THE SAUDI ARABIAN ARBITRATION LAW IN THE INTERNATIONAL BUSINESS COMMUNITY

A Saudi Perspective

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ABSTRACT

Arbitration is now generally accepted as a principle method of solving disputes in commercial transactions. It is no longer a product to be advertised in seminars or symposiums related to international trade, rather it is a must in international business transactions. Because we have reached a point where most countries have adopted the UNCITRAL Model Law on arbitration and become party to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, we believe that some studies from the Islamic perspective are necessary in order to find a route to the theory of the delocalisation of arbitration. Moreover, at the time when practitioners are calling for the internationalisation of arbitration, I believe that my duty as a former Secretary of the Arbitration Board at the Chamber of Commerce and Industry in Riyadh is to discuss, evaluate, and present the situation as it stands today. It is also, our responsibility to propose a route to its harmonisation within the international standards of arbitration. The idea of providing a historical background to arbitration is not solely for the purpose of historical research. However, as we will see in later chapters when we describe the Saudi legal system, *Shari'a* law and Islamic jurisprudence are the main laws of the land, and they are applicable whenever there is a statutory vacuum.

Therefore, an Islamic solution has to be found when addressing any problems related to arbitration in this research. Also, the purpose of this research is to set down the reasons that have made people believe that Saudi Arabia, of all the Arab Middle Eastern countries, is indeed the one in most need of a well-developed arbitration system, since some of the major banking and commercial activities are not permitted to come before the *Shari'a* courts. Moreover, in the year 2000 Saudi Arabia implemented the Foreign Investment Act, which liberalizes foreign investment in the Kingdom. The Saudi Arabian Government Investment Authority, which has responsibility for licensing all new foreign investment in Saudi Arabia, was created under the Act. This of course comes as a result of the government's desire to diversify the sources of national income. All these reasons should have an affect on developing commercial law in general and arbitration in particular.

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ABBREVIATIONS

In the body of the text, the following abbreviated forms are used for reasons of convenience and brevity –

AAA:	American Arbitration Association
ACIMA:	Alexandria Centre for International Maritime Arbitration
ADCAC:	The Abu Dhabi Commercial Arbitration Centre
ADR:	Alternative Dispute Resolution
ARAB CONVENTION 1952:	The Arab League Convention 1952
ARBITRAL TRIBUNAL:	includes sole arbitrator where the context permits
ARB. INT.	Arbitration International, published by Kluwer Law International on behalf of the LCIA
BANI:	Badan Arbitrasi Nasional Indonesia
CANACO:	Camara Nacional de Comercio de la Ciudad de Mexico
CEARCO:	Centro de Arbitraje y Conciliacion Comercial
CEDR:	Centre for Dispute Resolution
CIETAC:	China International Economic and Trade Arbitration Commission
CIS:	Commonwealth of Independent States
CMEA:	Council for Mutual Economic Assistance
COMECON:	former USSR, Bulgaria, Czechoslovakia, Hungary, Romania and Poland
CONVENTION ON COMMERCIAL ARBITRATION 1937:	The Arab Convention on Commercial Arbitration of 1931
CRCICA:	The Cairo Regional Centre for Commercial Arbitration
DCAC:	The Dubai Commercial Arbitration Centre
EBRD:	European Bank for Reconstruction and Development
ECC:	European Economic Community
ESOSOC:	United Nations Economic and Social Council
EUROPEAN CONVENTION 1961:	European Convention on International Commercial Arbitration 1961
EURO-ARAB ARBITRATION:	The Euro-Arab Chambers of Commerce Arbitration System

FIDIC:	The International Federation of Consulting Engineers
GAFTA:	Grain and Freed Trade Association
GATