter will also consider the nature of public policy. The chapter is, therefore, divided into several sections. Arbitrability, Non-Arbitrability, The Concept of Non-Arbitrability, What Constitutes a Non-Arbitrable Dispute in Kuwaiti Jurisdiction, Bankruptcy, Intellectual Property Disputes, Commercial Agency, Administrative Contracts, Antitrust and Competition Claims, Public Policy, the choice of law regarding public policy, implementation standards of the public policy exception, the difference between national and international public policy, lack of award justification, arbitrator bias, interest (*riba*), corruption, obligatory rules and public policy, Summary.

6.2 Arbitrability

The term ‘arbitrability’ originates from the NYC 1958.⁷ It states that each contracting country shall recognize an arbitration agreement concerning a subject matter capable of settlement.⁸ Hence, the subject matter of the claim is key to arbitration in international commercial arbitration as it opens up initial decisions by the arbitral tribunal⁹ and municipal courts.¹⁰ The word ‘arbitrability’ is contentious due to its many interpretations and the scope of its limitation in each contracting state.¹¹ Arbitrability may be defined as the ability of the tribunal to settle a given dispute.¹² According to Redfern and Hunter, in principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court.¹³ However, it is

⁷ Stuart Dutson, Andy Moody and Neil Newing, *international arbitration* (global law and business 2012) 43-44; NYC, art V (2) provides that an arbitral award may be refused recognition and enforcement if the subject matter of the difference is not capable of settlement by an arbitration under the law of the country.

⁸ Laurence Shore, ‘Defining Arbitrability’ (15 June 2009) *The New York Law Journal* (A New York Journal Special Selection) <<http://www.nylj.com>> accessed 14 November 2014.

⁹ UNCITRAL Model Law, art 2(1) and 3.

¹⁰ House of Lords’ application of arbitrability in *Nafta Products Ltd v Fili Shipping Co* [2007] 4 All ER 951 para 17-19.

¹¹ *Will Drill Resource Inc v Samson Resources Co* 352 F3d (5th Cir 2003); *Gulfside Casino Paternship v Mississippi Riverboat Council* 2008 US App Lexis 12903 (5th Cir, June 2008).

¹² Nigel Blackaby and Constantine Partasides (with Alan Redfern and Martin Hunter), *Redfern and Hunter on International Arbitration* ((5th edn, Student Version, OUP 2009) 22.

¹³ Redfern and Hunter (n 2) 163-172.

precisely because arbitration is a private proceeding with public consequences that some types of disputes are reserved for national courts.¹⁴

Arbitrability distinguishes forms of dispute that can be resolved through arbitration and those that belong only to the domain of the courts.¹⁵ Thus, arbitration can be considered as the ‘goal’, which involves private disputes and that the disputants would like to have public effects. Arbitration permits certain categories of disputes to be resolved through participation, the law applicable to the arbitration agreement, and/or contract.¹⁶

The reason for non-enforcement of a range of awards under article V (2) (a) of the NYC is that the dispute ‘is not capable of settlement by arbitration under the law of that country’. The issues that cannot be arbitrated are still taken into account and therefore not only should the parties be people in business but they should also be trustworthy and of good faith in commercial practice.¹⁷ Matters that are not subject to arbitration are referred to as ‘non-arbitration matters’.¹⁸ Non-arbitrable issues have been raised in disputes relating to competition law, property rules, and securities rules; once arbitration is challenged in that way, judicial intervention is involved.¹⁹ Antitrust is another form of arbitration,²⁰ that is, where the government attempts to enforce rules that avoid competition.²¹ A country has the right to decide which one is in the public interest.²² Also, the state may apply its own domestic law rather than the terms found in an agreement

¹⁴ *ibid.*

¹⁵ Yaqoub Sarkhouh, *Arbitral Awards and their Enforcement in Accordance with the New York Convention, 1958: Comparative Study of Commercial Arbitration* (Arabian Renaissance House 1996) 135-207; Ahmad Almelhim, ‘Commercial Arbitration Contract Concluded Between Arbitrators & Litigant Parties’ [June 1994] *Journal of Law* (published by Academic Publication Council, Kuwait University) 105-213; Ramzi Seif, ‘Civil and Commercial Procedures Law in accordance with the Kuwaiti Law’ (Kuwait University, Faculty of Law Journal 1974) 33-40

¹⁶ Mark A Buchanan, ‘Public Policy and International Commercial Arbitration’ (1988) 26 *Am Bus LJ* 511, 513-514.

¹⁷ *ibid.*

¹⁸ Abdullah Alrumaih, *Arbitration in the GCC States, Arbitration General Framework in the GCC in accordance with the latest amendments including new Saudi Arbitration System 2012, Arbitration Development, Arbitration Agreement, Arbitration Panel, Arbitration litigation, Arbitral Award* (Arab Renaissance House 2013) 368-393.

¹⁹ Buchanan (n 16).

²⁰ Pierre Mayer and Audley Sheppard, ‘Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19 *Arbitration International* 249, 255.

²¹ European Directive on Competition Law 2014/24.

²² European Directive, art 34 on Competition, among European States, a case in point *Ryanair v Commission*.

between the parties.²³ For example, in some Arabic states,²⁴ contracts between foreign companies and the citizens are given special protection under the law, to strengthen the protection, any disputes arising from these contracts were strictly resolved through national courts²⁵ with the exception of the recent public policy that is described as ‘one of the dynamic rules foremost and most controversial for refusing to enforce an arbitration award of the world’.²⁶ One of the grounds upon which the recognition and enforcement of foreign arbitral awards may be opposed is that the arbitration agreement deals with issues that cannot be arbitrated in some jurisdictions. In addition, the claim of arbitration²⁷ must be based on the law, both domestic and international. These terms refer to the existence of national law conflicts, specifically given that resolution is through arbitration, despite the fact that the parties agreed illegally to take recourse to arbitration. As a result, arbitration decisions relating to such matters need not be recognized.²⁸

²³ Loukas Mistelis, “Keeping the Unruly Horse in Control” or Public Policy as a Bar to Enforcement of Foreign Arbitral Awards’ (2000) 2 International Law FORUM du droit international 248, 252. Some Jurisdictions may enforce awards that have been set aside such as the conflict in the COMMISA decision deviates from US court decisions in which courts have tended to refuse to recognise and enforce arbitral awards which had been set aside at the arbitral seat. In an earlier decision, *Chromalloy Aeroservices v Arab Republic of Egypt*, 15 the US Court of Appeals for the D.C. Circuit enforced an arbitral award that had been set aside at the seat of arbitration, finding that launching an appeal against the award in Egypt violated the final and binding nature of the award and that failing to recognize the award would violate US pro-arbitration public policy. However, subsequent US court decisions have deviated from the broad ruling in *Chromalloy*, and have refused to confirm awards that had been annulled at the seat of arbitration; i 191 F2d 194 (2d Cir. 1999); *Spier v Calzaturificio Tecnica SpA* 71 F Supp 2d 279, 288 (SDNY 1999); *TermoRio SA ESP v Electranta SP* 487 F.3d 928, 938 (DC Cir 2007); *Corporacion Mexicana de Mantenimiento Integral, S de RL de CV v PEMEX-Exploracion y Produccion*, Case 1:10-cv- 00206-AKH, August 27, 2013 (The award was rendered in an International Chamber of Commerce arbitration arising out of a contract for the construction of natural gas platforms between Corporacion Mexicana de Mantenimiento Integral, S de RL de CV (COMMISA), a subsidiary of KBR, and PEMEX-Exploracion y Produccion (PEMEX), a Mexican state company. The US district court for the Southern District of New York subsequently confirmed the award, but the Mexican court judgment nullified the award based on it being contrary to the Mexican law. The NYC principally governs the enforcement of international arbitral awards, and requires contracting parties to recognize and enforce awards, except as provided under the Convention).

²⁴ GCC states Conventions and how the executive has limited over new entrants in the market of GCC states.

²⁵ Alrumaih (n 18) 9-16.

²⁶ Mistelis (n23).

²⁷ Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001) 767.

²⁸ *ibid.*

6.2.2 Non-Arbitrability

Every legal system in Kuwait pertaining to foreign arbitral award enforcement contains a stipulation of non-arbitrability.²⁹ As specified by the NYC, if the dispute is found by the relevant authority in the enforcing country not to be suitable for arbitration according to the law of that country, it may lead to the refusal of recognition and enforcement of an arbitral award.³⁰ Similarly, the inapplicability of arbitration in dispute resolution under the law of the enforcing state has also been stated by the Arab League Convention and the Riyadh Convention as a reason for refusal of enforcement.³¹ Likewise, for an enforcement order to be approved, Kuwaiti law stipulates that arbitration must be applicable to the issues in respect of which the award was made and must be in keeping with the law of the enforcing state.³² In relation to the issue of non-arbitrability, three aspects are addressed in the subsequent sections, namely, the concept of non-arbitrability, the relevant legal framework and what constitutes a non-arbitrable dispute.

6.2.3 The Concept of Non-Arbitrability

The concept of non-arbitrability is generally understood at international level as the classification of arbitrable and non-arbitrable disputes applied by the law of a specific country,³³ regardless of the agreement reached by the disputing parties as to the use of arbitration. For instance, the

²⁹ Abdulkareem Althulia, *Enforcement of Foreign Arbitral Awards under Investment Contract Disputes: Comparative Study* (Arabian Renaissance House 2014) 331-616; Ahmad Melaiji, *Arbitration Rules in the Kuwaiti Law* (Arabian Renaissance House 1996) 228-232; Khaled Alyaqout and Tarq Rezq, *Al Wasset in the Rules & Principles of Kuwait Arbitration* (Arabian Renaissance House 2008) 351-400; Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Sharia and Statute Law* (Mid- country press, London, Graham and Trotman 1984) 258-259.

³⁰ NYC, art V(2)(a); Gary Born, *international arbitration, law and practice* (Kluwer Law International 2012) 383.

³¹ Arab League Convention, art 3(3); Riyadh Convention, art 37(a).

³² Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (Arab Renaissance House 1999) 66-160; Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

³³ Abdullah Alremeh, *Arbitration Award in Accordance with Civil & Commercial Procedures Law and Judicial Arbitration Law: Comparative Study in The Kuwaiti & Egyptian Laws Compared with Islamic Jurisprudence* (Bookshop House Est 2009) 121-147 and 223-295.

provisions made by the NYC are only for a dispute that can be resolved through arbitration,³⁴ which in legal terms is called ‘objective arbitrability’ (arbitrability *rationae materiae*).³⁵ Certain jurisdictions, such as the USA, afford wider connotations to the notion of ‘arbitrability’, covering the matter of court jurisdiction as well.³⁶ However, this interpretation is rarely employed in international practice because it can engender ambiguity and confusion. As such, non-arbitrability will be understood according to its basic definition pertaining to disputes that cannot be settled through arbitration.³⁷

The non-arbitrability concept was prompted by the need to ensure that only appropriate legal authorities would address those issues of a high level of sensitivity, related to public policy or the interests of third parties.³⁸ Consequently, arbitrability has become correlated with public policy in the writings of a considerable number of authors.³⁹ On the other hand, there are also authors⁴⁰ who consider non-arbitrability to be a distinct reason for enforcement refusal with absolutely no

³⁴ NYC, art V(2)(a).

³⁵ Julian D M Lew, Loukas A Mistelis and Stefan Michael Kroll, *Comparative International Arbitration* (Kluwer Law International 2003) para 9-35; Piero Bernardini, ‘The Problem of Arbitrability in General’ in Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (CMP Publishing 2009) 503-22; CA Paris, 4 January 1980, *Intercast v Ets Peschaud et Cie International*, cited in Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law 1999) para 533.

³⁶ Gaillard and Savage (n 35) para 532; Lew, Mistelis and Kroll (n 35) para 9-4; Loukas A Mistelis and Stavros L Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 3.

³⁷ Gaillard and Savage (n 35) para 532.

³⁸ Lew, Mistelis and Kroll (n 35) para 9-2; Born (n 23) 768.

³⁹ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, (Cameron May 2000) 360, 368; Gaillard and Savage (n 35) para 1704; Richard Garnett, ‘International Arbitration Law: Progress Towards Harmonisation’ (2002) 3 *Melbourne Journal of International Law* 108; Redfern and Hunter (n 2) 149, 471; Lew, Mistelis and Kroll (n 35) para 26-111; Azemi Atiya, *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law* (University of Kuwait 2012) 417-521; Alsamdan (n 32) 66-160; Domenico Di Pietro, ‘General Remarks on Arbitrability under the New York Convention’ in Mistelis and Brekoulakis (n 36) para 5-38; Pieter Sanders, ‘Consolidated Commentary’ (1981) VI *YBCA* 211, 270; G Gaja, ‘Introduction’ in G Gaja (ed), *International Commercial Arbitration: New York Convention Vol I* (Dobbs Ferry 1978) para IC5.

⁴⁰ Alremeh (n 33) 223-295; Sayed Mahmoud, *Specialty of Judicial Arbitration, Combined Arbitration in accordance with Kuwait Law No 11 of 1995* (Bookshop House Est 1997) 195-213; Sayed Mahmoud, *Arbitration Concept in accordance with Kuwait Procedures Law* (Bookshop House Est 2004) 19-80.

connection to public policy.⁴¹ As noted by Brekoulakis, since public policy has little bearing on arbitrability, it is erroneous to outline the scope of non-arbitrability in relation to public policy.⁴² Moreover, a dispute cannot be automatically classified as non-arbitrable and hence a court matter, if it comprises issues of public policy.⁴³ Since separate clauses regarding arbitrability are included in the NYC and the UNCITRAL Model Law,⁴⁴ arbitrability is not mentioned in the International Law Association Committee's Final Report on public policy as a reason for refusal of award enforcement.⁴⁵

Some have advocated that arbitrability of domestic disputes and arbitrability of international disputes should be clearly differentiated so as to restrict the control that courts have over the scope of dispute arbitrability.⁴⁶ Such a differentiation, from the perspective of Fouchard, Gaillard and Goldman,⁴⁷ would signify that, despite a country's law labelling a dispute as non-arbitrable, an international award pertaining to an identical subject matter could still be recognized in that country.⁴⁸ As stipulated by all regimes applicable in the member states of the GCC,⁴⁹ non-arbitrability should be addressed by the enforcing courts in keeping with the law of those respective states. The NYC holds that the arbitration of a dispute must abide by the law of the enforcing country.⁵⁰ The same provision is made by the Arab League Convention and the Riyadh Convention⁵¹ as well as by the national laws of GCC states, the only exception being the law of

⁴¹ Mistelis and Brekoulakis (n 36) paras 1-19, 1-24, 2-5, 2-39; Antoine Kirry, 'Arbitrability: Current Trends in Europe' (1996) 12 Arb Intl 373, 374-379; Homayoon Arfazadeh, 'Arbitrability under the New York Convention: The *Lex Fori* Revisited' (2001) 17(1) Arb Intl 86; Born (n 23) 770-72.

⁴² Mistelis and Brekoulakis (n 36) para 2-39.

⁴³ Arfazadeh (n 41) 86; Born (n 23) 770-72; Mistelis and Brekoulakis (n 36) paras 1-19 to 1-24, and 2-5 to 2-39; Kirry (n 41) 374-379.

⁴⁴ UNCITRAL, arts 35 and 36.

⁴⁵ ILA Final Report 255.

⁴⁶ 1995 Protocol on the Enforcement of Judgments Letters Rogatory and Judicial Reviews by the Courts of the Member States of the Arab Gulf Cooperation Council.

⁴⁷ Gaillard and Savage (n 35) para 1701.

⁴⁸ *Scherk v Alberto-Culver Co* (US Supreme Court 1974).

⁴⁹ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

⁵⁰ NYC, art V(2)(a).

⁵¹ Arab League Convention, art 3(a); Riyadh Convention, art 37(a).

Saudi Arabia.⁵² As such, it can be confidently asserted that the issue of non-arbitrability must be dealt with according to the law applied in the country in which award enforcement is sought.⁵³

In spite of this, the immutable relevance of the law in deciding non-arbitrability has been called into question by some authors.⁵⁴ Instead, they argue that the focus of the enforcing court should be on establishing whether its exclusive jurisdiction has been infringed upon by the award.⁵⁵ Moreover, the existence of a territorial connection between the dispute and the enforcing country has a direct bearing on that exclusive jurisdiction.⁵⁶ Under these circumstances, the courts of the enforcing country must have had jurisdiction over the dispute established by the arbitral tribunal in order for the law of the enforcing country to be applicable in terms of enforceability. If this is not the case, then the court has no grounds for implementing its own legal regime and declining to enforce the award.⁵⁷

For instance, a dispute regarding an administrative contract signed in Kuwait is determined by an arbitral court. Arbitration cannot be applied to this kind of dispute because the law in Kuwait stipulates the exclusive jurisdiction of the Kuwaiti courts over it.⁵⁸ Therefore, the court would probably refuse award enforcement in Kuwait sought by the successful party by arguing that the

⁵² Bahrain Code of Civil and Commercial Procedure, art 253 and International Law, art 36(1)(b)(5); Kuwait Code of Civil and Commercial Procedure, art 199(1)(c); Qatar Code of Civil and Commercial Procedure, art 381; Oman Code of Civil and Commercial Procedure, art 353; UAE Code of Civil Procedure, art 235(2)(d).

⁵³ *Consmaremma-Consortio v Hermanos Escot Madrid SA* (2001) XXVI YBCA 858 (Spain, Supreme Court 2001) 859; *Audi-NSU Auto Union AG v SA Adelin Petit & Cie* (1980) V YBCA 257 (Belgium, Supreme Court 1979); *Nitron Intl Corp v Golden Panagia Maritime Inc* (2000) XXV YBCA 987 (US District Court SD NY 1999) 989; Arfazadeh (n 41) 74-85; Albert Jan van den Berg, 'Consolidated Commentary' (2003) XXVIII YBCA 630; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention* (Cameron May 2001) 175; Lew, Mistelis and Kroll (n 35) para 26-113; Atiya (n 39) 417-521; Alsamdan (n 32) 66-160; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes, International and English Law and Practice* (OUP 2007) 424; Born (n 23) 517; Gaja (n 39) para IC5 and fn 82.

⁵⁴ Mistelis and Brekoulakis (n 36) para 6-31.

⁵⁵ Arfazadeh (n 41) 86-89; Mistelis and Brekoulakis (n 36) para 6-31.

⁵⁶ Mistelis and Brekoulakis (n 36) para 6-33, 6-34.

⁵⁷ *ibid* para 6-34.

⁵⁸ *Corporacion Mexicana de Mantenimiento Integral, S de RL de CV v PEMEX-Exploracion y Produccion*, Case 1:10-cv-00206-AKH.

award infringed Kuwaiti law, on the grounds of Islamic law.⁵⁹ However, the Kuwaiti court could not invoke non-arbitrability under Kuwaiti law, to refuse enforcement in the case of an award associated with an administrative contract created in another country. This would not be a concern for national law, the purpose of which is to protect the exclusive jurisdiction of national courts over certain types of disputes and not to identify the national arbitration domain. Although reasonable, such an interpretation may have undesirable implications if the concept of non-arbitrability included in the law of the enforcing country is too broad.

Under these circumstances, the researcher suggests that an enforcing court should seek to narrow the concept by determining whether it possesses exclusive jurisdiction over a non-arbitrable dispute, before refusing enforcement without consideration of extraneous factors such as an international component.

However, differentiating between domestic and international dispute arbitrability is warranted.⁶⁰ This would hinder the enforcing court from invoking non-arbitrability as a reason for refusal of award enforcement in the case of an international dispute that is unresolvable under national law. The US Supreme Court has expressed its active support for this approach,⁶¹ emphasizing that the international policy in favour of commercial arbitration must take precedence over the interpretations of arbitrability of national courts.⁶² Drawing attention to the fact of overriding formal contracts and insisting that disputes being settled according to domestic laws is not conducive to business and industry development; it is not reasonable for a country to impose its laws on global trade and markets, and settle disputes on its own terms and in its own courts.⁶³ This perspective closely reflects the scope of the NYC and the objectives of those who drafted

⁵⁹ Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995, Civil and Commercial Articles; and the Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

⁶⁰ Gaillard and Savage (n 35) para 1707; Born (n 23) 774-6; Di Pietro and Platte (n 53) 178.

⁶¹ *Pake Webber Inc v Charles Landay* 903 F Sup 19 US 2 (James R Foley).

⁶² *Parsons & Whittemore Overseas Co v RAKTA* 508 F2d 969 (US Court of Appeals 2nd Cir 1974); *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc* (1986) XI YBCA 555 (US Supreme Court, 2 July 1985) 565; *Sonatrach (Algeria) v Distrigas Corp* (1995) XX YBCA 195 (US District Court 17 March 1987) 801-4.

⁶³ *Bremen v Zapata Offshore Co* 407 US 1; 92 SCt 1907; 32 LED 2d 513 (1972).

it.⁶⁴ It clearly transpires from the above discussion that the law relating to non-arbitrability is primarily concerned with the location where enforcement occurs. However, whether a distinction should be made between the notion of arbitrability defined under national law and under international law remains open to debate.⁶⁵

The researcher argues that the doctrine of arbitrability is a creature of the national courts, not the arbitral tribunal, based on the authority of the country where the foreign arbitral award is sought to be enforced under article V (2). Therefore, the most applicable in terms of challenging the recognition and enforcement of an arbitral award, may be subject to Islamic law of Kuwait. In other words, the enforcing state may decide to refuse an award based on capacity, which may be different from another country. For example, in France, the Paris Court of Appeal at the level of the Court Cassation of Kuwait in the case of *Gatoli v National Iranian Oil Company*,⁶⁶ rejected Gatoli's argument that the agreement was invalid because it lacked the necessary parliamentary authorization. The NYC deals with objectivity of arbitrability which concerns whether the subject matter is capable of arbitration. The agreement is deemed null and void not because of consent but because its objective is centrally to public policy. The question that the researcher imposes in this thesis is, 'Who determines the applicable law to the arbitrability of the agreement, the courts or the arbitral tribunal?' It is known under the doctrine of party autonomy that arbitrators determine the applicable law of the arbitration agreement, a feature of the doctrine of party autonomy and separability. Although courts are empowered under *lex arbitri* and *lex fori*, they should apply and determine the Convention objectively. In this context Kuwaiti courts should apply the arbitrability principle of the NYC with objectivity⁶⁷ when a foreign arbitral award is sought to be enforced and is being challenged under article V (1) a.

⁶⁴ Gaillard and Savage (n 35) para 1707.

⁶⁵ *Oriental Commercial and Shipping Co, Ltd v Rosseel*, N V 609 F Supp 75, 78 (SDNY 1985).

⁶⁶ *Gatoli v National Oil Company* 1993 (2) Rev Arb (Paris, 17 December 1991).

⁶⁷ NYC, art V (2) (objectivity of arbitrability).

6.2.4 What Constitutes a Non-Arbitrable Dispute in Kuwaiti Jurisdiction

The political, social and economic policy of a country and its prevalent perception of arbitration play a central role in the decision of that country to classify a dispute as arbitrable or non-arbitrable.⁶⁸ Since the location of enforcement is considered the exclusive determinant of non-arbitrability, as previously discussed, only the perspectives articulated by GCC laws on non-arbitrability will be explored in the following section. An extensive range of aspects of arbitrability is covered by the related GCC laws. Overall, it is considered that arbitration can be applied to any issue that can form the focus of an agreement among parties.⁶⁹ This encompasses matters with a financial dimension. Hence, arbitration is deemed relevant to disputes of a civil, commercial and economic nature. Arbitrability can thus be treated as the rule,⁷⁰ while non-arbitrable issues are exceptions to the rule. Nonetheless, some aspects must be considered with respect to this interpretation. This study finds that the definition of arbitrability must conform to the rule that issues of public order are non-arbitrable but that the financial matters arising from such issues can be subject to compromise.⁷¹ Matters of a personal nature and crimes fall under this category of non-arbitrable public issues and are usually dealt with by national courts. However, there are exceptions to this rule as well, some cases involving such matters are still amenable to compromise and hence can be settled by arbitration. For instance, a compromise is permitted by Kuwaiti law with regard to a crime that has transgressed any of the stipulations contained in the Free Zone Act.⁷² As far as the second criterion is concerned, there are cases in which national courts are granted exclusive jurisdiction over disputes of a particular nature by the national laws. As a result, those disputes are classified as non-arbitrable. The ability of

⁶⁸ Lew, Mistelis and Kroll (n 35) para 9-35; Born (n 23) 768; Redfern and Hunter (n 2) para 3-13; Mistelis and Brekoulakis (n 36) 10.

⁶⁹ Bahrain Code of Civil and Commercial Procedure, art 233; Kuwait Code of Civil and Commercial Procedure, art 173; Qatar Code of Civil and Commercial Procedure, art 190; Saudi Arabia Arbitration Law, art 2 and Implementation Rules, art 1; Oman Law of Arbitration in Civil and Commercial Disputes, art 11; UAE Code of Civil Procedure, art 203(4).

⁷⁰ Alsamdan (n 32) 66-160; Atiya (n 39) 417-521; Iqbal Alqallaf, *Arbitration in the State of Kuwait Arab Renaissance House* 2006) 150-152.

⁷¹ Bahrain Civil Code, art 498; Kuwait Civil Code, art 554; Qatar Civil Code, art 575.

⁷² Kuwaiti Free Zone Law No 26 of 1995, art 15.

arbitrators to formulate a socially appropriate judgment is called into question by legislators, especially with respect to cases involving a high degree of sensitivity.⁷³ Consequently, legislators make provisions for disputes emerging under particular legislation to be addressed by the courts.

6.2.5 Bankruptcy

Under GCC laws, courts have exclusive jurisdiction to address matters of personal or corporate bankruptcy.⁷⁴ This means that the power to authorize the opening and closing of bankruptcy proceedings, to designate bankruptcy agents to oversee the management of the proceedings, and to administer the assets of the debtor, rests exclusively with the courts. Nevertheless, it has been argued by some authors that the financial dimensions of bankruptcy are open to compromise and hence, arbitration.⁷⁵ From the viewpoint of the researcher, despite the fact that the law makes allowances for a compromise in this kind of matter, one must bear in mind that national courts have exclusive jurisdiction over such a compromise, requiring the court to preside over the dispute between the individual who filed for bankruptcy and his creditors. As a result, the national laws of GCC member states declare disputes pertaining to bankruptcy as non-arbitrable.⁷⁶

⁷³ Moneer Aljenbehi and Mamdouh Aljenbehi, *Recognition & Enforcement of Foreign Arbitral Awards* (Dar Al Feker 2005) 5-90; Ahmad Salam, *Technical Structure of Arbitral Award* (Arabian Renaissance House 2010) 69-96 and 180-198.

⁷⁴ Bahrain Bankruptcy and Composition Law promulgated by Decree No 11 of 1987; Kuwait Commercial Code, arts 555 at 800 and art 17; Saudi Arabia Code of the Settlement Preventing Bankruptcy issued by Royal Decree No M/16 of 4/9/1416 (H); Qatar: Commercial Code, arts 606 at 846; Oman Commercial Code, arts 579 at 788; UAE Federal Commercial Transactions Law No 18 of 1993, arts 645 at 900.

⁷⁵ Abdel Hamid El-Ahdab, *Enforcement of Arbitral Awards in the Arab Countries: Arbitration International* (LCIA 1995) 297.

⁷⁶ El Sayed Almarakebi, *Arbitration in the GCC States and to What Extent it is Affected by State Sovereignty* (Arabian Renaissance House 2001) 103-121; Alrumaih (n 18) 368-393; The state of the Kuwaiti arbitration system by virtue of Law No 11 of 1995, Organizing Ministerial Resolutions and the Civil and Commercial Procedure Code No 38 of 1980, (Publication of the Judicial Arbitration Administration, Kuwait 2013).

6.2.6 Intellectual Property Disputes

Due to the fact that a decision of invalidity has extensive ramifications, the GCC laws stipulate that disputes over intellectual property, such as patents and trademarks, are non-arbitrable and must be dealt with exclusively by courts or governmental committees.⁷⁷ These intellectual property rights are subject to public registration because they mainly arise from the legal protection afforded by the national sovereign power.⁷⁸ As previously highlighted, disputes related to criminal activity are considered non-arbitrable. Hence, it is not possible to apply arbitration to settle disputes regarding the validity of such rights. On the other hand, arbitration can be applied to resolve disputes related to the financial dimensions of rights violation.⁷⁹

6.2.7 Commercial Agency

The national courts of Kuwait are granted by law exclusive jurisdiction over all disputes relating to commercial agency contracts.⁸⁰ In the UAE, disputes associated with trade agencies must be dealt with only by the Committee on Trade Agencies.⁸¹ The most common cause that triggers disputes in this context is inequitable negotiation between parties, as it frequently happens that an agent is forced to agree to the contract terms so as not to lose the business opportunity.⁸² In the case of Saudi Arabia, commercial agency regulations do not classify such disputes as non-arbitrable, yet the commercial agency contract must follow a standard format implemented by the relevant authority and which stipulates that all disputes must be addressed by the committee in charge of commercial dispute resolution.⁸³ Thus, due to the fact that the law grants exclusive

⁷⁷ Bahrain Law No 1 of 2004; Kuwait Commercial Code, art 92, Law No 4 of 1962 amended by Law No 3 of 2001; Qatar Decree Law No 30 of 2006 to issue Patent Law, Law No 7 of 2002; Oman Royal Decree No 82 of 2000; Saudi Arabia Royal Decree No M/27 of 2004; UAE Federal Law No 17 of 2002.

⁷⁸ Lew, Mistelis and Kroll (n 35) para 9-64.

⁷⁹ *ibid.*

⁸⁰ Kuwait Commercial Code, arts 282 and 285.

⁸¹ Art 28 of the Federal Act No 14 of 1988 modifying some provisions of Federal Act No 18 of 1981 of 1981 Organizing Trade Agencies; the decision of the Federal Court of Cassation of the UAE of June 28, 1994.

⁸² Stefan Michael Kroll, 'The "Arbitrability" of Disputes Arising from Commercial Representation' in Mistelis and Brekoulakis (n 36) para 16-9.

⁸³ El-Ahdab (n 75) 574-75.

jurisdiction to the national courts, arbitration cannot be applied to settle such commercial disputes. By contrast, the Commercial Agency Law enforced in Oman, Bahrain and Qatar is not as strict and clearly specifies that the parties involved in a commercial agency dispute can rely on arbitration to settle the matter.⁸⁴ However, in Oman, these types of disputes must be brought before the dispute resolution authority,⁸⁵ whereas in Bahrain and Qatar they must be brought before a competent court.

6.2.8 Administrative Contracts

No other GCC country apart from Kuwait has provisions regarding the arbitrability of disputes arising from administrative contracts. This leads to the inference that, in general, arbitration can be applied in the settlement of such disputes. What makes Kuwait an exception is the fact that a specialized administrative court has been created there and has been granted sole jurisdiction over any dispute related to administrative contracts.⁸⁶ Furthermore, the non-arbitrability of disputes pertaining to administrative contracts is also highlighted by the Kuwaiti courts, maintaining that only a competent court has the authority to deal with such disputes.⁸⁷ However, this begs the question, what is the exact meaning of the term administrative contracts?

According to the courts in Kuwait, administrative contracts must be associated with public services for the administration to be deemed an involved party. Furthermore, the administration is considered a party to administrative contracts, if it demonstrates its intent to apply the

⁸⁴ Bahrain: art 30 of the Decree No 10 of 1992; Oman: art 18 of the Commercial Agency Law; Qatar: Law No 8 of 2002 on Organization of Business of Commercial Agents, art 23.

⁸⁵ Art 18 of the Commercial Agency Law (Royal Decree No 26/77 as amended by Royal Decree 37/96).

⁸⁶ Kuwait Constitution, art 169 and Law No 20 of 1980, art 2.

⁸⁷ Abdulaziz Khalifa, *Arbitration in the Internal & International Administrative Contract Disputes: Analytical Study within the Light of the Latest Orders Passed by State Council* (Maraif Est 2006) 144-164; Mohammad Abdulnaeem, *Limits of Judicial Control on Internal Arbitration of Administrative Contract Disputes: Comparative Study* (Arabian Renaissance House, Cairo 2002) 14-54 and 255-304; Judicial Arbitration Administration, *Publication of the Judicial Arbitration Administration* (Judicial Arbitration Administration 2013) 3-7; Abdulaziz Khalifa, *Arbitration on Internal and International Administrative Contract Disputes* (Arab Renaissance House 2007) 144-153; Khaled Alenazi, *Arbitration in the Administrative Contracts in Kuwait: Comparative Study* (Arabian Renaissance House 2007) 138-148; Kuwait Cassation Court Decision No 155/96 dated 7 April 1997; Cassation Court Decision No 51/1997 dated 15 March 1998; Cassation Court decision No 444/98, date 14/3/1999.

authority granted by public law in its decision making and if the contracts contain extraordinary conditions.⁸⁸ This rule, however, has allowed some exceptions. One such exception is administrative contracts classified as build-operate-transfer (BOT) or build-own-operate-transfer (BOOT).⁸⁹ The other exception is when a foreign party represents one side of an administrative contract.⁹⁰ Thus, a dispute of one of these types can be settled through arbitration, according to a specific provision for the management of such administrative contracts.⁹¹

6.2.9 Antitrust and Competition Claims

Legal provisions regarding competition are not stipulated in any GCC countries with the exception of Saudi Arabia and Kuwait, suggesting that arbitration is considered to be an acceptable method for the settlement of disputes relating to competition.⁹² In Saudi Arabia however, matters pertaining to the protection and promotion of equitable competition as well as to the prevention of monopolies are under the sole jurisdiction of the national courts and governmental agencies, as granted by the competition law.⁹³ This concerns a range of practices, including ratification or opposition of cases of merger, acquisition, or association of multiple management bodies to create a single joint management with the purpose of strengthening market position. Investigation undertakings, opening criminal case proceedings against law

⁸⁸ Khalifa, *Arbitration in the Internal & International Administrative Contract Disputes: Analytical Study within the Light of the Latest Orders Passed by State Council* (n 87); Judicial arbitration administration, Publication of the judicial arbitration administration, Kuwait 2013,3-7; Khalifa, *Arbitration on Internal and International Administrative Contract Disputes* (n 87) 144-153; Alenazi (n 87); Kuwait Cassation Court Decision No 43/97 dated 8 December 1997.

⁸⁹ Hamada Hamada, *Arbitration on B.O.T. Contracts* (Arab Renaissance House 2013) 201-204; Siraj Abu Zaid, *Arbitration on Petroleum Contracts* (Arab Renaissance House 2010) 235-281; Law No 7 of 2008 Governing the Building Operation and Transfer, art 15.

⁹⁰ Alenazi (n 87); Law No 8 of 2001 Regulating Foreign Capital Direct Investment Law in State of Kuwait, art 16.

⁹¹ Hamada (n 89) 201-204; Law No 7 of 2008 Governing the Building Operation and Transfer, art 15.

⁹² Almarakebi (n 76) 103-121; Alrumaih (n 18) 368-393.

⁹³ Competition Law, arts 9, 11, 15, 16, and 17 and Executing Regulation of Competition Law, arts 17, 19, 20, 21, and 22.

transgressors, disposal of assets, shares, or property rights and conducting any activity that eliminates the consequences of the infringement.⁹⁴

The public authorities possess exclusive jurisdiction over the types of disputes mentioned above, due to the fact that they are related to unlawful practices liable to criminal penalties and therefore cannot form the focus of a compromise between parties. As such, it is not possible to apply arbitration in the resolution of such disputes. Nevertheless, arbitration appears to be allowed in cases of claims arising from violations, as inferred from the phrasing of the provision, which specifies that any natural or corporate individual that has suffered damage due to illegal practices may request compensation before a competent court.⁹⁵ In reference to the court jurisdiction, the use of the word ‘may’ denotes that the rule is not obligatory and therefore the court does not have sole jurisdiction. Another aspect that lends legitimacy to this view is that these types of claims can form the focus of compromise. Despite the fact that the scope of the Kuwaiti Competition Law is identical, its interpretation of the arbitrability of such disputes is different; it also contains an explicit provision which stipulates that any dispute related to the implementation of the Law provisions may be settled through arbitration.⁹⁶ In this respect, Kuwaiti law differs from the common practice in many other countries.

6.3 Public Policy

Public policy is a popular ground used by parties to international arbitration to resist enforcement of arbitral awards; it is highly complex and controversial because of the diverse approach by national courts in relation to the concept of public policy in international arbitration.⁹⁷ In the context of the enforcement of foreign arbitral awards in Kuwait, there is no legal definition of public policy within the Kuwaiti Constitution or the CCP,⁹⁸ rules, procedures, or any cases where

⁹⁴ Competition Law, arts 4, 5, 6 and 7 and Executing Regulation of the Competition Law, arts 4, 5, 6 and 7.

⁹⁵ Competition Law, art 18.

⁹⁶ Law No 15 of 2007 regarding the Protection of Competition, art 24.

⁹⁷ *Richardson v Mellish* (1824) 2 Bing. 229, 252.

⁹⁸ Kuwait, The Code of Civil Procedure.

the courts have given a purposive interpretation to remedy this problem.⁹⁹ It is, however, pertinent to note that since Kuwait was a former British colony, the researcher suggests that the definition of public policy can be viewed from the English perspective¹⁰⁰ or according to decided cases in England. For example, in 1853 the House of Lords gave a definition of public policy as a legal principle that forbade by law, anyone from indulging in acts that could prove harmful to the public or the public interest.¹⁰¹

In addition, the House of Lords found that the element of illegality had to be established,¹⁰² that the enforcement of the award would damage the public interest, or that enforcement would be repugnant to people fully informed about the exercise of power in the country.¹⁰³ The most common definition of public policy¹⁰⁴ is that which relates to the culture or way of life of a people.¹⁰⁵ Public policy is one reason for a domestic court to refuse the enforcement of a foreign arbitral award.¹⁰⁶ However, as Maurer points out, ‘public policy is not identical with domestic law’.¹⁰⁷ Therefore, public policy entails all that the nation upholds for the wellbeing of its citizens.¹⁰⁸

At the drafting stage of the Convention, the Ad Hoc Committee and the UN Conference on International Commercial Arbitration refused to accept the proposal of India and Israel that

⁹⁹ Ashraf Alrefaei, *Public Policy & Applicable Law on Arbitration Procedures in the Relations Having Foreign Element* (Academic Thinking House 2003) 23-63; Ashraf Al-Refaei, *Applicable Law on Arbitration and Public Policy Concerning International Relations: Comparative Jurist Judicial Study* (Arab Renaissance House 2003) 7-51; Ahmad Abdultawab, *Arbitration Agreement and Related Pleas, Comparative Study of the GCC Laws* (Arabian Renaissance House 2008) 137-227; Almarakebi (n 76) 188-197.

¹⁰⁰ Tweeddale and Tweeddale (n 53) 425-27.

¹⁰¹ *Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v Ras Al Khaimah National Oil Company* [1987] 2 Lloyd’s Rep 246.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *Parsons & Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier RAKTA and Bank of America* (1974) 508 F 2d 969 (2nd Cir).

¹⁰⁵ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2008) 218.

¹⁰⁶ Ref’at Wala’a, *The National Commercial Arbitration and International in Saudi Arabia* (Chamber of Industry and Commerce 1999) 213.

¹⁰⁷ Anton G Maurer, *The Public Policy Exception under the New York Convention History, Interpretation and Application* (Juris 2012) 58.

¹⁰⁸ Abu Zeid Radwan, *The General Principles of International Commercial Arbitration* (Dar University 1981) 95.

recognition and enforcement should be denied when it violates domestic policy.¹⁰⁹ This demand is a central policy discussion here because it is one of the main grounds usually argued as to why an award should not be enforced in a given jurisdiction.¹¹⁰ Given the heavy reliance placed on ethical and public policy issues and especially in Islamic states like Kuwait, it is not surprising that these could limit enforcement and may be used as a means to refuse recognition.¹¹¹ It indicates that there is likely to be some conflict between the need to support international trade and the general ethical principles associated with Islamic law.¹¹² Thus, the policy is also based on the concept of the judicial principle of wisdom.¹¹³ However, this policy will trouble only one part of the community, which means that states need to reflect on the community in applying policy issues if Kuwait believes that these actions may impact on its own public morals.¹¹⁴

Policy is on two distinct levels: local and international. Domestic policy is sometimes seen as the basic concepts of morality and justice established by the national government to use local conflicts strictly for its mandate.¹¹⁵ Kuwaiti domestic policy may be viewed in a global context. Two or more internal policies will probably not be reflected in international public policy;¹¹⁶ in other words, international policy is usually a largely liberal policy. International policy is the application of the general policy of domestic law in a global context but tends to consider several factors, with the exception of public interest at the international level.¹¹⁷ Each country has its own level of restriction and sometimes may feel the need to control and restrict arbitration

¹⁰⁹ Maurer (n 107).

¹¹⁰ Georgios Petrochilos, *Procedural Law in International Arbitration* (OUP 2004)300-301.

¹¹¹ Wala'a (n 106) 220.

¹¹² Ahlam Al Tamimi, *Enforcing Foreign Judgments and Arbitral Awards in Kuwait* (Al Tamimi & Co, Kuwait Office 2010) 14.

¹¹³ *ibid.*

¹¹⁴ Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' *Comparative Arbitration Practice and Public Policy Arbitration*, ICCA International Arbitration Congress (1987) 261; Abu Zeid (n 108) 9-69.

¹¹⁵ Keith Michael Curtin, 'Redefining Public Policy in International Arbitration o/Mandatory National Laws' (1997) 64 *Def Couns J* 271, 275, 281; Abu Zeid (n 108) 19.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

methods, thus interfering with the importance of international trade;¹¹⁸ state policies change from time to time.

Article V (2) (b) of the NYC provides that a state party may refuse to recognize or enforce an award if ‘it is inconsistent with public policy’. However, article V (2) (b) does not explicitly mention any specific form of public policy.¹¹⁹ It is widely accepted that the NYC challenges the foundations of international public policy. Public policy within the context of international arbitration is usually thought of in terms of the NYC where it requires recognition and enforcement in foreign countries.¹²⁰ Public policy, by its very nature, undergoes dynamic evolution in meeting the vital needs of the community, in conjunction with the political, cultural, moral and economic dimensions, as public policy adapts to the community or issues related to changes in Kuwait.¹²¹ Therefore, the researcher argues that although the NYC is an international document, it has not set clear procedures to be followed by domestic courts in regard to the issue of public policy. On such grounds a state may refuse to enforce an award based on a public policy defence;¹²² this is mostly not defined but is a discretionary approach.¹²³

This controversy is evidenced by the case of *Hilmarton and Chromalloy*¹²⁴ where arbitral awards were set aside by the courts on grounds of public policy. It should be emphasized that the burden is upon the resisting party to prove that there is no public policy to refuse enforcement. Given the power of the state and its ambiguity in the application of public policy, the users of arbitration as a dispute mechanism, under party autonomy, are left victims and this hampers the process of arbitration and at times makes arbitration meaningless if the awards cannot be enforced as per the agreement. Article V(1)(e)¹²⁵ should be interpreted purposively on the wording of the

¹¹⁸ *Soleimany v Soleimany* [1998] 3WLR 811 (CA).

¹¹⁹ James D Fry, ‘Désordre Public International under the NYC: Wither Truly International Public Policy’ [2009] Chinese Journal of International Law 81.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *Seller v Germany Buyer* (1980) V Ybk Comm Arbn 260.

¹²³ Cour de Justice of Geneva 11, 1997 (1998) XXIII Yearbook Commercial Arbitration 764.

¹²⁴ *Baker Marine (Nig) Ltd v Chevrn (Nig) Ltd* 191 F3d 194 (2nd Cir 1999); NYC, art V(1)(e).

¹²⁵ NYC, art V (2).

Convention by domestic courts since parties who approved the NYC on 10 June 1958 agreed upon a narrow interpretation of the public policy exception.¹²⁶ It should be noted that the main purpose of the NYC is to see that arbitral awards are enforced and to protect against political intervention by the doctrine of public policy. In the leading US case of *Scherk v Alberto-Culver*,¹²⁷ the court explained that ‘the overriding purpose of the convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements are arbitrated, observed and enforced in the signatory states’.¹²⁸

Furthermore, the arbitration scholar Jan van den Berg argues that the public policy defence rarely causes enforcement to be refused.¹²⁹ He believes that one reason for this is the distinction drawn between domestic and international public policy on the grounds that what constitutes ‘public’ in domestic policy is not public from an international perspective.¹³⁰

The researcher, however, does not agree with van den Berg. In the opinion of the researcher, Kuwait needs to revisit the main purpose of the NYC¹³¹ and interpret the doctrine of public policy in a purposive manner in order to render foreign arbitral awards enforceable and recognizable. All GCC regimes concerned with the implementation of foreign arbitral awards acknowledge that enforcement can be denied if an award contravenes public policy.

What Van den Berg does not consider when analysing the public policy is the monarchical structure of Kuwait, which defines public policy in a conservative manner that impedes foreign investment. In addition, Van den Berg does not take into account the Sharia or Islamic law,¹³² which is completely different from other jurisdictions, to which courts are attached. There are

¹²⁶ Maurer (n 107) 56.

¹²⁷ *Scherk v Alberto-Culver Co* (US Supreme Court 1974) 417, 520 fn 15.

¹²⁸ *ibid.*

¹²⁹ Maurer (n 107) 331.

¹³⁰ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (The Hague 1981) 25.

¹³¹ NYC, art V(2)(b).

¹³² Civil of Code and Commercial Procedure of Kuwait on rules governing *Riba* or interest. The NYC allows interest in compensation of damages, while under Islamic jurisprudence of Islamic law it is prohibited.

scholars in circular states who discuss public policy with an open view, while in Kuwait the only scholars are those from the schools of thought or theology.¹³³ It should also be noted that Kuwait is rigid in its application of the scholarly view when applying public policy since among the four scholars under *fiqh*, only Malik is considered.¹³⁴ Indeed this creates a problem when applying the NYC subjecting non-Muslims to Islamic law. To match the demands of international commerce there is a need to reconcile Islamic law of Kuwait with the NYC, since the Convention is open to interpretation as it does not provide solutions or interpretations in areas of complexity of Islamic Law in Kuwait where Islamic law is supreme.¹³⁵

It should, however, be noted that Islamic law and Sharia scholars agree on the principle of party autonomy, with regard to arbitration agreements.¹³⁶ According to El-Ahdab,¹³⁷ a prominent authority on Islamic law, there are too many contraventions and subtle lines between the different schools of theology. However, Saleh and Wakim¹³⁸ argue that public policy is limited to *riba* (interest) only. Such divergency of opinion creates tension when a foreign party seeks recognition and enforcement of an arbitral award in Kuwait.

Further, the researcher argues that courts should limit non-enforcement of the award on the ground of public policy. This concept of compliance with contractual provisions not to set aside an award was emphasized by the Court of Appeal in Abu Dhabi, in the case of *AA Commercial Company v S Motors Ltd Co and D Industries Co*.¹³⁹ A Muslim judge ruled that if the award is final and binding, is deemed to be central to the Muslim good morals or contains any flagrant breach of justice.¹⁴⁰ In Kuwait, there is too much credence afforded to Islamic law,¹⁴¹ while

¹³³ Sayed Mahmoud, *Arbitration System: Comparative Study between Islamic Law & Kuwait & Egyptian Legislative Law* (Bookshop House Est 2004) 69-217.

¹³⁴ *ibid.*

¹³⁵ Constitution of Kuwait 1963, which provides that Islamic law is supreme.

¹³⁶ Mahmoud Alsaratawi, *Arbitration in the Islamic Law* (University of Kuwait 2007) 9-64.

¹³⁷ Abdul Hamid El-Ahadad and Jala El-Ahadab, *Arbitration with Arab Countries* (3rd edn, Wolters Kluwer 2011).

¹³⁸ Arthur Gemmel, 'Commercial Arbitration in Middle East' (2006) 5 Santa Clara J of Intl 169; Faisal Kutty, 'The Sharia Factor in International Commercial Arbitration' (2006) 28 Loyds LA Intl and Comp LR 565.

¹³⁹ *AA Commercial Co v S Motors Ltd Co and D Industries Ltd Company*, No 1007/1981 unpublished (UAE, The Abu Dhabi Court Appeal 1981).

¹⁴⁰ Alsaratawi (n 136) 9-64.

Western practice considers public policy in enforcement as the last-resort exception to the rule.¹⁴²

As stipulated by the NYC, refusal of recognition or enforcement of an award is justified if the recognition or enforcement is found by the competent authority in the enforcing country to transgress the public policy adopted in that country.¹⁴³ Similarly, the Arab League Convention states that if the judgment of the arbitrators contains aspects that are not consistent with general order or public morals in the country where enforcement is sought, award enforcement may be denied.¹⁴⁴ The Riyadh Convention also specifies that if the award goes against Islamic law, the public policy or the moral ethics of the enforcing country, it will not be enforced.¹⁴⁵ The provision that enforcement depends on the award conforming to public policy and norms of moral conduct is included in the national laws of Kuwait.¹⁴⁶ Furthermore, the provisions of the NYC have been incorporated into the Bahrain International Commercial Arbitration Law.¹⁴⁷ Although no related clauses are included in Saudi Arabian law, a circular was published by the Grievances Board which stated that award enforcement must abide by public policy and emphasizing that, based on the power granted by the Arab League Convention.¹⁴⁸ The court can exercise its discretion to deny the execution of a foreign arbitral award if it does not comply with the public policy or moral principles of the country where enforcement is sought. Consequently, given that both the legal system and the governance system in Saudi Arabia are under the

¹⁴¹ *ibid.*

¹⁴² Born (n 27); Redfern and Hunter (n 2); van den Berg (n 130).

¹⁴³ NYC, art V(2)(b).

¹⁴⁴ Arab League Convention, art 3(e).

¹⁴⁵ Riyadh Convention, art 37(e).

¹⁴⁶ Bahrain Code of Civil and Commercial Procedure, art 252(4) of the; Kuwait Code of Civil and Commercial Procedure, art 199(1)(d); Qatar Code of Civil and Commercial Procedure, art 380(4); Oman Code of Civil and Commercial Procedure, art 352(d); UAE Code of Civil Procedure, art 234(2)(f).

¹⁴⁷ Bahraini International Law, art 36(1)(b)(2).

¹⁴⁸ Arab League Convention 1952.

supreme authority of Islamic law, a foreign arbitral award that breaches the main precepts of Islamic law will not be executed.¹⁴⁹

It must be mentioned that the terms used by the above regimes, such as public policy, public order, good morals, and Islamic law, may be different. It is submitted here that their meaning is identical because they are all concerned with safeguarding the same values that are considered to be crucial in GCC countries. Taking into account the pertinent doctrines and legal practice, a series of aspects regarding public policy are discussed in the following section. These aspects are: the definition of public policy, the law regulating public policy, the guidelines as to what constitutes public policy infringement, and the exceptions to public policy.

It is near impossible to define the notion of public policy precisely and comprehensively.¹⁵⁰ This difficulty is particularly poignant in relation to the execution of foreign arbitral awards¹⁵¹ and is also complicated by the fact that public policy is not defined by any international convention and no guidelines are supplied with regard to its use as a reason for denying enforcement. The absence of a general definition of the concept is due to the fact that all spheres of the law are influenced by public policy differently,¹⁵² while its content also varies geographically and temporally.¹⁵³

Furthermore, the provisions made by the national laws of different countries on the matter of public policy, exhibit significant discrepancies as a result of contrasting views and opinions

¹⁴⁹ Atiya (n 39) 417-521; Alsamdan (n 32) 66-160; The Circular of the Grievance Board regarding Enforcement of Foreign Judgments and Arbitral Awards, No 7 dated 15/8/1405 H (1985), arts 3 and 5.

¹⁵⁰ Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (CMP Publishing 2009) 788; Lew, Mistelis and Kroll (n 35) para 26-115; Bernard Hanotiau and Olivier Caprasse, 'Public Policy in International Commercial Arbitration' in Emmanuel Gaillard and Domenico Di Pietro (n 150) 787.

¹⁵¹ *Deutsch Schachtbau-und Tiefbohrgesellschaft MBH v Ras Al Hkaimah National Oil Co* [1987] 2 Lloyd's Rep 246 (UK Court of Appeal) 254; *Renusagar Power Co Ltd v General Electric Co* (1995) XX YBCA 681 (India, Supreme Court 1993) 696.

¹⁵² Lalive (n 114) 309; Di Pietro and Platte (n 53) 179; Buchanan (n 16) 513.

¹⁵³ Alan Redfern, 'Commercial Arbitration and Transnational Public Policy' (ICCA Congress Series No 18 Montreal 2006) 2; Audley Sheppard, 'Public Policy and the Enforcement Arbitral Awards: Should There be a Global Standard?' (2004) 1(1) Transnational Dispute Management para I; Lew, Mistelis and Kroll (n 35) para 26-117.

about the principles which are deemed to be important for the legal system or social order.¹⁵⁴ For instance, whereas awards related to gambling can be enforced in many countries, they are denied enforcement in the GCC states where the laws stipulate that they are against public policy.¹⁵⁵ Moreover, the GCC member states even have different interpretations of the notion of public policy. By way of example, although contravening public policy in Saudi Arabia, an award associated with interest would be considered enforceable according to the Commercial Codes of the other countries in the GCC. In a prominent report on the obstacles posed by public policy to foreign arbitral award enforcement, the International Commercial Arbitration Committee of the International Law Association provided a classification of the different types of international public policy and exemplified these types, although it failed to provide a clear definition of public policy.¹⁵⁶ It can thus be inferred that it is much less difficult to demonstrate the concept of public policy than to define it and it may even be preferable that no conclusive definition exists. There is a need for Kuwait to apply the Egyptian approach to enforcement of foreign arbitral awards; for example, in the Cairo Court of Appeal in *Organisme des Antiquities v G Silver Night Company*,¹⁵⁷ concerning arbitration in commercial matters. The Court of Appeal held that public policy should not be a ground to reject an arbitration clause contained in their contracts by invoking legislative restrictions, even if they are genuine. It should be observed that the notion of public policy is daunting depending on the norms and practice of its courts. For example, in *Societe de Grans Travaux de Marseille v EPIDC*,¹⁵⁸ Bangladesh aimed to avoid its contractual obligation as a state party by dissolving the state entity that is subject to the arbitration and by abolishing the subject matter of arbitration. The Swiss arbitral tribunal held that the dissolution of the entity was a breach of Bangladesh's obligation under international law and the abolition of

¹⁵⁴ *Northrop Corp v Triad Intern. Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987).

¹⁵⁵ The Kuwaiti Civil Code contains a general principle.

¹⁵⁶ ILC Committee on International Commercial Arbitration, *Public Policy as a Bar to the Enforcement of International Arbitral Awards* (London Conference Report 2000).

¹⁵⁷ Egyptian Law No 27/1994.

¹⁵⁸ *Societe des Grandes Travaux de Marseille v Republique Populaire des Bangladesh* (1980) 5 ICCA Yearbook of Commercial Arb 129 (Award) 217, decision of Swiss Tribunal Federal, 14 May 1976.

the subject matter violated Swiss public policy.¹⁵⁹ The issue was further considered in Dubai where the Court of Cassation¹⁶⁰ set aside an order of the Court of First Instance and Court of Appeal because the court had misconstrued the limited scope of public policy under article 3 of UAE Civil Transactions Code. The main grounds of the Court of Cassation's ruling were: (a) the Balti Court had failed to take into account the definition of public policy under article 3 of the UAE Civil Transactions Code; and (b) the Balti Court had set a dangerous precedent for both domestic and foreign arbitral awards to be refused or set aside, on an overly broad standard of public policy that allows for application whenever rules relate to the circulation of wealth or private ownership. In other words, based on the facts of this case there was need for the Balti Court to refuse enforcement of a foreign arbitral award in the UAE. Dubai recently has broadened the interpretation of public policy under the Court of Cassation¹⁶¹ to render foreign arbitral awards enforceable.

Islamic law does not define public policy exactly either but acts as a point of reference. For instance, in Saudi Arabia, public policy is outlined according to the Islamic law,¹⁶² while in the UAE, public policy incorporates Islamic law. Civil law is the foundation of the legal system in the UAE; following the stipulation of provisions with regard to the proper law in the event of conflict of laws, the Civil Code highlights the unlawfulness of enforcing the concepts of law described by those provisions if they contravene Islamic law, public policy or moral ethics.¹⁶³ On the other hand, El-Ahdab noted that, in Islamic law, the Islamic law and its sources constitute the basis of public policy, which also relies on the principles that people have to honour their agreements unless they prohibit what is allowed and allow what is prohibited.¹⁶⁴ Even so, there is

¹⁵⁹ *ibid.*

¹⁶⁰ *Baiti Real Estate Development v Dynasty Zarooni Inc Dubai Court of Casstion*, Appeal No 14/2012.

¹⁶¹ Dubai Court Casstion Case No 180/2011 (12 February 2012).

¹⁶² Hassan Mahassani, 'Moslem Law is a Main Part of Saudi Public Policy' (Conference in Jeddah, 20 January 1977) cited in El-Ahdab (n 75) 608.

¹⁶³ Civil Transaction Code, art 27.

¹⁶⁴ Abdul Hamid El-Ahdab and Jalal El-Ahdab, 'General Introduction on Arbitration in Arab Countries' in Sanders, P and van den Berg, AJ (ed) *International Handbook on Commercial Arbitration* (Kluwer 1998) suppl 27, annex 1, p 12; M I M Aboul-Enein, 'Liberal Trends in Islamic Law (Shari'a) on Peaceful Settlement of Disputes' (2000) 2 *Journal of Arab Arbitration* 1-6.

both a theoretical and practical agreement that public policy¹⁶⁵ embodies the essential economic, legal, oral, political, religious and social norms of a country.¹⁶⁶ No definition of public policy is provided by the GCC laws and courts.¹⁶⁷

Nevertheless, a series of aspects of public policy is specified in the Code of Civil Transactions of the UAE,¹⁶⁸ and these aspects include personal matters (such as marriage and inheritance), issues regarding decision management, free trade and distribution of wealth, concepts of individual ownership and other matters related to fundamental social principles.¹⁶⁹ Furthermore, the Cassation Court confines public policy to a few key principles that epitomize the values that are considered to be absolute in a country. In a case in which an international law appeared applicable in a national context, the Kuwaiti Cassation Court ruled that the prohibition of international law would depend on whether its provisions were contrary to Kuwaiti public policy or morals, which represent the essence of the state and reflect essential public interests.¹⁷⁰

6.3.2 The Choice of Law Regarding Public Policy

The protection of the fundamental moral values and social order of the country where enforcement is sought is the main concern of this ground.¹⁷¹ Therefore, every GCC country can invoke public policy as a reason for denying enforcement of foreign arbitral awards considered to contradict the basic precepts underpinning their legal system.¹⁷²

¹⁶⁵ Bahrain Court in *Merril Lynch v Abdul Falil Behbehani* Case No 859/m/ 1985 before the Civil High Court Appeal (Bahrain).

¹⁶⁶ Julian D M Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Ocean Publications, Dobbs Ferry, NY 1978) 532; Born (n 23) 2829; ILC Committee on International Commercial Arbitration (n 156) 15, 14-30; Jean-Louis Delvolvae, Jean Rouche and Gerald H Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (Kluwer Law International 2009)153.

¹⁶⁷ Court Cassation, Case No 123/2009. 25th March 2010.

¹⁶⁸ Abu Dhabi Court Cassation, Petition No814/2011 Judgment of 21 December 2011.

¹⁶⁹ Civil Transaction Code, art 3.

¹⁷⁰ Cassation Court Decision No 221 dated 15 December 1991.

¹⁷¹ van den Berg (n 39) 360.

¹⁷² Almarakebi (n 76) 103-121; Alrumaih (n 18) 9-16.

Unquestionably, the law of the enforcing country should regulate what constitutes transgression of public policy and what does not.¹⁷³ The provisions of the various Conventions and the national laws of the GCC countries clearly emphasize this point.¹⁷⁴ For instance, within the setting of the NYC, the matter of public policy is dealt with by the majority of national courts according to their own laws,¹⁷⁵ regardless of whether the legal system is based on common or civil law.¹⁷⁶

6.3.3 Implementation Standards of the Public Policy Exception

While creating provisions regarding the implementation of the enforcing country's public policy, the related regimes do not specify whether the public policy standards that the courts should apply to foreign arbitral awards, are identical to those applicable to national awards. Notwithstanding the emphasis placed on national public policy, a clear propensity exists for a narrow interpretation of the NYC and other conventions in order to be able to refuse enforcement. Hence, it is essential to differentiate between the standards stipulated by the NYC and the GCC regimes with respect to public policy breach. A differentiation between national and international public policy within the setting of foreign arbitral award enforcement is all the more important as national and international relationships are distinct.¹⁷⁷ This differentiation forms the focus of the following section.

¹⁷³ Redfern and Hunter (n 2) 472; Gaillard and Savage (n 35) para 1710; Di Pietro and Platte (n 53) 180; Robert Merkin, *Arbitration law* (Lloyd's of London Press 2004) para 19.58; ILC Committee on International Commercial Arbitration (n 156) 30; Born (n 23) 2831-33.

¹⁷⁴ NYC, art V(2)(b); Arab League Convention, art 3(e); Riyadh Convention, art 37(e); Bahrain Code of Civil and Commercial Procedure, art 252(4); Kuwait Code of Civil and Commercial Procedure, art 199(1)(d); Qatar Code of Civil and Commercial Procedure, art 380(4); Oman Code of Civil and Commercial Procedure, art 352(d); UAE Code of Civil Procedure, art 234(2)(f).

¹⁷⁵ Qatar Civil and Commercial Procedure Code, art 206; Bahrain Civil and Commercial Procedure Code, art 242; Kuwait Law of Evidence in Civil and Commercial Matters, art 53.

¹⁷⁶ *Renusagar Power Co Ltd v General Electric Co* (India, Supreme Court 1993) 701-2; *Dragon, Inc v Gebr Van Weelde Scheepvaartkantoor BV* 574 F Supp 367, 372 (SDNY 1983); *Construction Company (UK) v Painting Contractors (Germany)* (2006) XXXI YBCA 722 (Germany, Court of Appeal 2004) 726-27.

¹⁷⁷ Van den Berg, 'Consolidated Commentary' (n 53) 655.

6.3.4 The Difference Between National and International Public Policy

Within the context of foreign arbitral award enforcement, national and international public policy are clearly distinguished by numerous courts and authors,¹⁷⁸ as well as by several national statutes,¹⁷⁹ in terms of the standards for public policy breach. How can international public policy be defined? Van den Berg noted that the attributes of public policy in national and international relations are not inevitably the same. For example, the matters classified as public policy in national cases are numerically greater than those in international cases. This is due to the fact that the scope of national and international relations is different.¹⁸⁰ Similarly, it has been observed by Fouchard, Gaillard and Goldman that the denial of a foreign arbitral award recognition or enforcement is not legitimized by every violation of an imperative regulation of an enforcing state.¹⁸¹ The issue of public policy being considered in one country might not be the same in another country, for example; in the case of *North Corporation v Trial Intern Marketing SA*,¹⁸² where it was held that public policy can be a ground to set aside a foreign arbitral award. Many commentators of international arbitration have argued that public policy is a truism of an individual state.¹⁸³

¹⁷⁸ *Firm P (US) v Firm F (Germany)* (Germany, Court of Appeal, 3 April 1975); *Renusagar Power Co Ltd v General Electric Co* (India, Supreme Court 1993) 696-702; *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Investment and Isny* (1996) XXI YBCA 617 (Luxembourg Court of Appeal 1993) 625, 626; Born (n 23) 2837-2838; Fraser P Davidson, *Arbitration* (W Green/Sweet & Maxwell, Edinburgh 1991) 374; Gaillard and Savage (n 35) para 1712; Atiya (n 39) 417-521; Alsamdan (n 32) 66-160; van den Berg 'Consolidated Commentary' (n 53) 665; Di Pietro and Platte (n 53) 181; Redfern and Hunter (n 2) 473; Lew, Mistelis and Kroll (n 35) paras 26-114 and 26-126.

¹⁷⁹ France New Code of Civil Procedure of 1981, art 1502(5); Lebanon New Code of Civil Procedure of 1983, arts 814 and 817(5); Algeria Decree No 83.9 of 1993, art 458 bis 23(h); Tunisia Arbitration Code 1993, arts 78(2)(II) and 81 (II).

¹⁸⁰ Van den Berg 'Consolidated Commentary' (n 53) 655.

¹⁸¹ Khaled Alomirah, *Institutional Arbitration, Comparative Study between International Institutional Arbitration & National Institutional Arbitration* (Arab Renaissance House 2013) 487-578.

¹⁸² Court of Appeal 9th Circuit 1987.

¹⁸³ James Buchnann, 'Public Policy and International Commercial Arbitration' (1988) 26 (3) American Business Law Journal 511, 514.

The award's infringement of fundamental principles considered to have unconditional value in the enforcing country¹⁸⁴ represents the only acceptable justification for denying enforcement.¹⁸⁵ With regard to the recognition of this differentiation in the judicial system, the Luxemburg Court of Appeal cited the NYC by highlighting that the enforcing state's public policy, represents its international public policy rather than its domestic one and refers to everything with an impact on the fundamental precepts of justice administration or fulfilment of contractual responsibilities, in other words, the foundation of moral ethics and political and economic stability.¹⁸⁶ On the other hand, several authors have criticized the lack of a coherent definition of international public policy.¹⁸⁷ According to some, the concept should be perceived as transnational public policy instead of international public policy interpreted from the perspective of national law. As explained by one author, the purpose of transnational public policy is to introduce general principles of international law and relations that are compatible with the interests of the global community, surpassing and occasionally contravening the interests of individual countries.¹⁸⁸

Nevertheless, international public policy must be deemed to be that of a country as article V(2)(b) of the NYC makes reference to the public policy 'of that country' that is to say, the enforcing country. Fouchard, Gaillard and Goldman have supported the view that article V(2)(b) does not refer to the actual international public policy underpinned by the laws of the international community, which is of concern only to international arbitrators,¹⁸⁹ but to international public policy as interpreted by the enforcing country.¹⁹⁰ As regards the concept of

¹⁸⁴ *Alsop Automatic Inc v Tecnoskin* (1997) XXII YBCA 725 (Italy Court of Appeal) 726, *W v F and V* Switzerland Supreme Court 30 Dec 1994, cited in ILA Committee on International Commercial Arbitration, Interim Report on Public Policy as A Bar to Enforcement of International Arbitral Awards.

¹⁸⁵ Gaillard and Savage (n 35) para 1711.

¹⁸⁶ *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Investment and Isny* (1996) YBCA XXI 617 (Luxembourg Court of Appeal 1993) 625.

¹⁸⁷ Born (n 23) 2837; Lalive (n 114) 1; Buchanan (n 16) and fn 15.

¹⁸⁸ Jan Dolinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17 Texas Int LJ 167.

¹⁸⁹ Gaillard and Savage (n 35) para 1712.

¹⁹⁰ Born (n 23) 2837-2838; W Michael Reisman, 'Law, International Public Policy (so-called) and Arbitral Choice in International Commercial Arbitration' (ICCA Congress Series No 18 Montreal 2006) 12-17; Redfern and Hunter (n 2) 1-2; Gaillard and Savage (n 35) paras 1648 and 1712.

transnational public policy, it has been the subject of intense criticism and no court has so far adopted it.¹⁹¹ Although there are provisions in the GCC laws for the implementation of public policy, no mention is made as to its nature whether international or national. Additionally, the researcher is unaware of any case law in the GCC countries where a differentiation was made between national and international public policy in relation to foreign arbitral award enforcement. Moreover, an investigation of the matters considered to contravene public policy in the GCC states falls outside the scope of the present research. Rather, the interpretation of public policy, whether narrow or broad, is the main issue of concern here. The researcher also considers that, in the context of award recognition and enforcement, there would be a significant possibility that the GCC courts would interpret the notion of public policy narrowly. Generally, not every obligatory rule in the GCC is included in the notion. Foreign arbitral awards do not contravene the fundamental social, political, economic or moral values of the state where enforcement is sought. Non-compliance with the GCC obligatory rules, regardless of whether they are procedural or substantive, is not necessarily a breach of public policy. Moreover, refusal of enforcement has to be justified on the basis of specific provisions and not general interpretations of public policy.¹⁹² The findings of an examination of court rulings have indicated that the justification of public policy before the GCC courts is mostly unsuccessful.¹⁹³

In addition, the researcher submits that invoking the public policy exception is only acceptable if the violation of fundamental procedural guarantees in foreign arbitral cases have influenced the award outcome.¹⁹⁴ The dominant concept of Arab jurisprudence supports this view too.¹⁹⁵ According to one author, the national courts of a country should not dismiss the relevant foreign law based on misinterpretation of public policy in private international law as this would not only have a negative impact on private international relations but would also reflect their lack of

¹⁹¹ Born (n 23) 2838.

¹⁹² Abdultawab (n 99) 137-227.

¹⁹³ Almarakebi (n 76) 103-121.

¹⁹⁴ *ibid.*

¹⁹⁵ Alrumaih (n 18) 368-393.

knowledge about foreign law.¹⁹⁶ The cassation courts in Egypt adopt this approach.¹⁹⁷ Despite the fact that national and international public policy are not differentiated in Egyptian law, the courts invoked article 28 of the Civil Law to rule in one case that foreign law could not be dismissed if it did not contravene Egyptian public policy, moral ethics, state constitution, or vital community interests. Furthermore, if the foreign law and the rules of public policy in Egypt are not significantly different, the court cannot argue that the national public policy has been breached due to existing differences, and therefore has to apply the international public policy.¹⁹⁸ Another point worth mentioning is that courts in the GCC countries should place less emphasis on the implementation of national public policy and instead show greater consistency in their interpretation of the provisions of the NYC in favour of award enforcement.¹⁹⁹

The principles of Islamic law govern public policy in Saudi Arabia.²⁰⁰ This warrants a short discussion of how national and international public policy is distinguished by Islamic law.²⁰¹ Neither Islamic law nor Saudi law explicitly refer to the precepts of international public policy. Nonetheless, as testified by judicial precedent in Saudi Arabia, the notion of public policy is narrowly interpreted by Islamic law in relation to foreign arbitral award enforcement.²⁰² The Saudi Arbitration Law clearly highlights this by declaring that it must be ensured that an award

¹⁹⁶ Ibrahim Ahmmad Ibrahim, *Private International Law* (3rd edn, Dar al Nahdah Al Arabiah 2000) 'in Arabic') 333; Moneer Abed Al Majeed, *Arbitration in International Commercial Disputes* (Dar Al Mabo'at al Gam'iah, 1995 'in Arabic') 280; N Fathi, *Supervising Foreign Awards by the National Courts* (Dar Al Nhdah al Arabiah, 1996 'in Arabic') 467.

¹⁹⁷ Mahmoud (n 133) 69-217; Yaqoub Sarkhouh, *Arbitral Awards and their Enforcement in Accordance with the New York Convention, 1958: Comparative Study of Commercial Arbitration* (Arabian Renaissance House 1996) 135-207; Yaqoub Sarkhouh, *General Principles of International Commercial Arbitration: Study of Comparative Law & Kuwaiti Law under the Civil & Commercial Procedures Law and the New Commercial Arbitration Law 1995 in Kuwait* (Arab Renaissance House 1996) 263-275.

¹⁹⁸ Decision No 714/47 k, dated 26 April 1982, Collection of Cassation Decisions vol 32, 422; Decision No 1259/49, dated 13 June 1983, Collection of Cassation Decisions vol 34, 1416; The Court of Cassation decision dated 5 April 1967, Collection of Cassation Decisions (Civil Departments) s 18 (1967) 79.

¹⁹⁹ Born (n 23) 2838.

²⁰⁰ See the Four *Fiqh* Schools of Theology, as source of Sharia I Saudi Arabia.

²⁰¹ Ahmad Fahmi, *International Comparative Study of Commercial Arbitration* (Council of Saudi Chambers 1985) 43-57; Alrumaih (n 18) 9-16; Mahmoud (n 133).

²⁰² *ibid*

does not contravene an Islamic law principle before it can be enforced.²⁰³ This provision makes broad reference to Islamic law, covering all obligatory rules of the law. What is then the correct interpretation of Islamic law? Saudi courts have demonstrated in various settings that certain restrictions on public policy with regard to foreign arbitral award enforcement are acknowledged by Islamic law. For instance, despite the fact that, according to the Saudi Arbitration Law, arbitrators must be Muslim,²⁰⁴ the courts have not always ruled that foreign arbitral awards contravened public policy on grounds that the arbitrators were not Muslim, provided that agreement existed between the disputing parties.²⁰⁵

An additional provision specifies that arbitrators must comply with the principles and rules of Islamic law.²⁰⁶ From this it can be inferred that foreign arbitral awards regulated by non-Islamic law cannot be enforced because they contradict Saudi law.²⁰⁷ However, courts in Saudi Arabia and in other GCC states stipulate that public policy will only be considered to have been breached if the award goes against the fundamental precepts of Islamic law and not simply if it is governed by a foreign law.²⁰⁸ This provision has allowed the enforcement of numerous foreign arbitral awards, irrespective of the fact that the law governing them was distinct from Islamic law.²⁰⁹ On a different note, since they contradict Islamic law, foreign arbitral awards that accord indemnity for loss of profit or opportunity (unacknowledged by the Hanbali Muslim principle applicable in Saudi Arabia) may be denied.²¹⁰ Notwithstanding, foreign arbitral awards offering compensation not only for actual loss but also for future profit losses have been executed by

²⁰³ Saudi Arbitration Law, art 20.

²⁰⁴ The Implementation Rules of the Saudi Arbitration Law, art 3.

²⁰⁵ 4th Review Committee, Decision No 155/T/4 dated 1415 H (1994); 4th Review Committee, Decision No 43/T/4 dated 1416 H (1995); 4th Review Committee, Decision No 187/ T/4 dated 1413 H (1992); 4th Review Committee, Decision No 156/T/4 dated 1413 H (1992); 3rd Review Committee, Decision No 15/T/3 dated 1423 H (2002).

²⁰⁶ The Implementation Rules of the Saudi Arbitration Law, art 39.

²⁰⁷ Kristin T Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1994) 18 *Fordham Intl LJ* 920, 950, 259 fn 259.

²⁰⁸ *ibid.*

²⁰⁹ 4th Review Committee, Decision No 155/T/4 dated 1415 H (1994); 3rd Review Committee, Decision No 15/T/3 dated 1423 H (2002); 4th Review Committee, Decision No 43/T/4 dated 1416 H (1995); 4th Review Committee, Decision No 187/ T/4 dated 1413 H (1992).

²¹⁰ Abdul Hamid El-Ahdab, 'Saudi Arabia Accedes to the New York Convention' 87 (1994) 11 (3) *J Intl Arab* 91; ILA Committee on International Commercial Arbitration (n 156) 235.

Saudi courts.²¹¹ For instance, the ruling of a lower court against foreign arbitral award enforcement on grounds that it granted compensation for future loss of profit and harm to reputation and thus contradicted Islamic law, was abrogated by an appeal court.²¹² Justifying its decision, the appeal court stated that, in order to demonstrate that indemnity for loss of profit would have been an infringement of Islamic law, the lower court should have employed evidence and arguments extended by Islamic scholars or derived from Islamic *Fiqh* to demonstrate that the foreign arbitral award did not conform to Islamic law.

In light of the decision of the appeal court, the case was sent to the lower court for reconsideration.²¹³ Subsequently, other courts also acknowledged the view that indemnity for loss of profit or opportunity did not constitute a violation of Islamic law.²¹⁴ Hence, despite not explicitly differentiating between national and international public policy, courts in the GCC states show a considerable level of caution when applying public policy to foreign arbitral award enforcement²¹⁵ by comparison to domestic awards. This practice accords with the idea that a narrow interpretation of public policy is necessary within the context of foreign arbitral award recognition and enforcement. A range of examples of public policy exception exists despite the fact that the use of this concept is usually unsuccessful in practice.²¹⁶ For obvious considerations, this research cannot review all cases of public policy that may occur in the GCC states. Instead, it focuses on the issues most likely to arise, namely, award illegitimacy, arbitrator bias, interest or *riba*, corruption and obligatory rules.

²¹¹ *ibid.*

²¹² 10th Subsidiary Panel, Decision No 20/D/F10 dated 1416 H (1995); 2nd Review Committee, Decision No 235/T/2 dated 1415 H (1994).

²¹³ 2nd Review Committee, Decision No 235/T/2 dated 1415 H (1994).

²¹⁴ 1st Review Committee, Decision No 30/T/1 dated 1419 H (1998); 2nd Commercial Panel, Decision No 65/D/TJ/2 dated 1420 H (1999); 3rd Review Committee, Decision No 202/T/3 dated 1420 H (1994).

²¹⁵ Mohei Alam Aldin, *Laws, Regulations and Rules of Arbitration & Reconciliation in the GCC States Compared with Arbitration Laws* (Arab Renaissance House 1998) 120-145.

²¹⁶ Hanotiau and Caprasse (n 150) in Gaillard and Di Pietro (n 150)787; Lew, Mistelis and Kroll (n 35) para 26-115.

6.3.5 Lack of Award Justification

In general, the fact that a foreign arbitral award is unjustified is not a sufficient reason to deny recognition or enforcement.²¹⁷ Moreover, not all the GCC states institute the justification requirement. For instance, whereas no justification is required under the arbitration laws of Bahrain and Oman,²¹⁸ the laws of Kuwait,²¹⁹ Qatar,²²⁰ Saudi Arabia,²²¹ and the UAE²²² do require reasons for the award.²²³ However, the main issue that needs to be determined is the ability of a court to deny execution of a foreign arbitral award that is unjustified. This issue has so far not been addressed by the courts in Kuwait, Qatar, Saudi Arabia and the UAE.²²⁴ However, the justification of an award is not attributed great significance as far as enforcement of national awards is concerned. For an arbitral award to be considered valid, only a concise justification is necessary. In other words, a domestic arbitral award would not be considered to be contrary to public policy if it were not based on appropriate reasons but only if it did not present any reasons whatsoever.²²⁵ As concerns foreign arbitral awards, they would not be considered to violate the public policy of the country where enforcement is sought due to lack of justification provided the disputing parties have reached an agreement governed by the relevant procedural law. If this is not the case, the GCC courts may deny enforcement of a foreign arbitral

²¹⁷ Van den Berg, 'Consolidated Commentary' (n 53) 668; *Buyer (PR China) v Seller (Germany)* (2008) XXXIII YBCA 495 (Germany, Court of Appeal 2004) 499; *Inter-Arab Inv Guarantee Corp v Banque Arabe et Internationale d'Investissements SA* (1998) XXIII YBCA 644 (France, Court of Appeal 1997) 652-53; *Tradax Export v Spa Carapelli* (1978) III YBCA 279 (Florence, Court of Appeal 1976) 280-81.

²¹⁸ Bahrain International Commercial Arbitration Law, art 32(2); Oman Law of Arbitration in Civil and Commercial Disputes, art 43(2).

²¹⁹ Kuwait Code of Civil and Commercial Procedure, art 199(1)(d).

²²⁰ Qatar Code of Civil and Commercial Procedure, art 308(4).

²²¹ Saudi Arbitration Law of 1983.

²²² UAE Code of Civil Procedure, art 234(2)(f).

²²³ UAE Code of Civil Procedure, art 212(5); Kuwait Code of Civil and Commercial Procedure, art 183; Qatar Code of Civil and Commercial Procedure, art 202; Saudi Arbitration Law, art 17; Implementation Rules of Arbitration Law, art 41.

²²⁴ *ibid.*

²²⁵ Kuwait Cassation Court Decision No 531 (Commercial) 8 February 2003; Decision No 332 and 338 (Civil) dated 25 March 2002.

award due to lack of justification, lending credence to the contention that the award has infringed the basic precepts of public policy.²²⁶

6.3.6 Arbitrator Bias

Infringement of public policy also occurs when the arbitrators are biased in their decision, thus disobeying the vital attribute of legal proceedings of fairness.²²⁷ This begs the question; does arbitrator bias result in denial of award enforcement in every case? As observed by van den Berg, the NYC²²⁸ differentiates between cases in which the arbitrator acted in a biased way due to specific circumstances, known as ‘imputed bias’ or ‘appearance of bias’ and cases in which the arbitrator has deliberately acted unfairly, known as ‘actual bias’.²²⁹ In general, the result of proceedings must be demonstrated to have been affected by actual bias for courts to deny award enforcement.²³⁰ The issue of arbitrator bias is not addressed by any case law in the GCC but can be established in some other jurisdictions, for instance the United States.²³¹ Furthermore, in accordance with the GCC arbitration laws,²³² this issue can only be introduced before the award is conferred.²³³ More specifically, if a party does not raise this issue during arbitral proceedings, it will not be able to do so in the enforcement proceedings as the court will consider that the party has given up its right to oppose award enforcement.

²²⁶ *Excelsior Film TV srl v UGC-PH* (1999) XXIVa YBCA 643 (France, Supreme Court 1998) 644; *X v X* (1998) XXIII YBCA 754 (Switzerland, Court of First Instance 26 May 1994) 758-62.

²²⁷ Sam Luttrell, bias challenges in international commercial arbitration, the need for a real danger test (Kluwer law international 2009) 14-19; Universal Declaration of Human Rights, art 10.

²²⁸ Van den Berg, ‘Consolidated Commentary’ (n 53) 667.

²²⁹ *Applied Industrial Materials, Corp v Ovalar Makine Ticaret Ve Sanayi, AS*, 492 F.3d 132 (2nd Cir 2007); *Positive Software Solutions, Inc v New Century Mortgage Corp*, 436 F.3d 495, 504 (5th Cir 2006).

²³⁰ Tweeddale and Tweeddale (n 53) 429; van den Berg, ‘Consolidated Commentary’ (n 53) 667; *Tianjin Stationery & Sporting Goods Import and Export Corp v Verisport BV* (1997) XXII YBCA 766 (Netherlands, Court of First Instance 1996) 766-7.

²³¹ *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145 (1968); *Applied Industrial Materials, Corp v Ovalar Makine Ticaret Ve Sanayi, AS*, 492 F.3d 132 (2nd Cir 2007); *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 504 (5th Cir 2006).

²³² Riyadh Convention 1983.

²³³ Qatar Code of Civil and Commercial Procedure, art 194; Kuwait Code of Civil and Commercial Procedure, art 178; Oman Law of Arbitration in Civil and Commercial Arbitration Disputes, arts 18 and 19; UAE Code of Civil Procedure, art 207(4); Kuwait Cassation Court Decision in Domestic Case No 37 dated 3 June 1981 and Decision No 182/86 dated 11 March 1987, No 210/88 dated 15 May 1989.

6.3.7 Interest (*Riba*)

The simple definition of *riba* according to Islamic jurisprudence is the interest charged on any loan in any financial dealings.²³⁴ The Islamic ruling according to the Quran²³⁵ is termed as *haram*, which means it is prohibited and liability could lead to imprisonment.²³⁶ This approach is quite different from capitalist regimes that depend on interest in financial dealings from mortgages and many other loans.²³⁷

At first sight, nothing may appear to be a clearer infringement of public policy in the GCC states than the award of interest (*riba*).²³⁸ In actual fact, however, this research finds that different provisions regulating this matter exist in the GCC laws.²³⁹ Islamic law prohibits the collection and payment of interest, but modern GCC laws permit it nonetheless. The only case in which interest is considered to contravene public policy and hence is completely banned, is when it takes the form of a civil debt.²⁴⁰ In this regard, the Civil Code of Kuwait,²⁴¹ as well as that of Bahrain, Qatar, and the UAE,²⁴² stipulates that an interest agreement will be nullified if it pertains to the use of a sum of money or against deferral in the same settlement. By contrast, the commercial codes of the abovementioned countries acknowledge interest in relation to commercial agreements although they address the issue differently.²⁴³ Whereas in some countries the breach of strict limitations implemented by laws is equivalent to violation of public policy,²⁴⁴ in other countries no regulations specifically related to public policy are incorporated in the laws.²⁴⁵ According to the commercial laws in Kuwait and Bahrain,²⁴⁶ the conditions under which

²³⁴ Alsaratawi (n 136) 9-64; Atiya (n 39) 417-521; Alsamdan (n 32) 66-160.

²³⁵ *ibid.*

²³⁶ *ibid.*

²³⁷ England FSA Rules regarding Interest and Bank of England interest charges.

²³⁸ Kuwait: Code of Civil and Commercial Procedure, art 183.

²³⁹ Almarakebi (n 76) 103-121.

²⁴⁰ Kuwait Cassation Court Decision No 166 (Commercial)/2, dated 2 March 2005.

²⁴¹ Kuwaiti Civil Code, art 305(1).

²⁴² Qatar Civil Code, art 568; Bahrain Civil Code, art 228(1)(a); UAE Civil Transaction Law, art 714.

²⁴³ Aldin (n 215) 120-145.

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ Kuwaiti Civil Code, art 305(1); Bahrain Civil Code, art 228(1)(a).

interest is prohibited are where there is a collection of frozen interest and a total interest greater than the capital fund or the legal rate.²⁴⁷ If no agreement exists, the legal rate in Kuwait²⁴⁸ and the UAE is 7% and 12%, respectively,²⁴⁹ while in Bahrain, the Bahrain Monetary Agency dictates the rate.²⁵⁰ Hence, interest must infringe on the abovementioned standards to be deemed as transgressing public policy.

In summary, in terms of interest (*riba*), this study reveals that an award may be considered a violation of public policy if it is associated with an excessively high interest rate or profit margin, frozen interest or a civil contract. Under these circumstances, a court may decide to execute the main part of the award but deny enforcement of the interest-related part by invoking public policy infringement.²⁵¹ However, the researcher suggests that there are two aspects that may influence the decision of a court to enforce interest based on public policy. The first aspect concerns the application of the obligatory rules of an enforcing state on a foreign arbitral award, while the second aspect relates to whether or not courts in enforcing countries ought to acknowledge a more restricted international public policy compared to the concept of national law. It should be noted that Kuwaiti municipal courts will normally enforce an award entirely. However, there are strict stringent rules in regard to interest.²⁵² According to the highest source of law in Kuwait, which is the Quran, interest is both a civil and criminal offence²⁵³ as it contradicts the rules of the Quran, the governing yardstick in both Kuwaiti commercial and criminal courts. The commercial laws of Qatar and Oman sanction the payment and collection of interest but that is the entire extent of their provisions.²⁵⁴ One other potentially applicable rule

²⁴⁷ Bahrain Commercial Code, arts 76 and 81; Kuwait Commercial Code, arts 102(1), 110 and 115; the UAE, arts 76, 77 and 88 of Federal Law No 18 of 1993 issuing the Commercial Transactions Law.

²⁴⁸ Kuwaiti Commercial Code, arts 102(1) and 110.

²⁴⁹ The UAE Commercial Transactions Code, art 76; Abu Dhabi Federal Court of Cassation No 245/2000 dated 7 May 2000 citing Richard Price and Essam Al Tamimi, *United Arab Emirates Court of Cassation Judgments 1998-2003* (Brill 2004) 179-182.

²⁵⁰ Bahrain Commercial Code, art 76.

²⁵¹ *Buyer (Austria) v Seller (Serbia and Montenegro)* (2005) XXX YBCA 421 (Austria, Supreme Court, 26 January 2005) 435-6.

²⁵² Al-Refaei (n 99) 7-51; Alrefaei (n 99) 23-63.

²⁵³ *ibid.*

²⁵⁴ Qatar Commercial Code, art 77; Oman Commercial Code, art 80.

included in the Commercial Law of Oman is the stipulation that all loans settled by merchants with regard to their commercial affairs are classified as commercial loans.²⁵⁵ The laws of Qatar²⁵⁶ and Oman²⁵⁷ do not specify any additional rules about the contexts in which the matter of interest constitutes a violation of public policy and therefore could be invoked by the courts as a reason to deny award enforcement. An award of interest is the most frequently encountered form of public policy infringement in Saudi Arabia.²⁵⁸ This is due to the strict application of the interest-prohibiting Islamic law by the courts.²⁵⁹ The prohibition of usury is heavily emphasized in the Quran and *Sunna*,²⁶⁰ which represent the two major sources of Islamic law.²⁶¹ The reason why interest is forbidden by Islamic law is the perceived immorality of receiving something without giving anything in return.²⁶² In a circular issued by the Grievance Board,²⁶³ which is the competent court responsible for foreign arbitral award enforcement, it was highlighted that no foreign arbitral award that contravened the fundamental precepts of Islamic law can be enforced. This was supported by judicial precedents where the enforcement of the interest part of foreign arbitral awards had been refused.²⁶⁴ As such, the enforcement of foreign arbitral awards relating to contracts that specify interest or interest payment as compensation for financial loss is denied in Saudi Arabia.²⁶⁵ These rules have been implemented by Saudi courts in different cases in which they have refused the enforcement of the part of a foreign arbitral award, related to interest on grounds of infringement of Islamic law principles while granting enforcement of the other parts of the award.²⁶⁶

²⁵⁵ Qatar Commercial Code, art 78; Oman Commercial Code, art 79.

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

²⁵⁸ Fahmi (n 201) 40-43.

²⁵⁹ *ibid.*

²⁶⁰ *The Quran, Al-Baqrah* [2: 275-276]; Prophet Mohamed (reported by M Al-Bukhari, *Sahih al-Bukhari* (in Arabic) No 2266; Muslim, *Sahih Muslim* No 258.

²⁶¹ *ibid.*

²⁶² Peter D Sloane, 'The Status of Islamic Law in the Modern Commercial World' (1998) 22 *Intl Law* 743, 751.

²⁶³ *ibid.*

²⁶⁴ The Circular of Grievance Board No 7 dated 15/8/1405 H (1997), art 3.

²⁶⁵ Sloane (n 262) 751.

²⁶⁶ 25th Subsidiary Panel, Decision No 11/D/F/25 dated 1417 H (1996) 8.

6.3.8 Corruption

In European countries, arbitral courts are usually responsible for settling issues of bribery and corruption.²⁶⁷ However, enforcement may be denied if the contract is considered to be illegal and hence constitutes a violation of public policy. UNCITRAL published a report in which it was stated that the concept of public policy, as employed in the NYC and other agreements, encompassed both the substantive and procedural aspects of the basic precepts of law and justice. Therefore, *inter alia*, matters of corruption, bribery and fraud are to be prohibited.²⁶⁸ Corruption, fraud, bribery, smuggling and drug-related practices are all deemed to be infringements of public policy in the GCC states.²⁶⁹ In accordance with the provision that a contract is considered null and void if its subject does not conform to public policy or morality, such practices will lead to the abrogation of all the contracts.²⁷⁰ Nevertheless, the enforcing court must first demonstrate that an infraction has been committed before refusing to enforce an award believed to be associated with any of the abovementioned practices.²⁷¹ Likewise, in Saudi Arabia, Islamic law stipulates that the validity of a contract's subject matter depends on its legality.²⁷²

6.3.9 Obligatory Rules and Public Policy

Generally, obligatory rules and public policy are closely integrated in the GCC legal systems.²⁷³ A discussion of obligatory rules falls outside the scope of this research but without doubt this concept is much more comprehensive than public policy. Moreover, not all obligatory rules are underpinned by essential precepts and are significantly valuable to society.²⁷⁴ For instance,

²⁶⁷ *Northrop Corp v Triad* 593 F Supp 928 (1984); Lew, Mistelis and Kroll (n 35) para 9-80.

²⁶⁸ UN Doc A/40/17 para 297.

²⁶⁹ Aldin (n 215) 120-145.

²⁷⁰ Bahrain Civil Code, art 109; Kuwait Civil Code, art 172; Qatar Civil Code, art 151; Oman Code of Civil and Commercial Procedure, art 352(d); UAE Transaction Civil Code, art 205.

²⁷¹ *ibid.*

²⁷² Nicholas Kourides, 'The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and binding Force of Contracts' (1970) 9 Colum J Transnatl L 387, 403-4.

²⁷³ Bahrain Civil Code, art 109; Kuwait Civil Code, art 172; Qatar Civil Code, art 151; Oman Code of Civil and Commercial Procedure, art 352(d); UAE Transaction Civil Code, art 205.

²⁷⁴ Karl-Heinz Bockstiegel, 'Public Policy and Arbitrability' (ICCA Congress Series No 3, New York 1986) 183.

despite being obligatory, some procedural rules are not a component of public policy.²⁷⁵ That is to say, although all rules of public policy are obligatory, not all obligatory rules are integral to public policy.²⁷⁶ This clarification has been emphasized by the Cassation Court of Kuwait in relation to foreign arbitral award enforcement in declaring that, in order to be considered an element of public policy, obligatory rules must be aimed at the accomplishment of social, political, economic, and moral precepts which serve the interests of society.²⁷⁷ The Egyptian Cassation Court maintains a similar interpretation with respect to foreign arbitral award enforcement in accordance with the provisions of the NYC. As stated by the court, a foreign law cannot be refused application solely on grounds that it is in contravention of public policy, regardless of the veracity of this argument. Article 28 of the Egyptian Civil Code specifies that the prohibition of foreign laws is justified only if those laws are incompatible with the social, political, economic or moral principles that underlie the chief interests of society. Hence, violation of an obligatory rule is not alone sufficient to ban foreign laws.²⁷⁸ The enforcing court under the authority of the Cassation Court is responsible for verifying whether foreign laws fulfil the specified requirement. Even if these laws pertaining to a foreign arbitral award are indeed found to breach the obligatory rules of the GCC laws, enforcement of the award cannot be denied on this ground alone.

²⁷⁵ Civil and Commercial Procedure Code of Kuwait, art 80.

²⁷⁶ ILA Report, London Conference (2000) 18.

²⁷⁷ Cassation Court Decision No 221 (Commercial) dated 15 December 1991.

²⁷⁸ Cassation Court Decision No 714 (judicial year 47) dated 26 April 1982, citing Ahmed El-Kosheri, 'Public Policy under Egyptian Law' (ICCA Congress No 3, New York 1986) 325.

6.4 Summary

This chapter has discussed the two major grounds upon which national courts can invoke on their own motion to deny foreign arbitral award enforcement. Non-arbitrability is the first such ground and all regimes in the GCC countries make allowance for it, apart from the national law of Saudi Arabia.²⁷⁹ This chapter analysed the technicalities associated with the narrow interpretation of non-arbitrability as matters that are not subject to arbitration are the most commonly applied. Furthermore, a differentiation between national and international disputes on arbitrability is highlighted and is deemed necessary to restrict the authority that courts have over the scope of dispute arbitrability. However, from this research it appears that Kuwaiti courts have not made such a distinction.

Public policy is the second ground that courts can invoke to deny enforcement of foreign arbitral awards on their own motion. Apart from the national laws of the GCC member states, the provisions of international conventions acknowledged in the GCC also make reference to this ground. On the other hand, no definition of the concept of public policy is provided in any GCC laws or in conventions ratified by the GCC including Kuwait.²⁸⁰ Thus, in the absence of a clear-cut definition, this concept is understood as encompassing the economic, legal, moral, political, religious and social principles that are of fundamental value to a specific country or extra-national society. That explanation also serves as an illustration of the view that it is much less difficult to demonstrate the concept of public policy than to define it and it may even be preferable that no conclusive definition exists. It should be noted that this study does not seek to pinpoint the definitive standard of public policy but it does advocate for a narrow interpretation and application of public policy so that any mischief in interpretation by the municipal courts in Kuwait is remedied in order to enhance arbitration proceedings in Kuwait.

²⁷⁹ Almarakebi (n 76) 103-121.

²⁸⁰ *ibid.*

The national law of the country where the enforcement of a foreign arbitral award is sought dictates what constitutes a transgression of public policy. As regards the cases in which public policy exceptions apply, it has been observed that public policy contributes more to the theoretical aspects of arbitration than the practical aspects.²⁸¹ Notwithstanding, public policy is narrowly interpreted by the majority of national courts as a ground for refusing to enforce foreign arbitral awards.²⁸² Such an interpretation is underpinned by the differentiation between national and international public policy, which is also attributed great significance by several national statutes.²⁸³ This differentiation is an acknowledgement of the fact that public policy may be related to certain matters in domestic relations but not in international relations. Surprisingly, this research finds that such differentiation is not applied by the GCC courts and no definition of public policy as a national or international element is provided in the national laws of Kuwait.

The researcher argues that in theory, where national laws overlook the classification of public policy, it might be assumed that national courts are then somewhat free to interpret and apply the concept of public policy as they see fit. However, perhaps rather surprisingly as well, this research finds that courts in the GCC deal with requests for recognition and enforcement of foreign arbitral awards on the basis of a narrow interpretation of public policy. As reflected in the judgments in a number of cases, it appears that GCC courts understand public policy as being related only to the fundamental principles that express the most important values of a society or country. Hence, the courts would deny award enforcement if it is demonstrated beyond reasonable doubt that the enforcement poses a threat to the social, political, economic or moral principles which reflect and embody the chief interests or concerns of an individual country or community. There are countless reasons that can be put forward to argue that public policy has been violated;²⁸⁴ however, the parties are mostly unsuccessful when they invoke this ground for refusing award enforcement.

²⁸¹ Aldin (n 215) 120-145.

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ *ibid.*

Furthermore, this research finds that Kuwaiti courts would tend to apply the notion of public policy narrowly. The most frequently mentioned variables in relation to infringement of public policy are lack of award justification, arbitrator bias, award of interest (*riba*), corruption and obligatory rules.²⁸⁵ Most of those examples are common grounds of public policy in many countries and are not uniquely problematic. One major violation of public policy influenced by Islamic law and principles and due to which courts in the GCC states deny foreign arbitral award enforcement, is interest or *riba*,²⁸⁶ especially if it is associated with civil debt or commercial contracts in which the interest is frozen or in which the total interest is greater than the capital fund or the legal rate. Islamic law forbids interest because of the perceived immorality of receiving something without giving anything in return. However, it should also be noted that even if the imposition of interest in an award is deemed contrary to public policy based on Islamic law, Kuwaiti courts may still declare the rest of the award enforceable. Admittedly though, the different interpretation and application of Islamic law, which in turn may result in a different conception of public policy, can cause difficulties in Islamic courts when deciding issues in regard to enforcement of foreign arbitral awards in Kuwait.

In order for Kuwait to remedy this problem, the researcher argues that there is urgent need for a new arbitration law that will cater for both domestic and international litigants especially as since Kuwait is also a member of the Organisation of Petroleum Exporting Countries (OPEC) made up of Muslim and non-Islamic countries. Since Kuwait ratified the NYC, there has been a clear effort to make arbitration recognition and enforcement international, without hindrances to the scope of application and interpretation of the primary and secondary sources of law in Kuwait. Any refusal to recognize and enforce foreign arbitral awards in Kuwait will render arbitration as a dispute mechanism meaningless since people come to arbitration under party autonomy, separability and competence-competence, to have their disputes resolved by the tribunal with the assistance of the courts to enforce the awards, not to intervene or to set rigorous impediments in enforcement. The irony that may arise is that any law that is not compatible with Islamic law

²⁸⁵ *ibid.*

²⁸⁶ Abdultawab (n 99) 137-227.

may be viewed as an attack on Kuwaiti jurisprudence and is a problem that needs to be addressed, by the Law Commission in Kuwait and the member of the national assembly of Kuwait (Parliament).²⁸⁷

²⁸⁷ Alsamdan (n 32) 66-160.

CHAPTER 7: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE GCC

7.1 Introduction

Arbitration is always chosen by parties to an arbitration agreement, with the expectation that an arbitrator will resolve current or future disputes on the basis of the doctrine of party autonomy, competence-competence, separability and furthermore that a final and binding award, regardless of whether it is domestic or foreign, should be given the power of the court in enforcement. However, it often happens that a losing party may not intend to comply with the final award, in which case support from national courts is required in order to enforce the award like a judgment of the court. In international arbitration, it is very important to know which country is going to enforce the award sought. It is common practice for enforcement to be sought in a country where the losing party has got assets available to meet the final award. However, it is not unlikely for the losing party to have assets in more than one country. The question is how likely are those other countries, like GCC states¹, to recognize and enforce a foreign arbitral award, subject to the application and interpretation of their laws. All GCC member states have ratified the New York Convention (NYC). This chapter will examine how foreign arbitral awards can be enforced within GCC states, with the exception of Kuwait, since Kuwait is a key ally and a signatory to the GCC Convention.

The main countries that will be given focus in this chapter are: The Kingdom of Saudi Arabia, the Kingdom of Bahrain, the state of Qatar, the United Arab Emirates (composed of seven emirates, namely, Abu Dhabi, Dubai, Sharjah, Ajman, Um Al Quwain, Fujairah, and Ras Al Khaimah) and the state of Oman.

¹ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

The question to address in this examination is, ‘To what extent are foreign arbitral awards enforced in the GCC?’ To this end, the chapter will be divided into four sections, as follows: the political structure of the mentioned states; the rules governing recognition and enforcement of foreign arbitral awards in member states; how foreign arbitral awards are recognized and enforced in these member states and a summary.

7.2 The Kingdom of Saudi Arabia

The beginnings of the Kingdom of Saudi Arabia during the 1700s were enmeshed with a new movement initiated by the Islamic scholar Mohammad Ibn Wahhab, whose teachings were embraced and promoted by Prince Mohammad Ben Saud. Ibn Wahhab urged all Saudi Muslims to denounce and eliminate any distortions of faith. This period in the history of Saudi Arabia ended with its invasion and destruction by the Ottoman Empire allied with Egypt. During the subsequent transition period, Riyadh was established as the capital of Saudi Arabia by Turki bin Abdullah Al Saud in 1818, before the state was conquered by Al Rashid. In 1902, King Abdul-Aziz Al Saud captured the current Saudi capital of Riyadh and achieved the unification of the entire Arabian Peninsula, thus founding the Kingdom of Saudi Arabia, which received its official name in 1932. The Saudi system of government has always been monarchy and rule by the successors of King Abdul Aziz Al Saud.² They are rulers for life, as no political elections are held in the country and there are no political parties.

There is no formal constitution of Saudi Arabia apart from a series of elementary constitutional precepts outlined in the 1992 basic law. According to these precepts, the country is governed in keeping with the Islamic law that is grounded in the Holy Quran and the *Sunna* (i.e. the teachings of the Prophet Muhammad). The judicial, executive and regulatory authorities are the three authorities specified in the basic law. Owing to the dominance of the monarchy, Saudi Arabia is not a democratic state and does not implement the rule of law and separation of powers. In addition to the Islamic law, the Saudi legislative system is based on four theological schools. The

² The Royal Decree No 2716 dated 17/05/1351 AH (18/09/1932AD).

juristic theology of Imam Hanbal, which has been influenced by the instructions of the scholar Ibn Taymiyyah, is attributed overarching importance in Saudi Arabia. However, state regulations, customs and practice have had to be adjusted to cope with legal issues emerging in various fields. This is due to the fast-paced development as well as commerce and international trade.³

7.2.1 The Structure of Courts in Saudi Arabia

7.2.1.1 Judiciary

By comparison to the judiciary of Western countries, the Saudi judiciary is not as well-developed, having been established only in 1975. Nevertheless, the autonomy of judges and the universal right to fair treatment and access to courts, have been stipulated in the Saudi constitution.⁴ The Saudi judiciary is not democratic in character, as attested by its structure. There are five full-time Supreme Council members designated by Royal Decree that constitute the Saudi judiciary.⁵ These members are accountable for their state duties solely to the Saudi king and not to the parliament or national assembly. Furthermore, the Minister of Justice can interfere in the activities of the Supreme Judicial Council, according to the Saudi constitution. This means that the Minister's approval is necessary before a decision made by the Supreme Judicial Council is considered irrevocable. In the event that the Minister of Justice does not approve of the decision, then it will be up to the Supreme Court Judicial Council to settle the issue with no recourse to appeal.⁶

³ Sayed Hassan Amin, *Middle East Legal Systems* (Glasgow, UK: Royston, 1985) 313.

⁴ Saad Badah, 'Enforcement of Foreign Arbitral Awards in the GCC' (November 2014) 3 *International Law Research* 24-37; Faizal Al Fadel, *Enforcing Awards in the Kingdom of Saudi Arabia*, (2011) Al Riyadh House, 43; Mohammad Al Pijad, *Arbitration in the Kingdom of Saudi Arabia*, (2010) renting and Publishing Centre of Administration Institute 235.

⁵ The Law of Judiciary Royal Decree No M/64, art 6.

⁶ *ibid* art 20.

There are four courts that make up the Saudi judiciary:

- (a) The Sharia Court: with the exception of those specified by law, every dispute and crime falls under the jurisdiction of this court. The Supreme Judicial Council, the Appellate Courts, the General Courts and the Summary Courts are the four divisions of the Sharia or Islamic law.⁷
- (b) The Board of Grievances (*Diwan Al Mathalem*):⁸ Government entities, private individuals and disputes associated with fraud, corruption and intellectual property fall under the jurisdiction of this court.⁹
- (c) The Committee on Settlement of Commercial Disputes: Both domestic and international cases are arbitrated by this court.
- (d) Quasi-judicial institutions: These institutions are attached to the Chamber of Commerce and Industry, the Committee on Commercial Paper, the Supreme Commission on Labour and Industry Disputes, the Commission on the Impeachment of Ministers as well as independent councils for civil servants, military personnel and government staff.¹⁰

The complexity of court structure is another factor that will impede purposive interpretation when it comes to enforcement of foreign arbitral awards. All laws are subject to the discretion of the King who has the supreme power of the land. Even if the *Shura* Council (highest organ)¹¹ passes laws, as provided by the Law of Consultative Council, the King has the power to veto or decline the new laws. This means that even the Consultative Council,¹² which would be a check and balance, is more theoretical than practical in applying and assisting the development and implementation of the laws, especially those for circular states (for example, NYC, articles III, IV, and V.

⁷ *ibid* of 14 Rajab 1395 (23 July 1975), art 26.

⁸ These courts exist in Riyadh, Dammam, and Jeddah.

⁹ Royal Deree No. (M/51) of 17-71402 Hegira.

¹⁰ *Bilaly, A, Criminal Procedure in Saudi Arabia* (Dar Alnhdah Alarabiyh 1990) 858-917.

¹¹ Consultative Power known in Saudi Arabia as Majilis Al Shura.

¹² The Law of the Consultative Council No/A/91) 27/08 1412 (1992), art 15.

7.2.2.2 The Law Governing Arbitration in Saudi Arabia

The rules of the Commercial Court Act 1931, represented the first provisions that addressed matters related to arbitration, such as agreements, tribunal structure, time frames,¹³ arbitral proceedings, as well as pre-implementation court endorsement of arbitral awards.¹⁴ Arbitration agreements could only be implemented after a notary republic validated them. If they were signed prior to the emergence of a dispute, arbitration clauses were considered invalid and the arbitration agreement would be annulled if the rules of formality were violated. The stipulations of the 1931 Act were superseded by the Commercial Companies Act 1965, which was introduced in response to transformations in commerce for the purpose of commercial dispute arbitration. The school of theology was instrumental in alleviating the tensions that arose as a result of this act. The integration of the legal system with the Sharia Courts was the recommendation put forth by scholars. However, the judiciary and Commercial Courts refuted the suggestion. The Board of Settlement of Commercial Disputes was created due to the retention of the 1931 Act,¹⁵ despite the intense discord. Arbitration continued to be under the authority of the Commercial Court.

Promulgated by Royal Decree via the Chamber of Commerce and Industry Regulation, the Arbitration Act 1980 resolved the tensions fostered by the previous acts. This new act empowered the Chamber of Commerce to oversee arbitration of commercial disputes between merchants. This was the first act free of any ambiguities, not just in Saudi Arabia but in the whole of the GCC. The Regulation was promulgated by the Council of Minister Resolution No 7/2021M and became effective on 28th June, 1985. It was applicable not only to domestic arbitration but also to international arbitration. Both arbitration agreements and arbitration clauses were acknowledged as valid by the act and arbitration went beyond commercial issues. According to article 3 of the Regulation, although the arbitration process could be overseen by

¹³ Royal Decree No22 22 of 15/1/1350 (2 June 1931).

¹⁴ *ibid* arts 493-497.

¹⁵ *ibid*.

Saudi courts, the President of the Council of Ministers had to approve the arbitration for it to be binding on government entities.¹⁶

7.2.1 Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia

7.2.1.1 Foreign Investment Arbitration under Saudi Arabian and Islamic Laws

Sharia and Saudi Arabian laws are both amenable to the resolution of commercial disputes via arbitration process. Investor-state disputes are best resolved by international arbitration. It should be noted that such an alternative dispute mechanism is subject to primary restrictions, for example, capacity and arbitrability. Previously Saudi Arabia did not permit the government or any agency to participate in arbitration proceedings. However, the total ban was uplifted by the 1983 Commercial Regulation. There are still some restrictions in place in relation to oil disputes. The Hanbali School of theology, which is the official school,¹⁷ dictates that the award is just as binding as a court judgment.¹⁸ It should be noted that enforcement is not automatic since the principle of Sharia may be entirely inconsequential. Although article 37 of the Riyadh Convention of 1983 forbids examination of the merits of a dispute, Saudi Arabia judges do not generally comply with article 37.

Saudi Arabia argues that its public policy concerns are different from those of other GCC states. It should be noted that many awards that require enforcement include awards for interest or the sale of musical items or tobacco, each of which are inconsistent with Islamic law. Moreover, article 37 of the Riyadh Convention also provides that an award can be vacated if:

- (a) The law of the arbitration seat cannot govern the arbitration of a dispute.
- (b) The losing party is not suitably informed about the process appointment by the arbitrator.

¹⁶ Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 1990) 553-569.

¹⁷ Abdulrahman Yahya Baamir, *Sharia Law in Commercial and Banking Arbitration, Law and Practice in Saudi Arabia* (Ashgate Publishing 2010) 17.

¹⁸ Anthony Shoult, *Doing Business with Saudi Arabia* (GMB Publishing Ltd 2006).

- (c) The issues encompassed by the award are external to the considerations associated with the arbitration agreement or fall outside the arbitration agreement scope.
- (d) Award acknowledgement would transgress Islamic law precepts or public interest.

In analysis this clearly means that despite Saudi Arabia subscribing to the NYC, there is no automatic enforcement of such awards in Saudi Arabia. The Hanbali school judges demand that arbitrators are knowledgeable in Islamic law.¹⁹ It should be noted that under the Saudi Arabian Arbitration Law,²⁰ disputants are free to revoke the appointment of an arbitrator at any time prior to the final award unless otherwise provided in the arbitration agreement. However, when a judge appoints an arbitrator, the arbitrator is deemed to be the judge's representative and therefore may not be revoked by the disputants.²¹ What this means is that the NYC has limited effect in Saudi Arabia in regard to recognition and enforcement of foreign arbitral awards or international commercial disputes including investment disputes. This calls for attention or requires discussion before one moves forward. The implications of the NYC must be considered before discussing the arbitrability of investment contracts in Saudi Arabia under the Convention on the Settlement of Investment Disputes Between States and Nationals of other States (Washington Convention 1965), which was ratified by Saudi Arabia in 1980.²²

¹⁹ *ibid.*

²⁰ Yahya Al-Samaan, 'The Legal Protection of Foreign Investment in the Kingdom of Saudi Arabia' (1993) Centre for Petroleum and Minerals Law and Policy of Dundee 271.

²¹ *ibid.*

²² Mohamed S Abdel Wahab and Mona Mansour, 'Saudi Arabia, The International Comparative Legal Guide to: International Arbitration 2009 (2008) 48, 387-389.

7.2.1.2 Effects of the New York Convention on Enforcement of Foreign Arbitral Awards and Investment Arbitration in Saudi Arabia

The Kingdom of Saudi Arabia has become a party to many international conventions which govern the enforcement of foreign arbitral awards in Saudi Arabia. One is the Arab League,²³ which was ratified in 1954 in order to permit the enforcement of foreign arbitral awards made in signatory states.²⁴ In 1980, Saudi Arabia ratified the Washington Convention and the Convention on the Enforcement of Judgments Delegations and Judicial Notices in the GCC States.²⁵ However, Saudi Arabia reserved the right to submit all disputes to the ICSID. The convention that requires most critical analysis in this thesis is the NYC,²⁶ which was a landmark convention in Saudi Arabia and a step forward for international arbitration in Saudi Arabia.²⁷

The NYC anticipates and provides for two specific scenarios. First, it provides for the recognition and enforcement of foreign arbitral awards. This scenario is contemplated under article 1, which sets out the applicability of the Convention. The Convention applies to enforcement of an arbitration agreement where the parties thereto are resident in or have business in at least two different states.²⁸ The Convention's duty is to recognize and enforce foreign arbitral awards, as provided under article III: 'each contracting state shall recognise and enforce the award, as binding and enforce them in accordance with rules of procedure of the territory when the award is relied upon.' In other words, each contracting state to the NYC is required to enforce foreign arbitral awards pursuant to its own procedural rules. However, this is cumbersome for Saudi Arabia.²⁹ Prominent scholars in international arbitration such as

²³ Samir Saleh, *Commercial Arbitration in the Arab Middle East, A Study in Sharia and Statute Law* (Mid- country press, London, Graham and Trotman 1984) 289-326; Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards 1952.

²⁴ Royal Decree M/11 of 16/07/1414 (17/07/14 Hegira 29/12/1993; the Kingdom of Saudi Arabia will apply the Convention only to the recognition and enforcement of awards made in the territory state of contracting states.

²⁵ Royal Decree No M/3 of 28 /4/1417.

²⁶ Saudi Arabia ratified NYC in 19th April 1994.

²⁷ Royal Decree No M/3 of 28 /4/1417.

²⁸ NYC, art V (1).

²⁹ Michael O'Kane, *Doing Business in Saudi Arabia* (Al- Andalus Legal Publishing 2009).

Fouchard, Gaillard, Goldman and Savage argue that although GCC states or Middle East states have embraced the NYC in regard to enforcement of foreign arbitral awards, or have modernized their arbitration laws by distinguishing between domestic and foreign arbitration, Saudi Arabia did not. It should be noted that Saudi Arabia did reform its arbitration laws in 1983 and 1985. However, many of the pre-existing traditions continue to provide for constraints in relation to religion and nationality.³⁰

The Saudi Arabia arbitration laws are not modelled on the UNCITRAL Model Law, which means that arbitration awards in Saudi Arabia are not considered final.³¹ This means that investor state arbitration may eventually find its way to the national courts of Saudi Arabia on an appeal under the auspices of article III of the NYC.

Arbitration is the preferred method of dispute resolution between private investors and the state or private persons due to party autonomy and competence-competence of the tribunal. Ultimately, the idea is to avoid litigation or the existence of formal adjudication, for obvious reasons. Indeed, subject to such hostile legal tension the private investor will not have confidence in the ability of the judiciary of the host state to be impartial in a matter involving an alien and the government whom it is paid to serve.³² The fact that disputants are at liberty to challenge the final award defeats the purpose of arbitration agreement and party autonomy.

Most investors argue that justice delayed is justice denied. Moreover, article 6 of the Saudi Arabian Law of 1983³³ confers jurisdiction upon the Board of Grievances to hear and determine an application designed to enforce arbitration agreements.³⁴ This can be perceived as a method of eventually circumventing delays later on when the validity of the arbitration agreement is

³⁰ Phillippe Fouchard, Emmanuel Gaillard; Berthold Goldman and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer International 1999) 277.

³¹ Dr Abdel Wahab Mansour, 'Saudi Arabia' (2008) 48 *The International Comparative Legal Guide to: International Arbitration* 2009, 387-389.

³² United Nations Conference on Trade and development; Disputes Settlement; International Commercial Arbitration (2005) United Nations 1, 43, 25.

³³ Issued by the Royal Decree No. M/46. Of 7/12/1403 Hegira (25 April 1983).

³⁴ Arbitration Law 1983, art 6.

challenged. For obvious reasons if the Board of Grievances approves the agreement, a subsequent challenger will be futile.

This clearly calls or invites a number of problems in that it provides for excessive intrusion into the concept of party autonomy, which the parties to an arbitration agreement had avoided. Saudi Arabia does not consider the UNCITRAL Model Law when considering enforcement of foreign arbitral awards. The Model Law is clear. Redfern and Hunter states: ‘The Model Law is a major success and it is entirely simple and sets out the arbitration process in a manner that can be understood by virtually anyone who can read.’³⁵ Although Redfern and Hunter considers the UNCITRAL Model Law a blessing, Saudi Arabia cannot comply with it due to its public policy, whereby it does not consider any law that is not Islamic law to be supreme.

Accordingly, the researcher argues that there are apparent inherent difficulties created by both article III of the NYC and the Saudi Arabian arbitral laws. The NYC guarantees enforcement of foreign arbitral award in contracting states, while Saudi Arabia’s procedural laws under arbitration law permit the Board of Grievances to disallow foreign arbitration or enforcement of a foreign arbitral award or provisions of arbitration agreement if the party loses a dispute with the Board. The Board of Grievances will not dismiss the process for want of jurisdiction automatically and may proceed to hear the case itself. The enforcement of foreign arbitral awards is too problematic in Saudi Arabia despite the accession of Saudi Arabia to the NYC. For example, under the Convention an award is final and binding; under Saudi Arabian law, an award that is not final is subject to appeal, provided the appeal is lodged within fifteen days of issue. Therefore, if an appeal is not filed within the fifteen days, the award is considered not binding and therefore the court before whom enforcement is sought may vacate the award pursuant to article V (1) of the Convention. If an appeal is filed, then obviously that appeal will render the award non-binding and final until such time as the appellate process is exhausted.

³⁵ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, 2004).

Article V of the NYC is problematic in Saudi Arabia when it comes to enforcement of foreign arbitral awards. By virtue of article 20 of the Arbitration Law of Saudi Arabia, an award is not enforceable unless it has been approved by the Board of Grievances. This means that a person seeking to enforce arbitration has to first lodge an application with the Board and participate in the hearing, thereby necessitating an examination of the merits of the case, which merits will be visited for the purpose of determining whether or not the award is enforceable pursuant to Islamic law. Since an award becomes final and binding only when this Board has approved it. The Board's decision equates to the same level of a judgment of both domestic and foreign arbitral awards. Ironically the NYC is designed in a manner so as to prevent national court supervision by limiting intrusive national courts' supervision by limiting the procedural grounds.³⁶ Articles III and V enable Saudi Arabia to permit intrusive government intervention in the arbitral process, which cannot bode well for the arbitrability of investment contracts. Foreign investors presumably choose arbitration for the purpose of escaping the state control process with a view to having a neutral third party presiding over the dispute.

This degree of Saudi Arabian control of the arbitration process and refusal of recognition and enforcement of foreign arbitral awards separates Saudi Arabia from other countries. It is against the spirit of the NYC, yet at the same time it is consistent with articles III and V thereof.

In analysis, Saudi Arabian courts should not only be limited to the literal approach of interpretation of the Convention, but a wide purposive should be applied, so as to attract investors who seek to see that their foreign arbitral awards are enforced. In addition, since Saudi Arabia is party to the Washington Convention, which ensures that an award is not submitted to the national court for annulment by virtue of article 52, courts should limit annulment of final awards in Saudi Arabia. The Washington Convention to which Saudi Arabia is a party provides under article 53 that an award shall not be binding on the parties and shall not be subject to appeal or to any other remedy except those provide for in that Convention.

³⁶ Walter Matti, 'Private Justice in a Global Economy: from Litigation to Arbitration [2001] International Organization 919, 947, 939.

Urgent reform is required in Saudi Arabia on the grounds that out of 181 economies in the world Saudi Arabia ranks 137th in the recognition and enforcement of foreign arbitral awards. This confirms that Saudi Arabia continues to lag behind when it comes to contract enforcement and implementation of foreign decisions.

This calls for urgent comprehensive reform to the judicial systems of Saudi Arabia and corresponding amendments to the Saudi Arabian law on arbitration, in order to ensure that the current law is compatible with the purposes and the philosophy of arbitration which are of wider application in many jurisdictions and in order to assess how far it is able to cope with the signed conventions and regional and international developments related to arbitration. A classic explanation of this saga is illustrated in the leading case of *Saudi Arabia v Arabian American Oil Company*,³⁷ where it was held that the legal system of enforcing foreign arbitral awards is still in embryo form in the schools of Muslim *Fiqh*. In other words, this case illustrated that Saudi Arabian Law on arbitration was too rigid³⁸ in enforcement of foreign arbitral awards. It should, however, be noted that since this case Saudi Arabia has been gradually changing its attitudes to arbitration and progress has been made in the creation of mechanisms for the resolution of commercial disputes involving international parties.³⁹ It is of importance to note that the Kingdom of Saudi Arabia is also a signatory to the ICSID Convention,⁴⁰ which clearly promotes that recognition and enforcement of foreign arbitral awards. In other words, a final award should be treated like a court judgment with automatic recognition and Saudi Arabia should not be viewed as recalcitrant by the World Bank authorities.

³⁷ *Saudi Arabia v The Arabian American Oil Company* (RAMC) (1963) 27 International Law Report 117; El-Ahdab (n 16) 599-600.

³⁸ Grievances Board, art 8(1); Art 6 of the Rules of Procedure of the Grievances Board, issued by Council of Minister Resolution No 190, 6/11.1409 (June 20 1989).

³⁹ Jalal El-Ahdab and Ruth Stackpool-Moore, 'Arab Arbitration v International Arbitration/The Case for a Reconciliation. *Journal of International Arbitration*' (April 2008) 25(2) 275-288.

⁴⁰ ICSID, composition and Rules <<http://www.worldbank.org/icsid>> accessed 7 June 2016.

7.3 The Kingdom of Bahrain

In 1783, Bahrain was founded by the Khalifa family. After Bahrain and the UK agreed to stop plunder and piracy in 1820, Bahrain acquired the status of British protectorate in 1880 and only became independent in 1970.⁴¹ After coming into power in March 1999, Sheikh Hamid Ibn Isa Khalifa set about promoting democracy and openness in Bahrain. Thus, in 2001 a national referendum was organised, in which the population could cast their votes for the very first time. In the subsequent year, a new constitution was enacted. Hence, Bahrain became a constitutional monarchy and from February 2002 its official title has been the Kingdom of Bahrain.⁴² The constitution consisted of five sections with a total of 125 articles, namely, the fundamental structure of society, public rights and obligations, public authorities, general provisions, as well as financial matters.

It is debatable whether indeed Bahrain is ruled with the doctrine of separation of power and rule of law under the new Constitution.⁴³ The executive is composed of the prime minister and ministers and is responsible for protection of state interests. A point to consider is that the king has the power to dismiss the executive with no consultation. The new Constitution is based on the separation of the executive, legislative and judicial powers, while maintaining cooperation between them in accordance with the provisions of the Constitution. None of the three authorities may assign any part of its powers stated in the Constitution. Nevertheless, the king has power to pass laws without consulting the other arms of government. The king has the right to issue legislation,⁴⁴ to hold the ministers answerable,⁴⁵ which should be the role of the legislature, to appoint and dismiss the prime ministers,⁴⁶ appoint and dismiss the Consultative Council,⁴⁷ to

⁴¹ Constitution of Bahrain, art 1.

⁴² Amin (n 3) 19-20.

⁴³ Constitution of Bahrain, art 32 para A.

⁴⁴ *ibid* arts 32(b) and 39.

⁴⁵ *ibid* art 33.

⁴⁶ *ibid* art 33(d).

⁴⁷ *ibid* art 33(f).

chair the higher Judicial Council, to appoint judges,⁴⁸ to conclude decrees,⁴⁹ to dismiss and appoint civil servants,⁵⁰ military personnel and political representatives in foreign states and to deal with international organization.

7.3.1 The Judicial Framework of Bahrain

Bahrain's judicial structure⁵¹ is composed of the following:

- (a) Islamic law, or Sharia, which has jurisdiction over all issues related to the personal status of Muslims, both citizens and non-citizens.⁵² Sharia has jurisdiction over inheritance, gifts, wills, and donations (*waqf*). In Bahrain, Islamic law is composed of two sects: The *Sunni* model and the *Shia* model. Sharia Courts are classified into two: The Senior Court and the High Court of Appeal. All courts at both levels are presided over by the two sects, the followers of *Sunni* practice and *Shia* practice. Appeals in these courts are composed of two judges; in the event of disagreement the Minister of Justice has the power to appoint the third judge and the decision will be determined by a majority vote.
- (b) Constitutional law, which provides that all legislative enactment should be in accordance with the constitutional provisions. Law No 8 of 1989 established the Supreme Court or Court Cassation, which serves as the final court of appeal for civil, commercial and criminal matters. In additional cases that for non-Muslims are dealt by the same court. The Court Cassation is composed of a chairman, and three judges who are appointed by a decree. In practice, civil courts do not invoke rulings of the Sharia or Islamic courts unless the issue is concerned with inheritance.

It is very clear from the above structure and the substantive laws that the parties prefer to access civil courts than Sharia Courts and that Bahrain operates a mixed system, wherein secular law

⁴⁸ *ibid* 33(h).

⁴⁹ *ibid* art 37.

⁵⁰ *ibid* art 40.

⁵¹ *ibid* arts 104, 105.

⁵² Constitution of Bahrain, art 2, which provides that Islamic Sharia is a principal source of legislation.

plays a dominant role. The rationale has even permeated fields that would otherwise be viewed as sacrosanct to Islamic legal theological thinking, as is the case with *riba* (interest) whose prohibition is clearly prohibited under Islam Law. It should be noted that in the real world there is no Islamic law application in all the Gulf States, this has impeded the introduction of a progressive commercial arbitration legislation. The lack of enforcement of foreign arbitral awards does not match trends of modern commerce.

7.3.2 The Law Governing Arbitration and Enforcement of Foreign Arbitral Awards

Arbitration as a mechanism for resolving commercial disputes has been recognised in Bahrain since before World War I, when disputes surrounding water sites were overseen by the customary council in keeping with local customs and following customary international law doctrine.⁵³ Regulation of arbitration in Bahrain takes the form of the Code of Commercial and Civil Procedure.⁵⁴ Furthermore, both the NYC and the UNCITRAL Model Law have been ratified by Bahrain.⁵⁵ Laws concerned with issues of arbitration also exist and disputes regarding such issues fall under the jurisdiction of the Chamber of Commerce and Industry of Bahrain. Arbitration as a dispute settlement mechanism is specified in the decree law associated with the stock exchange organisation;⁵⁶ additionally, this decree law includes a provision for the creation of an arbitration commission tasked exclusively with the settlement of Stock Exchange transactions. Workers' rights are also covered by arbitration.⁵⁷

⁵³ El-Ahdab (n 16) 101; Ahmad Abdultawab, *Arbitration Agreement and Related Pleas, Comparative Study of the GCC Laws* (Arabian Renaissance House 2008) 137-227.

⁵⁴ Saleh (n 23) 275-289; Arts 223 and 343 of Decree Law No 12 Issuing the 1979 Act of Commercial and Civil Procedure.

⁵⁵ Decree Law No 9 Issuing the 1994 Act of International Commercial Arbitration.

⁵⁶ Decree Law No 4 of 1978 in respect of the establishment of the Stock Exchange to be subject to arbitration.

⁵⁷ Chapter 16 of the Constitution, arts 138-139.

7.3.3 Recognition and Enforcement of Foreign Arbitral Awards in Bahrain

The Code of Commercial and Civil Procedure deals with enforcement of foreign arbitral awards:⁵⁸

An arbitral award irrespective of the country of origin, shall be recognised and binding, and upon application in writing to the competent court, shall be enforced subject to the provisions of this Article 35 and Article 36.⁵⁹

On face value this adduces that foreign arbitral awards are given effect in Bahrain, in addition Bahrain considers its ratification of the New York Convention⁶⁰ on the Recognition and Enforcement of Foreign Arbitral Awards,⁶¹ the Washington Convention,⁶² the Convention on Enforcement of Judgment Delegations and the Judicial Notices in the GCC states since 1996.⁶³

Despite of the above ratified conventions Bahrain is a problem to enforcement of foreign arbitral awards, especially in cases of conflict of Islamic law and circular laws of none Islamic countries. This becomes more cumbersome due to the schools of theology that govern Sharia, which are interpreted differently from the sects, for example; the *Shia* sect on one side and *Sunni* sect, on another side. To a non-Muslim seeking enforcement in Bahrain such complexity needs to be known to him before seeking enforcement of a foreign arbitral award, due to the fact that the courts construe convention in computability with their schools of thought. There is a crisis between Western states and Islamic law in application of enforcement of foreign arbitral awards, for example; in the case of *Beximco Phamacuticals v Shamil Bank of Bahrain*,⁶⁴ the English Court of Appeal dismissed the propriety Islamic law as governing law of contract, arguing that the concept of governing law especially for the purpose of the Rome Convention of the

⁵⁸ Civil Code of Commercial Procedure Article 253 and 253.

⁵⁹ *ibid* arts 35 and 36.

⁶⁰ Bahrain Ratified NYC in 6th April 1988.

⁶¹ Amin (n 3) 284-285.

⁶² World Bank signatory states to this convention <<http://www.worldbank.org/en/search?q=contracting+signatories>> accessed 26 June 2016.

⁶³ Decree Law No 14 of 1988. Bahrain made reservations to this Convention. It will not be a cause of recognition for the recognition of Israel. It will apply only to the recognition and enforcement of awards in the territory of contracting states.

⁶⁴ [2004] 1 WLR.

Applicable to contractual obligations refers to legal systems as a whole, as would be the case with Egypt, England or Bahrain. The court in this case held that Islamic law did not constitute a legal system despite its entrenchment in the Quran and supremacy in Bahrain and other GCC states. From the facts of the case it is of great importance, when one is considering enforcement of a foreign arbitral award, that the contract should be explicitly clear to avoid ambiguities that may arise or be construed in a negative way, as a case with English contract law which is compatible with Sharia.⁶⁵

The researcher advances his opinion that, in this case, subject to the supremacy of the Quran in Bahrain, party autonomy of the parties and separability, the court owed a duty to enforce the foreign arbitral award. Indeed, this case provides a very negative narrative to Islamic states. This was not the main aim of the NYC or the ISCID or Washington Conventions to which Bahrain is a signatory.

In USA for example; the USA Court *Rhodes v ITT Sheraton Corp*,⁶⁶ the Court held that Saudi Arabia was not a forum for enforcement of an arbitral awards, due to the application of Sharia, especially in the event of conflict between *Shia* and *Sunni*, as evident from the case of *Jivraj v Hashwani*⁶⁷ where it was held that a tribunal composed of only Ismails was contrary to the arbitration agreement. By way of illustration there is a discrepancy as to whether commercial agency agreements are indeed arbitrable in Bahrain or GCC states of equal jurisprudential leanings.

⁶⁵ Abdultawab (n53) 137-227.

⁶⁶ *Rhodes v ITT Sheraton Corp* No Civ 97-4530 1999 WL 26874 (Mass Supr 1999).

⁶⁷ [2010] EWCA Civ 712.

7.4 Qatar

The monarchical state of Qatar has been ruled by the Al Thani family since the 1800s.⁶⁸ The treaty signed by the Qatar Sheikh and the UK in 1916 made Qatar a British protectorate. The terms of the treaty were that Qatar would reserve its territories solely for the UK and would seek the UK's consent before establishing relationships with other states in return for British protection against aggression by sea and provision of military aid in the event of aggression by land. The treaty was active until Qatar became independent in 1971.⁶⁹ On April 30th 2003, the 1970 Constitution was substituted with a new constitution, which was endorsed by a referendum and enforced on June 9th 2005. The new constitution placed power firmly in the hands of the Al Thani family, in particular the male successors of Hamad Bin Khalifa Bin Hamid Abdullah Bin Jassim.⁷⁰ This constitution consists of five sections with a total of 150 articles.

Although the state of Qatar is a hereditary emirate,⁷¹ in the context of its legal system Qatar is considered to be a civil law jurisdiction. However, it applies Islamic law to aspects of family, inheritance, and criminal laws.⁷² The Constitution provides for the legislative authority of the *Shura* Council,⁷³ which is composed of 45 members of whom 30 are elected by direct secret ballot.⁷⁴ The Emir of Qatar appoints the remaining 15 from among the ministers or any other persons.⁷⁵ The Shura Council has the right to exercise legislative powers, approve the general policy of the government (for example, the budget) and control the executive.⁷⁶ The Constitution provides that the Qatar judiciary should remain independent⁷⁷ and given the influence of the

⁶⁸ Fawzi Al Khtaib and Sultan M Al-Abdulla, 'The State of Qatar, Financial and Legal Overview' (September 2001) VIII (3) Middle East Policy 110.

⁶⁹ *ibid* at 299.

⁷⁰ Qatar Constitution, art 1.

⁷¹ Qatar Constitution 2004, art 8.

⁷² Mahmood Abdel Rahman, *Introduction to Law; A Comparative Analysis in Qatar Law and Sharia* (1st edn, Igor, Qatar Business Handbook 2007) 3.

⁷³ Qatar Constitution, art 61.

⁷⁴ *ibid*.

⁷⁵ *ibid* art 77.

⁷⁶ *ibid*.

⁷⁷ *ibid* 130 and 131.

King, its independence as a monarchy is also debatable. The court structure is the Court of Cassation, the Court of Appeal and the Court of First Instance.

7.4.1 Recognition and Enforcement of Foreign Arbitral Awards in Qatar

The first arbitration law in Qatar was passed in 1963 on the Qatari Chamber of Commerce, which established the Chamber of Commission for Settlement in an amicable manner.⁷⁸ It should be noted that the Code of Civil and Commercial Procedure now regulates arbitration.⁷⁹ This Code does not distinguish between national and international arbitration. The Code of Civil and Commercial Procedure provides that foreign arbitral awards are enforceable under the same conditions that apply to foreign judgments. Qatar, under the CCP, article 190, provides a clear structure for consideration of an arbitration agreement. In other words, its application of capacity is compatible with international standards without resorting to the mischief interpretation of the schools of thought many other GCC states use, which has ultimately brought conflict. Qatar is a signatory to the NYC⁸⁰; Qatar does not have any reservations or reciprocity of the Convention when it comes to enforcement of foreign arbitral awards. Qatar may be the landmark state in GCC states when one is seeking enforcement of foreign arbitral awards. With its application of modern treaties⁸¹ in its commercial matters it is on such reasoning that the researcher argues that Kuwait should adopt Qatar's modern ways, that has attracted multi-billion-dollar investments, including hosting the World Cup in 2022. Under the NYC, Qatar does not restrict enforcement under the doctrine of arbitrability law,⁸² the arbitral matters can be settled amicably.⁸³ This further demonstrates the shortcomings and ambiguity of article 190 of the CCP. The only clarification of amicability contained within Arab legal jurisprudence suggests that the following

⁷⁸ El-Ahdab (n 16) 513.

⁷⁹ Saleh (n 23) 327-342; Law No 13 of 1990 issued in Official Gazette No 13 of 1/9/1990.

⁸⁰ Qatar ratifies NYC on 30th December 2002.

⁸¹ HS Shaaban, 'Commercial Transactions in the Middle East What Law Govern' [1999] 31 Law and Policy in International Business 2.

⁸² Doug Jones, 'International Commercial Arbitration and Australia' (Paper presented at the Australian-European Conference, Canberra, 2-3 March 2007).

⁸³ Mulla Habib, International Commercial Arbitration (2004) 6 DIAC Journal.

cannot be settled by arbitration: (a) disputes pertaining to validity of termination of marriage, incapacity, guardianship and inheritance and (b) disputes relating to criminality, betting and gambling, drugs, prostitution, and other immoral activities.⁸⁴ In other words, for the arbitration agreement to be given effect the notion of capacity is given paramount effect.⁸⁵ The CCP provides that the capacity of a natural person is regulated by the Civil Law.⁸⁶ The CCP also gives opportunity to public bodies of government officials or municipalities that have legal personality and therefore may exercise the rights of individuals except when limited by law.⁸⁷ It is submitted that such institutions also have the right to enter into arbitration as long as there are no any statutory restrictions presenting them from doing so.⁸⁸

Qatar respects the doctrine of party autonomy⁸⁹ as enshrined in the UNCITRAL Model Law,⁹⁰ which means that the enforcement of foreign arbitral awards subject to an arbitration agreement have no hindrance compared to GCC states like Kuwait. It should, however, be noted that the Qatari CCP permits a review of awards which is central to the Model Law. Under the CCP, an award may be set aside under articles 202-209 under ambiguous conditions and time constraints in respect of appeals against awards. There are no clear established grounds in Qatar on the appeal process; an award should only be appealed on questions of fact and law. In addition, the Qatari CCP provides that an appeal under article 205 is required to be lodged 15 days from the date following the notification of the award. In addition, notification should be lodged before the Court of Appeal which has original jurisdiction to consider the case.⁹¹ Alternatively, CCP, article 207 provides another method of judicial review against an award, namely, setting aside. The real

⁸⁴ Qatar Civil Code, art 34(2).

⁸⁵ Dr Zain Al Abduin Sharar, 'Does Qatar Need Reform in its Arbitration Law and to Adopt the UNCITRAL Model Law for Arbitration: A Comparative Analysis, The Legal & Judicial Journal-Ministry of Justice-State of Qatar, Vol. 2, 2011

⁸⁶ Civil Law No 22 of 2004, arts 49-52 and arts 3-95.

⁸⁷ M I M Aboul-Enein, *Peaceful Settlement of Commercial Disputes: Commercial Arbitration and other ADR Techniques* (1st edn, SIN 2005).

⁸⁸ El-Ahdab (n 16) 529.

⁸⁹ Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (Kluwer Law International 2004) 55.

⁹⁰ UNCITRAL, art 16 on Competence-Competence and Separability or autonomy of arbitration agreement.

⁹¹ Civil Law Qatar, art 205.

advantage of this article is that it mirrors the NYC⁹² grounds of refusal of an award under article V despite slight differences in language. The CCP is still in drastic need of reform in order to bring it into line with internationally recognized standards of arbitration law and at least adopt the UNCITRAL Model Law on International Commercial Law,⁹³ with a positive attitude. Qatar was very conservative in its enforcement of foreign arbitral awards and international arbitration, in 1957, as evidenced in the words of Sir Alfred Bucknill in the case of *Qatar v The International Marine Oil Company*:⁹⁴ ‘Islamic law is applied in the state of Qatar but it does not contain any principles which would be sufficient to interpret this particular contract.’ With the enactments of the ICSID Convention and the NYC there was some change to Qatar’s arbitration industry which used to be domestically and internationally rigid. More than 70 countries have businesses in Qatar because of the ICSID Convention, the NYC and the UNCITRAL Model Law. This signifies that in that last ten years Qatar’s commercial environment and negative perception of the courts have rapidly changed. Hence Qatar is becoming the backbone of GCC states in commercial investment and enforcement of foreign arbitral awards.

7.5 The United Arab Emirates

Founded in 1971, the United Arab Emirates (UAE) is a federation of seven emirates, namely, Abu Dhabi, Dubai, Sharjah, Ajman, Um Al Quwain, Fjairah, and Ras Al Khaimah. Before the creation of the UAE, these emirates had been British protectorates since the Perpetual Treaty of Maritime Truce of 1850.⁹⁵ On December 2nd, 1971, the federal constitution of the UAE was enacted and in 1996 it was made permanent.⁹⁶ According to this constitution, the matters of

⁹² David Butler, *Expediting Commercial Arbitration Proceedings (Recent Trends)* (1st edn) 6S. Afr Mercantile L J 251 (1994) 29.

⁹³ Gary Born, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction* (2nd edn, Kluwer Law International 2005).

⁹⁴ *Ruler of Qatar v International Oil Company* (153, 20 International Law Report, ILR Butterworths & Co. Publishers Ltd London 1957) 534.

⁹⁵ Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Kluwer law International 2003) 1.

⁹⁶ The Provision was signed on 18/7/1971 by Abu Dhabi, Dubai, Sharj, Un Al Quawain and Fujaira. Later Alkhaimah joined on 10 February 1972.

foreign affairs, security, nationality and immigration, education, public health and currency are relegated to the federal states or governments. Indeed, apart from the matters that the constitution expressly allocates to the federation, all other matters fall under the authority and jurisdiction of individual emirates.⁹⁷ There are ten sections to the UAE constitution with a total number of 152 articles.

7.5.1 The Judicial Framework of the UAE

The UAE features both federal courts and local courts, however, the Constitution allows for any emirate to transfer all or part of its jurisdiction authority to the UAE Federal Judicial Authority.⁹⁸ All emirates have complied with this directive apart from two states: Dubai and Ras Al Khaimah.⁹⁹ The Federal Supreme Court is the highest court in the federal states and handles cases between emirates and the government union, which cases can be submitted by any of the parties. Constitution interpretation, examination of the constitutional legality of union and local laws, interrogation of ministers and senior officials of the union appointed by the decree, crimes directly affecting the Federation. Conflict of jurisdiction between union judicial and local judicial authorities and lastly the Federal Supreme Court has jurisdiction in interpretation of international treaties of conventions ratified for example the application of the NYC. The federal court system consists of three levels; primary courts, Appeal Courts and the Supreme Court.¹⁰⁰ The federal courts and local courts are divided into civil courts, criminal courts and Sharia Courts.¹⁰¹ Like other GCC states, the UAE is subject to the schools of theology since Islamic law is part of their jurisdiction in all federal states. Within the UAE, Dubai has its commercial laws well drafted in English. This means that Dubai courts have judges from leading common law jurisdictions, most prominently England and Hong Kong. It should be noted that, given the UAE's tiered legal system, there are obvious problems: (a) there are a number of federal laws

⁹⁷ UAE Constitution, arts 116 and 122.

⁹⁸ *ibid* art105.

⁹⁹ Al Tamimi (n 95) 11.

¹⁰⁰ Federation of Judicial Authority Law (Federal Law No 3/9183), art 9.

¹⁰¹ *ibid*.

that apply to each emirate within the seven emirates of which Dubai and Abu Dhabi are the largest. In addition, there are a number of laws at each level of each emirate.

7.5.2 Arbitration and Rules Governing Enforcement of Foreign Arbitral Awards

Until 1992, the UAE had no federal laws regulating the arbitration process. However, there are now rules relating to arbitration contained in the Civil Procedure.¹⁰² The Code provides for the composition and establishment of an arbitral tribunal,¹⁰³ whereby in the event of arbitration agreement in regard to the appointment of arbitrators, the UAE courts are tasked with¹⁰⁴ making appointments which will be final and not subject to appeal. In the UAE, there is no doctrine of competence-competence (Kompetenz- Kompetenz) and there are no provisions in the CCP in this regard. Unless the parties to arbitration agreement provide that the arbitral tribunal can rule on its jurisdiction, it is open to the parties to apply to the UAE courts for a decision on whether a dispute referred to arbitration is in fact covered by the arbitration agreement. In the event of such a challenge the tribunal must schedule a hearing within thirty days from the acceptance of the appointment of the arbitration agreement,¹⁰⁵ subject to specification of the terms of reference.¹⁰⁶ Any witness testimony will be on oath, and an award must be rendered within six months from the date of the first hearing.¹⁰⁷ In such proceedings there are no stringent conditions attached to evidence in the UAE; the parties are free to choose the language of the seat.¹⁰⁸ In arbitration agreements the principle of capacity is taken seriously in the UAE as a potential ground for lack of enforcement.¹⁰⁹ Therefore it is very important for the parties planning to have arbitration in the UAE to confirm, when entering into contracts, that the signatories have specific authority to agree to arbitration. One of the common problems is that is not easy to determine whether or not

¹⁰² UAE Federal Law No 11 of 1992.

¹⁰³ CCP, art 206.

¹⁰⁴ *ibid* art 204(c).

¹⁰⁵ *ibid* 208(1)(c).

¹⁰⁶ *ibid* 203(3).

¹⁰⁷ *ibid* art 210.

¹⁰⁸ *ibid* 212.

¹⁰⁹ *ibid* 203(4)

one is dealing with a government entity or not. In this regard a party to an arbitration agreement should be aware of the following:

- (a) Federal- level: any federal government departments entering into a contract which includes an arbitration clause must obtain the prior approval of the Council of Ministers after being reviewed by the Ministry of Justice.¹¹⁰ In addition, the Government of Dubai and its agencies shall not enter into a contract to be governed by the laws of anywhere other than the UAE.¹¹¹
- (b) Sovereignty immunity: at federal level the CCP contains prohibitions against seizing public property owned by the state or one of the emirates for the purpose of enforcement. In practice, it is likely to be very difficult to enforce an arbitral award against sovereign assets in the UAE.¹¹² Any suit against government is subject to approval, thus meaning that it will be too difficult to sue or get an arbitral award enforced against the government.¹¹³
- (c) Arbitrability: the CCP expressly excludes certain disputes as being non-arbitrable as a matter of UAE law. Any such issues may be subject to public policy, which means that this will be a case falling under the jurisdiction of the UAE courts.
- (d) There is no right to appeal an arbitral award in the UAE if the enforcement of an award was domestic on grounds of: the lack of validity of an agreement; the time of the arbitral tribunal to render an award has exceeded or there was a flaw in the appointment of the tribunal; and there is a procedural irregularity in the award.¹¹⁴ In addition, for an award to be enforced, it must be ratified by a UAE court. Hence parties seeking to apply to a UAE court to ratify an award are required to follow the same steps as if they were bringing an action in the court of first instance in the appropriate local or federal court, subject to issuing a claim form and supporting documents of evidence. By reason of this ambiguity

¹¹⁰ Council of Ministers Decision No 406/ 2/Council of Ministers Decision No 406/ 222003 dated 15/9/2003.

¹¹¹ Dubai Instruction Order of 6 February 1988; Law on Dubai Government Contract Law No 6 of 1997, art 36.

¹¹² CCP, art 247.

¹¹³ Dubai Law No 3 of 1996 concerning government claims.

¹¹⁴ CCP, art 217(1).

it is for the court to annul the award or ratify it. Accordingly, it is of great importance from the researcher's view point that all procedural requirements of UAE law are complied with during the course of arbitration, particularly those highlighted above that may be different to a number of other Western jurisdictions, which assume that enforcement in Dubai is automatic.

7.5.3 Recognition and Enforcement of Foreign Arbitral Awards in the UAE

According to article 236 of the UAE on Civil Procedure, implementation of foreign arbitral awards is subject to the conditions associated with foreign judgement implementation.¹¹⁵ A number of international conventions allowing implementation of foreign arbitral awards have been integrated by the UAE into its federal legislation.¹¹⁶ The Washington Convention,¹¹⁷ the Riyadh Convention, the Convention on Enforcement of Judgement Delegation and Judicial Notices and most importantly the NYC,¹¹⁸ are among those international conventions.

In 2006, the UAE became a party to the long-awaited NYC,¹¹⁹ pursuant to article 5 of which the UAE courts must enforce foreign arbitral awards unless the grounds to resist enforcement in the NYC are satisfied. Before the UAE ratified the NYC, foreign arbitral awards were subject to the UAE courts, and awards were easily set aside on a number of grounds which are broader than the permitted grounds under the NYC. Despite the ratification of the NYC it was still debatable whether UAE courts would refer to the CCP when dealing with foreign arbitral awards. However, since 2006, there has been much progress in regard to enforcement of foreign arbitral awards in the UAE; for example, in the case of *Airmech v Macsteel*¹²⁰ in September 2012, the Court of Cassation in Dubai, which is the highest court in Dubai, enforced two foreign arbitral

¹¹⁵ Saleh (n 23) 343-369; CCP, art 235.

¹¹⁶ *ibid.*

¹¹⁷ World Bank <<http://www.worldbank.org/en/search?q=contracting+signatories>> accessed 15 June 2016.

¹¹⁸ Federal Decree No 43/2006.

¹¹⁹ UAE ratified NYC in 21 August 2006.

¹²⁰ *Macsteel International v. Airmech (Dubai) LLC, Court of Cassation of Dubai, 18 September 2012, A contribution by the ITA Board of Reporters 1 March 2013, Case date: 18 September 2012.*

awards. The decision was particularly welcomed by the arbitration community as the court gave an unequivocal ruling that foreign arbitral awards will be enforced in Dubai in accordance with UAE international treaty obligations under the NYC and noted that the CCP was not relevant in the context of foreign arbitral awards. It should, however, be noted that in December 2012, the Dubai Court of First Instance declined to enforce a foreign arbitral award from Paris under the ICC Rules, against the Government of the Republic of Sudan. The court in this case did not refer either to the NYC¹²¹ or the CCP provisions and simply concluded that the UAE courts did not have jurisdiction to hear the dispute because (a) the parties were not in the UAE and (b) the subject matter of the dispute had been performed outside the UAE. This was a surprising decision, not least because of the following reasons:

- (a) As a matter of UAE law, the provisions in the CCP on enforcing foreign judgments do not state that UAE courts must have jurisdiction to hear the claim; indeed, in many circumstances, if it is a matter that falls within the jurisdiction of the UAE, the court will not enforce the foreign judgment. The provisions that the court relied on to conclude that it did not have jurisdiction are expressed in the CCP as being ‘without prejudice’ to international convention between the UAE and other countries.
- (b) Under the NYC, enforcement does not depend on the award debtor having a geographical nexus to the country where the enforcement is sought. All that is required is that the award creditor presents to the enforcing court, in other words, there must be presentation of an original certified copy of the foreign arbitration award, and an original certified of the arbitration agreement.

From the arguments advanced by the UAE court, it is not yet known whether the Sudan decision will be appealed; given the passage of time an appeal seems to be unlikely. The researcher further argues that if the decision is not appealed, it is to be hoped that it will not be followed by other UAE courts in the future given the general pro-enforcement approach of the UAE courts in recent years. Overall, therefore, while the first instance decision in Sudan is concerning and one

¹²¹ New York Convention 1958.

that a foreign investor should most definitely be aware of, there are still a number of positive reasons to hope that it will be either appealed or not followed in the future. Dubai is planning further amendments to attract foreign investors, and this means that any mistakes as to lack of enforcement of foreign arbitral awards will be taken into account by the legislators. The Supreme Court of Court Cassation is likely to fill in the gaps in the law if there is no amendment to the CCP or if the courts are still in a quagmire in matters pertaining to enforcement of foreign arbitral awards.

In a recent case the Dubai Court of Cassation in a commercial challenge¹²² set out the grounds for annulment of an award under article 216 of the CCP and gave eight reasons, showing that despite article 216 of the CCP courts may enumerate a different number of grounds for annulment, though mostly similar. It should be noted that despite the ambiguity of the Sudan case, the UAE courts do not now consider public policy to be a ground to set aside a foreign arbitral award under article 216. The UAE courts have advanced the application of the NYC in a very open purposive approach.¹²³ For example, Dubai has limited the grounds of nullity (examination) in the proceedings of an arbitral award to defence of procedure, due process, and the procedures agreed by the parties to an arbitration agreement.¹²⁴

It is common to all international standards that an arbitration agreement will not be enforced if it does not satisfy the requirement of being in writing. The Dubai Court of Cassation,¹²⁵ however, reversed the appellate court's annulment of an arbitral award, stating that the contested decision misapplied the law regarding the inclusion of the arbitration agreement. Instead the Court of Cassation¹²⁶ stated that article 212(5) does not provide that the arbitral award should initially contain the entire arbitration agreement but should only mention its content.¹²⁷

¹²² Dubai Court of Cassation Challenge No 148/2008 16 Sept 2008.

¹²³ Dubai Court Cassation Civil Challenge Case No 265/265/007 3 February 2008.

¹²⁴ *ibid.*

¹²⁵ Court Cassation in Civil Challenge Case No 265/2007 3 February 2008.

¹²⁶ Court Cassation in Civil Challenge No 103 of 2011, 20 November 2011.

¹²⁷ Dubai Court Cassation, Case No 282/2012, Real Estate Cassation (3 February 2013).

Due process is the main ground for setting aside an award. An arbitral award, however, may be set aside for violation of due process if there is lack of notice to either party of the appointment of arbitrators and of the arbitration proceedings.¹²⁸ Due process may be violated if there is a violation of a party's right to be heard¹²⁹ the right to present a case¹³⁰ and submit a defence. Additionally, the parties must be treated equally¹³¹ with no bias by the court.¹³² In the Dubai Court of Cassation, Commercial Chamber, Action No 268 of 2007, in a case involving an allegation of forgery of court-admitted documents, the court (before rejecting the appeal) stated that 'the failure to afford the parties due process violated the right to be heard.'¹³³

7.6 Oman

The country of Oman is governed by the Al Bu Said family and this has been the case since around 1750. Oman is governed by an absolute monarchy. In 1891, despite the fact that Oman was practically subject to British protection, Britain did not concede this. Furthermore, Oman was not colonised.¹³⁴ Indeed, Oman was secluded until 1970, triggered by Sultan Qaboos ousting his predecessor.¹³⁵ There has been significant revitalisation in government and politics in general, and also in finance, society and culture.¹³⁶ This has been catalysed by the Sultan. However, Oman established a legal system after many of the Gulf States.¹³⁷

Royal Decree Number 101/96 outlined the Basic Law of the Sultanate of Oman. It was released on 6th November 1996 and with it, Oman became the final member of the Gulf Cooperation

¹²⁸ Abdul Hamid El-Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (3rd edn, Wolters Kluwer 2011) 822.

¹²⁹ Abu Dhabi Court of Cassation Petition No 980/2010.

¹³⁰ Dubai Court Cassation Petition No75/ 2007, Judgment 7 April 2008.

¹³¹ Dubai Court Cassation Case No 282/2012.

¹³² El-Ahdab and El-Ahdab (n 128) 823.

¹³³ Court Cassation Commercial Chamber, Action 268 of 2007 19 Feb 2008.

¹³⁴ Amin (n 3) 284-285; El-Ahdab (n 16) 475.

¹³⁵ Amin (n 3) 286.

¹³⁶ Abdultawab (n53) 137-227.

¹³⁷ Amin (n 3) 286.

Council to obtain a written constitution.¹³⁸ The constitution is made up of eighty-one articles which are categorised into seven sections. The seven sections detail the judiciary, the state, the governmental structure, public rights and duties, the values directing state policy and the head of state. Indeed, Article 5 submits that the governmental structure is one of a hereditary sultanate and it dictates that the leadership role should be occupied by a man who is a descendant of Sayyid Turki bin Said bin Sultan. There are three main foundations of the law in Oman. They are Islamic law, the constitution and legislation. According to the Basic Law, the Islamic Sharia must be the foundation of all legislation.¹³⁹ Article 79 of the Basic Law dictates that every law and process that is capable of enforcement under the legal system, should follow the Basic Law, that is, the constitution. The right to dispense and sanction legislation is reserved for the Sultan.¹⁴⁰

The constitution outlines three specific elements of government. These are the executive, the legislature and the judiciary. The separation of powers is incomplete however, because the powers of the executive and the legislature are both reserved for the Sultan. The Sultan is the sole executor of the executive powers. He is the representative of Oman for all state affairs. He acts as the Prime Minister and leads the Council of Ministers.¹⁴¹ This Council aids the Sultan and supports him in the completion of all necessary state tasks and affairs.¹⁴² Indeed, the Sultan is responsible for engaging a Deputy Prime Minister and he also selects the Ministers and many other important positions. He also has the power to discharge anyone occupying these roles. The Sultan is also responsible for hiring and firing all under-secretaries, general secretaries and other relevant positions.¹⁴³

The legislature in Oman is the Oman Council. It is formed of two sections, namely the Council

¹³⁸ The Basic Law was the first written expression of constitutional law in Oman. For an evaluation of the Basic Law, see Siegfried, Nikolaus A., 'Legislation and legitimation in Oman: the basic law' *Islamic Law and Society*, (2000) 7 (3) 359-397.

¹³⁹ The Basic Law, art 2.

¹⁴⁰ *Ibid*, art 42.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*, art 43.

¹⁴³ *Ibid*, art 41-56.

of State and the Majlis Al-Shar.¹⁴⁴ Those in the Council of State are selected by the Sultan,¹⁴⁵ whereas the Shura Council has elected representatives and they come from many areas of the country.¹⁴⁶ The legislature is essentially only an advisory body.¹⁴⁷ The constitution, in the Basic Law, assures the impartiality and separation of the judiciary and it does so in Articles 60 and 61. There are three ranks of courts as outlined by Royal Decree Number 90 of 1999. It was implemented in June 2000 and instigated the preliminary and appeal courts, as well as the Supreme Court. Every case, except administrative ones, can be examined in the three types of courts. Administrative cases are examined by the administrative court, which is an impartial element of the judiciary that has the ability to examine all of the determinations of the government.¹⁴⁸

Arbitration used to be regulated by the *Ibadi* School. This meant that arbitration arrangements were valid. However, these arrangements were not mandatory or restrictive. Despite this, real arbitral decisions were binding.¹⁴⁹ After 1984, a Royal Decree provided the Regulations regarding the Board for the Settlement of Commercial disputes. Within Articles 59-68, arbitration was controlled.¹⁵⁰ However, in 1997, the articles that were divergent to Royal Decree Number 47/97, were repealed. The UNCITRAL legal model is the foundation for the current arbitration law in Oman. Furthermore, arbitration can now ensue after an appeal is lodged by anyone with sufficient capacity and interest in any issue that could be directed to arbitration, or in any issue that falls outside the jurisdiction of the competent court of Oman. This is according to the Regulation and Privatisation of the Electricity and Water Related Sector, as pronounced by Royal Decree Number 78 of 2004.¹⁵¹

¹⁴⁴ Royal Decree No. 86/97 on the Formation of the Council of Oman Issued on 16 the corresponding to 16th December 1997 AD, art 21 and 22.

¹⁴⁵ Ibid, art 58.

¹⁴⁶ Ibid, art 11.

¹⁴⁷ Ibid, art 18 and 29.

¹⁴⁸ Royal Decree 91/99 established the Administrative Court. See also Article 4 of Royal Decree 91/99; Article 8 of the Judicial Authority Law of 1999.

¹⁴⁹ El-Ahdab (n 16) 469.

¹⁵⁰ Issued by Sultanate Decree No. 84/32 of April 12, 1984

¹⁵¹ The law for the Regulation and Privatisation of the Electricity and Water Related Sector, art 128 to 131.

7.6.1 Recognition and Enforcement of Foreign Arbitral Awards in Oman

The acknowledgement and application of foreign arbitration decisions can be implemented by both state laws, and relevant international agreements. Courts did not previously have the power to acknowledge and apply foreign decisions. Royal Decree Number 13/97 changed this,¹⁵² but was then repealed by the Decree regarding Civil and Commercial Procedure Code. Following this, in 2002, Articles 352 and 353 of the Code of Civil and Commercial Procedures stipulated the new laws regarding the application of foreign decisions.¹⁵³ Furthermore, the Washington Convention was acceded to on 5th May 1995.¹⁵⁴ The New York Convention 1958 was also ratified by Oman in 25th February 1999, and when it was implemented on the 26th May 1999 without any reservation.¹⁵⁵ Moreover, Oman has now acceded to the Convention on the Enforcement of Judgment Delegations and Judicial Notices, which is a convention of the Gulf Cooperation Council.¹⁵⁶

Unlike Kuwait, Oman generally follows the NYC with regard to the recognition and enforcement of foreign arbitral awards, because in Oman there is support for the party autonomy. Under the Oman Civil and Commercial Procedure Code (OCCPC),¹⁵⁷ a foreign award cannot be enforced if it is not issued by a competent tribunal.¹⁵⁸ In other words, Oman supports the doctrine of competence-competence and party autonomy, which are key principles in arbitral

¹⁵² El-Ahdab (n 16) 503.

¹⁵³ Saleh (n 23) 370-392; Royal Decree No. 29/2002 on Promulgating the Code of Civil and Commercial Procedure.

¹⁵⁴ The World Bank Group 'List of Contracting State and other Signatories of the Convention'
<<http://www.worldbank.org/icsid/constate/c-states-en.htm>> accessed 15 December 2016.

¹⁵⁵ UNCTIRAL 'Status; 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards'
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 17 December 2016

¹⁵⁶ Royal Decree No (17) Of 1996.

¹⁵⁷ Sultani Decree No 47/97, art 58(1).

¹⁵⁸ Sultani Decree 29/2002, art 352.

proceedings.¹⁵⁹ The Omani court in the capital Muscat held that an arbitral tribunal has the competency to settle disputes pertaining to the arbitration agreement.¹⁶⁰ Although the Oman CCPC provides that a foreign award will not be enforced if it breaches the Oman Law,¹⁶¹ the application of public policy¹⁶² does not limit the enforcement as in the case of Kuwait, where enforcement of a foreign award subject is to review by the courts¹⁶³ and to Arabic language.¹⁶⁴ In other words, the Oman legal frame invites foreign arbitration¹⁶⁵ since parties¹⁶⁶ trust the system that, in the case of disputes, their foreign arbitral awards will be recognised and enforced by courts, without protracted conflicts between the courts and arbitrators.

The Oman law on enforcement further considers that a foreign award to be enforced should be binding at the law of the seat of arbitration under the applicable law.¹⁶⁷ The lack of reservation of the New York Convention under Article 1(3) is another landmark success of recognition and enforcement of foreign arbitral awards in Oman. Indeed, Oman is on the same footing with UAE¹⁶⁸ and Qatar¹⁶⁹ when it comes to enforcement of foreign arbitral awards. All foreign arbitral awards under Oman jurisdiction that have been final and binding are automatically enforceable,¹⁷⁰ which indeed reflects the NYC as provided under Article V (1) (e). The Oman approach to international arbitration is more liberal,¹⁷¹ in that its public policy definition is not subject to the restrictive regime of Islamic jurisprudence¹⁷² but governed by the universality

¹⁵⁹ Decree 29/2002, art 352(1) and 353.

¹⁶⁰ Sultanate of Oman, Commercial Circuit Muscat, Appeal No. 199/ 2008, hearing held on 7 May 2008.

¹⁶¹ Jalila Ahmed, Enforcement of Foreign Arbitral Judgment in some Arab Countries-Legal Provisions and Court Precedent: Focus on Bahrain; (1999) 14 Arb Law Quarterly 169, 175.

¹⁶² Sultani Decree 13/97, art 120.

¹⁶³ Kuwait CCP, art185.

¹⁶⁴ Ibid, art183.

¹⁶⁵ Sultani Decree 29/2002(Oman), art 352(3).

¹⁶⁶ Ibid art 352(2).

¹⁶⁷ Ibid art 353.

¹⁶⁸ UAE Dubai Court of Cassation Judgement 267/99 (November 1999); Dubai Court Cassation Judgement 17/2001 (3rd October 2001).

¹⁶⁹ Qatar Law No.13 of 1990 on Civil and Commercial Procedures, art380 (c).

¹⁷⁰ Sultani decree 29/2002, art 352.

¹⁷¹ Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (4th edn, Sweet & Maxwell 2005) 13.

¹⁷² Sigvard Jarvun, Enforcement of an arbitration Award in Oman (1985) 2 Journal of International Arbitration) 4-7.

principle of international recognition of foreign arbitral awards under the NYC.¹⁷³ Indeed, this adduces that the Oman approach needs to be taken into account by Kuwait if the latter is to attract foreign investors. The Islamic schools of the theology are afforded less power and authority, in order to allow or to inspire confidence in non-Islamic corporations or countries regarding the ability to enforce their foreign awards in Oman.

An award that is not international in nature¹⁷⁴ will not be set aside by the Oman Court if the foreign court applied Oman law pursuant to the choice of law of the parties,¹⁷⁵ arbitration agreement or arbitral clause,¹⁷⁶ even if the award is in principle in contravention with Islamic jurisprudence, for example, interest (*riba*).¹⁷⁷ Moreover, in Oman, an award will be set aside if there is no valid agreement among the parties or the agreement is null and void.¹⁷⁸ This was evident in the well-known case of *Rotana Hotel Management Corp Ltd v Gulf Hotels (Oman) Co Ltd*,¹⁷⁹ where the Supreme Court stated that an arbitral award could be set aside in Oman if there was no valid arbitration agreement between the parties to refer the dispute to arbitration.¹⁸⁰

¹⁷³ Jan Poulsson, *International Handbook on International Commercial Arbitration* (Kluwer 2002) Supplement 36; El Sayed Almarakebi, *Arbitration in the GCC States and to What Extent it is Affected by State Sovereignty* (Arabian Renaissance House 2001) 112-113; Abdultawab (n 53) 150-163.

¹⁷⁴ Art 2-3 of the Oman Arbitration Law adduces that Oman is pro- enforcement and has restricted the grounds on which an award will be set aside.

¹⁷⁵ Sultani Decree 47/97, art 52.

¹⁷⁶ Oman Supreme Court, Case No 2002/1, Decision No 92, hearing held on 28 May 2002.

¹⁷⁷ Buraimi Court of Appeal in Appeal No 32 T/S 2003, Commercial Circuit (3rd May 2011), (2013) *International Journal of Arab Arbitration*.

¹⁷⁸ Omani Court of Appeals, Commercial Circuit Court, Appeal No 34/2009 (27 April 2009), 2009 Int 1 J of Arab Arb 3,245.

¹⁷⁹ *Rotana Hotel Management Corp Ltd v Gulf hotels (Oman) Co Ltd*, Case No 5/2001 (22 October 2001) Commercial Department, Supreme Court.

¹⁸⁰ Sultani Decree Article 47/97 art 53(1) (1) Oman.

7.7 Summary

This chapter has examined the enforcement of foreign arbitral awards in GCC states and showed that, although GCC states have ratified similar conventions, their applicability is quite different when it comes to enforcement.

Islamic law based on the school of theology has caused conflict in the application of modern conventions; for example, in Saudi Arabia, Qatar and Bahrain, the Sharia jurisprudence is against interest (*riba*), which in modern commerce is part of the final judgment. There is another problem where there are two sects who both claim to be Muslim but they apply their reasoning differently from other GCC states, as in the case of the Kingdom of Bahrain. In Bahrain, the Islamic courts are composed of two sects, which have a different adherence to Islamic jurisprudence. This creates difficulties for non-Muslims who seek to enforce a foreign arbitral award in Bahrain. Unless Bahrain revises its Islamic approach, its investment will be hindered. Since Bahrain has embraced the UNCITRAL Model Law and ratified the NYC, all foreign arbitral awards should be given effect in conformity with the Convention rights and procedures.

This thesis showed how Saudi Arabia's performance declined from 181 to 137, due to its poor compliance with international conventions, especially the NYC. The researcher, in his examination, argued that there is an urgent need for Saudi Arabia to comply with the Conventions signed. There is a conflict between Saudi Arabian Law and the modern circular law.¹⁸¹ Jurists should not only be limited to Hanbali theology but all the schools of theology of Islamic *fiqh* or jurisprudence. In order to harmonize enforcement of foreign arbitral awards they should be separated from normal disputes. This will enhance enforcement and will open up doors to investors who fear that countries confiscating their assets under public policy or conservative application of UNCITRAL¹⁸² or the NYC, since the domestic regulations do not welcome

¹⁸¹ Mahfouz Mir'ai Iben-Mahfouz, *International Commercial Arbitration and the Rules of Islamic Law* (Arab Renaissance House 2002) 66.

¹⁸² Ahmad Alsamdan, *International Arbitration & Foreign Arbitration in the Kuwaiti International Private Law* (Arab Renaissance House 1999) 66-160; Akasha Abdulaal, *Civil & Commercial International Procedures and*

foreign enforcement of awards. The current researcher argues that Saudi Arabia's legislative authority should revisit and update the current Saudi arbitration law and its implementing regulations, in order to satisfy the requirements of an effective and modern legislation in the field. It should be redrawn completely to apply the Model Law in a similar way to that of the Egyptian Arbitration Law or the UAE and Saudi lawyers should advocate for the Chamber of Commerce to be more involved in the process of enforcement of foreign arbitral awards. The national courts should loosen their tight surveillance and control over the arbitration process and be more supportive, rather than serving as an interference, in order to ensure that the arbitration process remains independent from judicial authorities based on the competence and separability doctrines.

Although Qatar is a member of the GCC, there have been enormous changes in recent years in the advancement of enforcement of foreign arbitral awards; however, there is still a lacuna in the law governing arbitration that needs urgent construction by the courts in order to comply with international enforcement of foreign arbitral awards. Since Qatar is also a member of ICSID, Qatar will undoubtedly enforce foreign arbitral awards in a better format. The fact is that since Qatar is expecting to host the World Cup, whereby all disputes emanating from sports are subject to arbitration, ICC, or ICSID,¹⁸³ there is a good likelihood that in the next few years Qatar will be at the forefront in the enforcement of foreign arbitral awards.

The UAE is a signatory to GCC conventions, the NYC and UNCITRAL. This thesis has examined the latest cases on the UAE's position in regard to enforcement of foreign arbitral awards. It would be unfair if the world did not acknowledge that in all GCC states the leading authority in enforcement of foreign arbitral awards is the UAE. It has managed to excel in this practice through limiting the Code of Civil on Commercial Procedure to domestic, disputes and leaving all cases pertaining to enforcement of foreign arbitral awards to the NYC. The application of the NYC is excellent, where its approach to grounds of refusal or setting aside an

Enforcement of Foreign Arbitral Awards (University of Kuwait 2010) 378-444; <http://www.uncitral.org/uncitral/en/about/origin_history.html> accessed 22 August 2016.

¹⁸³ <<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>> accessed 22 August 2016.

award is very minor.¹⁸⁴ This means that few foreign arbitral awards, if any at all, will be refused enforcement by the Court of Cassation, because minor irregularities will not warrant refusal. Indeed, if other GCC states apply the UAE approach the Middle East will have the biggest centre of arbitration after London, Paris and Hong Kong. There is no doubt that the UAE has an arbitration centre that is friendly to Western countries, and this is an advantage and a tremendous boost to its economy.

Oman is a member of the GCC.¹⁸⁵ The country has undergone enormous changes in recent years with respect to the advancement of enforcement of foreign arbitral awards; the law governing arbitration truly complies with the universality principle of the NYC. In other words, there is no reservation of the NYC.¹⁸⁶ Indeed such an approach opens doors for foreign investors, who are assured that in case of disputes awards will be given recognition and enforcement in Oman, without the necessity of protracted conflicts or reviews of awards by courts as is the case under the Kuwait CCP.¹⁸⁷

Oman's liberal approach in regards to enforcement and recognition of awards is on record whereby even awards subject to interest are enforced if the party's award was agreed at the seat of arbitration outside Oman but Oman law was the law governing arbitration. The researcher argues that all GCC states should adopt the Oman Model due to its foreign friendly approach to recognition and enforcement of foreign arbitral awards.

It should be noted that the global economy is subject to turbulences caused by oil price fluctuations, which can affect the GCC oil industry or OPEC countries. In order for any GCC member state to achieve and maintain business competitiveness, they need investment in service provision and this can only be achieved if foreign investors are assured that there is a mechanism

¹⁸⁴ Alsamdan (n182) 66-160; Ahmed Alsamdan, 'Application of Foreign Arbitration Awards in Kuwait' (March 1998) *Journal of Law, Kuwait University* 13-80.

¹⁸⁵ Abdultawab (n53) 155.

¹⁸⁶ NYC, art 1(3).

¹⁸⁷ Kuwait CCP, art 199,185 and 200; Khaled Alyaqout and Tarq Rezq, *Al Wasset in the Rules & Principles of Kuwait Arbitration* (Arabian Renaissance House 2008) 365-390.

that allows them to settle their disputes under international arbitration. Otherwise, arbitration becomes meaningless; an award that is final and binding to the parties cannot be enforced but has to be subject to the recourse of the courts.

CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

8.1 Conclusion

The study has sought to explore the legal position of the Kuwaiti laws with regard to recognition and enforcement of foreign arbitral awards. More specifically, the study has examined circumstances under which Kuwaiti law would recognize and enforce foreign arbitral awards and the circumstances under which the Kuwaiti courts would refuse to recognize and enforce foreign arbitral awards. Integral to the foregoing research question was the issue of the effectiveness of Kuwaiti laws in the realization of a robust dispute resolution regime (through arbitration) that would encourage international trade. In assessing the effectiveness of the Kuwaiti laws,¹ the researcher used the provisions of relevant international law instruments and the philosophies or circumstances behind their enactments as indicators of effective arbitration regimes.² Deviations in Kuwaiti law and practices have been analysed in order to ascertain the reasons for such change and to make proposals for reform where necessary.

This was a qualitative study which analysed primary and secondary sources of law to address the research questions. The thesis has cumulatively addressed the research questions in seven different but related chapters.

¹ Judicial Arbitration Administration, *The Way to the Panels of Judicial Arbitration (How to Resort to the Panels of Judicial Arbitration)* (Judicial Arbitration Administration, Kuwait 2013) 3-8; Judicial Arbitration Administration, *Challenge to Awards of Judicial Arbitration Boards* (Judicial Arbitration Administration, Kuwait 2013) 3-4; Judicial Arbitration Administration, *Associates of Judicial Arbitration Boards* (Judicial Arbitration Administration, Kuwait 2013) 3-5; Judicial Arbitration Administration, *Rights and Duties of Claimant and Respondent under the System of Judicial Arbitration* (the Judicial Arbitration Administration, Kuwait 2013) 3-13; Judicial Arbitration Administration, *Nature and Advantages of Juridical Arbitration Pursuant to Law 1195* (Judicial Arbitration Administration, Kuwait 2013) 3-13; Judicial Arbitration Administration, *Associates of Judicial Arbitration Boards* (Judicial Arbitration Administration, Kuwait 2013) 3-7; Judicial Arbitration Administration, *Rules of Arbitration in Kuwait Commercial Arbitration Centre* (Kuwait Arbitration Centre 1999) 5-49. Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; the JAL, Law No 11/1995; Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

² *ibid.*

In the examination conducted in Chapter 1 of the thesis, the researcher found that there is a gap in the literature on Kuwait in regards to international arbitration and recognition and enforcement of foreign arbitral awards. In other words, prominent scholars (e.g. Gary Born,³ Redfern and Hunter,⁴ Moses⁵) on international arbitration have afforded little or no attention to Kuwait, as concerns its application of the NYC. No journals have been published to bring to the attention of researchers the complexity of the Kuwaiti international regime. There are hardly any cases in Kuwait-related databases to provide some insight. During examination of the literature, the current researcher found that there is complexity in application of the Islamic schools of theology in Kuwait, in line with enforcement of foreign arbitral awards. Furthermore, by exploring all the conventions that Kuwait is party to the researcher found that Arab conventions are unfriendly, too restrictive and need to adopt a global village approach, in order for Kuwait and other GCC states to retain their economic power with a GDP ratio of 2.88 to the global economy. The review of the literature highlighted an urgent need for Kuwait to become friendlier and more open towards international arbitration in order to attract capital investment.

Chapter 2 examined the legal framework relating to the recognition and enforcement of foreign arbitral awards in Kuwait by identifying and analysing pertinent national, sub-regional and international arbitration laws applicable and relevant to Kuwait. Both domestic and international recognition and enforcement regimes were presented. It demonstrated that one of the major difficulties associated with the recognition and enforcement of foreign arbitral awards in Kuwait was the complexity of its legal framework.⁶ The Kuwaiti Constitution, Islamic law and teachings, domestic civil law, and numerous international conventions are all relevant in the context of recognition and enforcement of foreign arbitral awards in Kuwait. It was found that

³ Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International 2001).

⁴ Alan Redfern and Martin Hunter (with Nigel Blackaby and Constantine Partasides), *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell 2004).

⁵ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2008).

⁶ CCP and its application to international arbitration.

the legal framework essentially does provide for the requirements and procedures to enforce foreign arbitral awards.

Chapter 3 examined the international conventions as sources of enforcement of foreign arbitral awards. This chapter examined the New York Convention (NYC), primarily article (V) (1) on recognition and enforcement of foreign arbitral awards. The main issue in examination was the principle of reciprocity or reservation to the NYC. The reciprocity principle hinders enforcement of foreign arbitral awards. It is important to note that strong economies like Australia and Dubai have withdrawn from the doctrine of reciprocity or reservation under the NYC under article 1 in order to attract investment in their countries. Since Kuwait is also a member of UNCITRAL and ICSID, application of reciprocity will hinder international trade in Kuwait and this will affect its economic structure. Adopting the Dubai model (since UAE is a member of the GCC⁷ like Kuwait) will be a tremendous advantage in the recognition and enforcement of foreign arbitral awards. The Arab League Convention to which Kuwait is a signatory, the Amman Convention and the Riyadh Convention, that promotes cooperation among GCC states, provides automatic recognition and enforcement of foreign arbitral awards. This is not a complete solution, since it does not cover judgments of bankruptcy and tax cases which can be enforced as final awards in modern commerce. Despite the Arab League there is no uniformity in enforcement of foreign arbitral awards among Convention states due to the different applications Islamic theology and the mistrust of the Western legal framework pertaining to enforcement of foreign arbitral awards. However, for Kuwait to have a better enforcement climate, there is a need to separate domestic arbitration from international arbitration so that international arbitration is under the ambit of UNCITRAL and the NYC. This will harmonize or reconcile the tension of the Civil Code⁸ in regards to arbitration and enforcement of awards.

⁷ The Gulf Cooperation Council (GCC) was established in an agreement concluded on 25 May 1981 in Riyadh, Saudi Arabia between: The Kingdom of Saudi Arabia, The Kingdom of Bahrain, the United Arab Emirates, Kuwait, Qatar and Oman.

⁸ Code of Civil Procedure (CCP), art 199

Chapter 4 examined the role of courts in the enforcement of foreign arbitral awards, with attention given to the Civil Code and Commercial Procedure, which provides that exequatur, must be filed by the Court of First Instance in Kuwait.⁹ In other words, in Kuwait final and binding awards are not automatically enforced, unless the courts have examined the award and court is the only place with jurisdiction to enforce foreign arbitral awards or judgments.¹⁰ There is still a lacuna in the definition of a foreign arbitral award¹¹ since the constitution does not provide an explicit definition of what a foreign arbitral award means, simply the application of the law on arbitration or the Quran. There are no cases that have brought before Court of Cassation of Kuwait to interpret this end game. The courts in Kuwait from the researcher's point of view, need to interpret Kuwaiti arbitration legislation in compatibility with the doctrines of competence-competence and separability. It should be noted that the main aim of international arbitration is to create a business-supportive environment; this can only happen if justice prevails. It is often stated that justice delayed is justice denied: a refusal or delay of enforcement of an arbitral award indicates that foreigners may be forced to invest in a host state where the conditions of enforcement are compatible with the NYC. The role of courts under the doctrine of complementarity and compatibility is to enforce final awards, not to intervene in the arbitration process, because people come to arbitration to avoid litigation.¹² From this background the researcher argues that irrespective of the country to the law as stated in the constitution of Kuwait,¹³ the award should be based on the agreed by the parties.¹⁴

Chapter 5 examined the grounds for refusing recognition and enforcement of foreign arbitral awards under the NYC in Kuwait. This chapter demonstrated that Kuwait will defer to the determination of the court at the seat of arbitration, both in terms of annulment and the status of the award as binding and enforceable (the requirement of double exequatur). Although four

⁹ *ibid.*

¹⁰ *ibid* art 9.

¹¹ CCPL, art 173.

¹² *ibid* art 200.

¹³ Kuwaiti Constitution, promulgated on 11 November 1962.

¹⁴ Ahlam Al Tamimi, *Enforcing Foreign Judgments and Arbitral Awards in Kuwait* (Al Tamim & Co Kuwait Office 2010) 6.

grounds were examined in this chapter regarding refusal of recognition and enforcement of a foreign arbitral award (incapacity of parties, invalidity of arbitration agreement, unfair composition of the tribunal, setting aside, suspending, non-binding nature of an award).

Chapter 6 examined refusal of recognition and enforcement on grounds of non-arbitrability and public policy. The most contentious issue is the arbitrability and public policy due to the complexity and controversial nature of the conservative interpretation by Kuwaiti courts in regard to recognition and enforcement of foreign arbitral awards. Article V (2) (b) of the NYC provides that a state may refuse recognition of an award if it is inconsistent with public policy. In regard to the NYC, there no clear procedures to be followed by domestic courts. Hence Kuwaiti courts' use their discretion to decline enforcement of foreign arbitral awards.¹⁵ It should be noted that the aim of the NYC was to harmonize international enforcement of foreign arbitral awards¹⁶ by national courts.¹⁷ Kuwaiti courts' in their interpretation and enforcement of foreign arbitral awards, should limit public policy buffer, due to the principle of compliance with contractual obligations.¹⁸ However, from moral perspective view the researcher argues that public policy should be limited to corruption, gambling and interest, given the evidence in modern economies that Islamic banking is a solution to world recession or economic depression. The NYC provides that interest as part of the foreign arbitral award, that such award is final and binding and courts' should enforce it as a judgment. The disadvantages of Islamic finance in commercial settlement outweigh the interest concept of the Western circular perspective.

Chapter 7 of the thesis examined the enforcement of foreign arbitral awards in the GCC. It is imperative to note that the application of the NYC to GCC states (mainly the UAE, the Kingdom

¹⁵ *Hilmarton and Chromalloy* (2nd Cir 1999); NYC, art V(I)(e).

¹⁶ *Scherk v Albero Culver* (US Supreme Court 1974) 520.

¹⁷ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (The Hague 1981) 25.

¹⁸ *Commercial Co v S Motors Ltd Co and D Industries Ltd Company*, No 1007/181.

of Bahrain, and the Kingdom of Saudi Arabia, Qatar and Oman) is quite possible.¹⁹The main factors can be attributed to their court structures. For example, Saudi Arabia's court structure is composed of the Islamic law (Sharia) Court and the Board of Grievances, which handles government disputes. It should be noted that for any arbitration award to be enforced, the Board of Grievances has to approve it, especially in cases of corruption, fraud and intellectual property, which is different from Qatar. In addition, Saudi Arabia's Committee for Settlement of Commercial Disputes which is duly responsible for international arbitration also examines the award, centrally to article 37 of the Riyadh Convention. Although Saudi Arabia is a signatory to the NYC, it does not comply with the roles of enforcement of foreign arbitral awards;²⁰ neither does it consider the automatic enforcement of foreign arbitral awards under the UNCITRAL Model Law. The enforcement foreign arbitral awards in Saudi Arabia are at an embryonic stage. There is urgent need of reform the Saudi Arabian foreign arbitration to attract international investors.

In regard to the Kingdom of Bahrain, the Code of Civil Procedure deals with enforcement of foreign arbitral awards. However, enforcement is subject to application to a competent court as provided under CCP, article 36. The enforcement under the NYC is contentious due to a conflict between the Islamic law courts of *Shia* and *Sunni*. This causes tension when interpreting the arbitral procedures of the NYC, as elucidated in the case of *Jivraj v Hawshwani*,²¹ where the Court declined enforcement due to the composition of the arbitral tribunal composed of *Ismails*, who of the *Shia* sect under the Islamic jurisprudence of Bahrain. As regards Qatar, the CCP respects the doctrine of party autonomy, which means that enforcement of foreign arbitral awards is not hindered since it respects the UNCITRAL Model Law. However, Qatar reviews awards subject to article 202 and there no clear grounds as enshrined in article 209. Any appeal must be made within 15 days under CCP, article 205. With accession to ICSID, the NYC and

¹⁹ Abdullah Alrumaih, *Arbitration in the GCC States, Arbitration General Framework in the GCC in accordance with the latest amendments including new Saudi Arbitration System 2012, Arbitration Development, Arbitration Agreement, Arbitration Panel, Arbitration litigation, Arbitral Award* (Arab Renaissance House 2013) 368-393.

²⁰ Saudi Arabia Implementation Rules of the Arbitration Law.

²¹ [2010] EWCA Civ 712.

with investments in Qatar by Western countries, as well as the hosting of the World Cup in 2022. All football cases will be subject to the ICC and foreign arbitral awards will be given direct effect or enforcement), it is unlikely that Qatar will decline recognition and enforcement of foreign arbitral awards.

This chapter examined the enforcement of foreign arbitral awards in the UAE and the researcher was impressed by the significant contribution Dubai has provided in regard to enforcement of foreign arbitral awards. Dubai's CCP is excluded in matters relating to foreign disputes or international arbitration. There is no reciprocity when applying the NYC, at least 90% out of every 100 cases are enforced in Dubai. This explains why UAE is the leading centre of arbitration in the GCC states. In order for Kuwait to be a better place for settlement of arbitration disputes or enforcement of foreign arbitral awards, there is an urgent need to adopt the Dubai or UAE model.

This chapter has further examined the state of Oman. The researcher found that Oman's arbitration laws are foreign friendly. In other words, there is no reservation to application of the NYC; there is no court monopoly in arbitral proceedings and no restrictive Islamic theology applications that could hinder foreign investment. The public policy issue is less strict if an award is final and binding even if it is against public policy (e.g. interest). Indeed, every award is enforced if it is foreign in nature, if it was final at the seat of arbitration and if the Oman arbitration law was part of the parties' arbitration agreement.

Although the arbitration system in Kuwait is working, it needs some reform to bring it into line with other forums of arbitration. Kuwait recognizes and enforces foreign arbitral awards and also refuses recognition and enforcement of foreign arbitral awards that are contrary to its public policy. A difference exists between recognition and enforcement of foreign arbitral awards under the NYC and the awards rendered in the GCC²² countries. Under the NYC, the primary consideration is the rights of parties under Islamic law; consideration weighs heavily in favour of

²² Riyadh Convention on Judicial Cooperation 1983.

public policy based on moral and religious codes of the state.²³ While Kuwait aspires to develop at a very fast rate, it is still under Islamic law, which also guides its business law. Now that Kuwait has joined the World Trade Organization,²⁴ there is a need to reform its arbitration laws to facilitate trade and investments and attract foreign investors.

There are several conclusions which the researcher can draw from this study:

- A system of multiple sources of law governs the recognition and enforcement of foreign arbitral awards in Kuwait. In principle the Kuwaiti Constitution,²⁵ Islamic law and teachings, various Kuwaiti domestic civil procedure laws²⁶ and several international conventions are all applicable and relevant in this matter. These may create confusion, especially where there are differences in the stipulation of one instrument in relation to another. Nevertheless, when thoroughly traversed, it is shown that the requirements for enforcement and grounds for refusal are analysed within the framework of the requirements and grounds stipulated in the NYC.
- Most of the grounds to refuse recognition and enforcement of foreign arbitral awards under the NYC²⁷ would be applied narrowly in Kuwait. However, it should be noted that there is yet a large amount of published case law on this matter. In some areas there are several judicial decisions that can shed light on how Kuwaiti courts will act. Nevertheless, based on the comprehensive research on the legal instruments and the vast amount of literature on the subject, this conclusion can reasonably be made.

²³ See (n 1); Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; JAL, Law No 11/1995; Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions (Nos 43, 44, 174 and 179).

²⁴ Yaqoub Sarkhouh, *Arbitral Awards and their Enforcement in Accordance with the New York Convention, 1958: Comparative Study of Commercial Arbitration* (Arab Renaissance House 1996) 135-207.

²⁵ Kuwaiti Constitution, promulgated on 11 November 1962.

²⁶ Kuwait Arbitration Laws, Civil and Commercial Procedure.

²⁷ *ibid.*

- The narrow application of the NYC²⁸ in Kuwait can firstly be attributed to the fact that the Arabic version of the NYC obligates the enforcing court to refuse enforcement if one of the grounds for refusal is established. This is in contrast to the English text which gives the enforcing court the discretion in such situation. This discrepancy in language also explains the narrower application of specific grounds such as incapacity.
- The status and application of Islamic law and principles as the supreme law in Kuwait does not present a major roadblock for the recognition and enforcement of foreign arbitral awards in Kuwait. The area where Islamic law makes the biggest impact is in the application of public policy, especially with regard to awards that impose interest (*riba*). Nevertheless, the concept of interest is not absolutely rejected as there remain circumstances where awards with interest can be enforced.
- There are certain aspects that may prove to be a major obstacle to the recognition and enforcement of foreign arbitral awards in Kuwait. Prominent among these is the rule placing the burden of proof regarding the grounds to refuse enforcement on the parties that apply for recognition and enforcement. Even though this is just one aspect, the researcher submits that it has the severe consequence of adversely affecting the regime governing foreign arbitral awards in Kuwait. Another hindrance, which goes against the global standard is the requirement for double exequatur.

8.2 Recommendations

Given the findings of this study, the following suggestions are made:

Consistency: Based on the examination conducted in Chapter 2, the researcher is of the view that Kuwait's domestic law governing the subject should be amended to bring it in line with its

²⁸ *ibid.*

international commitments. Naturally, the amendment must also consider Islamic law and teachings so as not to violate the supreme law under Kuwait's Constitution.²⁹ In other words the drafters of the new constitution should consider the proximity between courts and the arbitral tribunal, so that courts effectively support the enforcement of foreign arbitral awards. In addition, the new constitution should be free from technicalities or legal jargon that may hinder the enforcement of arbitration, mainly the rules governing foreign arbitral awards, the composition of a tribunal, the mischief in application and interpretation of the NYC and the main methods of challenging a final award.

It should however be noted that since, the Quran is the supreme law of Kuwait, enforcement of interest (*riba*) may not be a subject that will be allowed easily or be legislated by the National Assembly. Given the modern development of Islamic finance which survived economic recession, it is still debatable if Kuwait will easily adopt the NYC without reservations. The only solution would be setting up a separate arbitration chamber exclusively for foreigners who are not Muslims, so that Islamic law is only restricted to Muslims. The schools of theology should be interpreted in line with *Ijma*, supporting the arbitration agreements of the parties.

Furthermore, it is imperative to note that, since the Quran advocates for enforcement of agreements established by the parties, the courts in Kuwait should enforce foreign awards without any hindrances or reviews. This would constitute a landmark to the outside world and hence foreign investment will increase in Kuwait, so that its economy expenditure will become dependent not just on oil but also on foreign capital investments.

Proper documentation and databases: In examination of Chapter 2, the researcher further advocates that greater interest must be generated regarding the investigation of the conditions and mechanisms of recognition and enforcement of foreign arbitral awards in Kuwait. Due to the current lack of reported case law or awards and accompanying literature on the enforcement of

²⁹ Kuwaiti Constitution, promulgated on 11 November 1962.

the judgments of foreign or national arbitration in Kuwait,³⁰ this is also to the benefit of Kuwaiti courts so that they can better grasp and understand the various rules regarding arbitration. It is hoped that this will in turn encourage a more robust application of international rules and standards with regard to enforcement of foreign arbitral awards. There is a need for a database of awards or cases to be made available in English, so that foreign investors can trust the arbitration system in Kuwait to the same degree that they trust the arbitration system of Dubai, Qatar, London, Hong Kong and Paris.

Judicial capacity building: In examination of Chapter 2, the study recommends that more capacity building needs to be conducted and directed towards Kuwaiti judges who will deal with the substantive and procedural rules for the recognition and enforcement of foreign arbitral awards. A robust system of training and retraining of judges both locally and internationally should be put in place.

There is a problem with the legal framework of Kuwait, which does not welcome foreign investment; the arbitration of Kuwait is friendlier to domestic proceedings than to international ones. This is due to lack of knowledge or training of judiciary and arbitrators to handle complex issues that arise from matters related to foreign investment. This will also address the strict approach of courts, the Arabic language, hence promoting harmony and attracting non-Islamic states and corporations, as is the case in Qatar and the UAE.

Harmonization: In examination of this Chapter 3, the researcher recommends that there is an urgent need for Kuwait to withdraw from the reservation of the NYC article 1(3) in order to compete with Qatar, Oman and the UAE that have dominated international arbitration. The NYC should be given effect to its objective in the preamble and its universality principle should be adopted by all GCC states. It is known that the London Centre of Arbitration has got offices in Dubai; indeed, this has made Dubai the leader of arbitration in the region. The Amman

³⁰ *ibid.*

Convention is compatible with the Washington Convention, whereby if an award is final and binding, it is automatically enforced in signatory states.

The Convention is composed only of Arab countries and all its proceedings are in Arabic. The researcher calls for opening up doors to non-Arab countries and that awards should be in both English and Arabic for ease of understanding. The Riyadh Convention is composed of only six states, which is why its scope with the outside world is limited; indeed, this means Kuwait will lose its share of the multi-billion world economy. The only solution is to implement the UNCITRAL Model Law; which Kuwait has ratified.

The Arab League is composed of eighteen, members and its purpose is enforcement of judgements in the signatory states. The convention is no longer a commercial mechanism of enforcement of judgement, but a tool used by both Arab and western countries for political disputes instead of commercial disputes. It is recommended that another convention on commercial arbitration should be initiated among the members of the Arab League.

Based on the fact that enforcement of arbitration awards is related to a number of regulations in Kuwait,³¹ the study recommends reviewing the regulations and making modifications to activate and apply international arbitration conventions and resolutions at a local level. In particular, the review and modification should clarify the mechanisms of harmonisation of the various legal instruments governing recognition and enforcement of foreign arbitral awards in Kuwait.

The analysis conducted by the researcher revealed that the Arabic conventions are incompatible with international business or global village. Hence, there is an urgent need to open doors to non-Arab countries that have a multi-billion market demand. It is against this background that the thesis recommends that the Kuwaiti legal structure should be changed, in order to meet the demands of commerce and international arbitration. The NYC should not be seen as an enemy by

³¹ See (n1) Main legislation includes: the CCPL, promulgated by Law Decree No 38/1980 in June 1980; JAL, Law No 11/1995; Civil Code 1980, issued by Law No 67/1980. Subsidiary legislation on arbitration includes Ministerial Resolutions Nos 43, 44, 174 and 179.

Kuwait, Saudi Arabia and Bahrain, but as a vehicle or a mechanism that harmonizes recognition and enforcement of foreign arbitral awards internationally.

Specialist centres: In examination of Chapter 7, the study is in favour of creating a centre in Kuwait, specialising in the recognition and enforcement of arbitration decisions in Kuwait, under the Ministry of Justice. This would improve current results, as it would act as an alternative to the difficulties that may arise in the training and retraining of current judges.

This procedure has been implemented by Qatar through membership of the ICC, NYC, and UNCITRAL Model Law, and by the UAE, which has opened up specialist centres and has specialist arbitration procedures for only international arbitration. Such specialist centres have attracted multi-billion investments in the UAE; for example, the London Court of Arbitration has an office in Dubai.

Arbitral proceedings: In examination of Chapter 4, 5 and 6, the researcher recommends that, since arbitral proceedings are subject to the intentions of the parties due to the principle of party autonomy, there is a need to reflect the Model Law in regard to party autonomy doctrine. This doctrine is not respected by the Kuwaiti courts and from a practical point of view this hinders investors who fear recourse to courts when disputes arise instead of using the arbitration mechanism as a dispute settlement. This means that the issue of arbitrability should not be subject to courts but to the arbitration tribunal.

Tension will thus be diminished when courts set aside an award for reasons of arbitrability. In other words, the new Act³² should be based on the philosophy of striking a balance between respecting the doctrine of party autonomy and the interests of the state in interpreting the NYC. In this regard, courts should just compel a reluctant party to implement his/her obligation to arbitrate subject to the arbitration agreement.

³² CCP of Kuwait.

8.3 Future Research

Other issues relevant to this study that have not been discussed in detail may be a focus of future research to enhance scholarship on recognition and enforcement of foreign arbitral awards in Kuwait.

First, given the multitude of international conventions governing this matter in Kuwait, it may be useful to conduct a study regarding the relationship and interaction between those conventions. Questions that may be dealt with include any possible hierarchy between the conventions as well as the consequences of following one convention over the other in a given case. Second, it may also be useful to conduct a study regarding the status and effect of international conventions regarding recognition and enforcement of foreign arbitral awards within Kuwaiti legal systems. This study would enable an in-depth analysis regarding the mechanism for applying international conventions in practice, specifically in the context of recognizing and enforcing foreign arbitral awards in Kuwaiti courts.³³

The application of the NYC by courts in regard to enforcement requires a purposive construction. From the research point of view, enforcement of foreign arbitral awards and recognition in Kuwait is still at its infancy, and therefore there is enormous potential for research in this area using a comparative analysis with civil jurisdiction.

The arbitrability of foreign arbitral awards will be a great impetus to knowledge. A study that excludes courts determining whether a case is arbitrable is required to enhance the scope of enforcement in Kuwait.³⁴

The research does not perform a case-by-case analysis of the enforcement of foreign arbitral awards. Hence future research could survey cases through developing solutions in the light of the text of relevant laws on commerce, which would be of great benefit to enforcement of foreign

³³ Khaled Alyaout and Tarq Rezq, *Al Wasset in the Rules & Principles of Kuwait Arbitration* (Arabian Renaissance House 2008) 351-400.

³⁴ *Ibid.*

arbitral awards in Kuwait. Since the thesis only covered recognition and enforcement of foreign arbitral awards, future research could cover all arbitral laws in Kuwait.

With trends of commerce, human rights are another issue that is commonly discussed in arbitration cases. There is a need for future research to examine the relationship between enforcement of arbitration in Kuwait and human rights. Under rule of law, justice delayed is justice denied. Clearly a refusal to grant or enforce a foreign arbitral award can be subject to the same notion.³⁵

There is an urgent need to harmonize all GCC states to emulate the UAE or Dubai in regard to enforcement of foreign arbitral awards. This can be achieved by revisiting the schools of theology in a wide scope rather than a narrow scope, in order to meet the demands of the 21st century. Scholars of Islamic jurisprudence should be subject to *Ijma* or *Qiyas*, since the Quran (as the main source of Islamic law under Surat Baqra)³⁶ honours agreements of parties and such agreements should be executed expeditiously. The refusal of enforcement due to party autonomy is against Sharia jurisprudence. Indeed, this thesis will be a remedy to this mischief in Kuwait and other GCC states, especially Iran with two different sects (*Shia* and *Sunni* Muslims) who have different interpretations of the Quran.

8.4 Contribution to Knowledge

First and foremost, the contribution of this thesis takes the form of an exploration of the merits of reforming the current public policy rules and Islamic law jurisprudence³⁷ to attract investors from different parts of the world who view Kuwait as a state dominated by Islamic law and

³⁵ Ibid.

³⁶ Surat Baqra, 4:45.

³⁷ *ibid.*

unfriendly to foreigners.³⁸ This will attract not only investors to Kuwait but also practitioners of arbitration from different countries.³⁹

The second contribution of the study consists of filling the gap in the literature on the topic of recognition and enforcement of foreign arbitral awards within the specific context of the Kuwaiti legal system, a subject that has received limited attention from scholars.

The third contribution is that it offers information necessary to review the longstanding but controversial interpretation of article V of the NYC.⁴⁰ The chapter on the legal development of Kuwait explored the problem that Kuwait had in arbitral enforcement, which was later remedied by the 1978 Act⁴¹ after signing the NYC. Furthermore, this thesis will provide a basis for future research to analyse the compensation grounds for non-compliance of enforcement of a foreign arbitral award.

³⁸ Arbitration Act 1996.

³⁹ NYC, arts 1 and II.

⁴⁰ Neil Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' (1996) 12 *Arb Intl* 28, 43; Xiaohong Xia, 'Enforcement of the New York Convention in China' [2011] *International Commercial Arbitration Brief* 20-24.

⁴¹ Ahmed Alsamdan, 'Application of Foreign Arbitration Awards in Kuwait' (March 1998) *Journal of Law, Kuwait University* 13-80.

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The Qur'an, Al-Baqrah [2: 275-276]

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Verse 35 of Surah 4(An-Nisa) of the Holy Quran

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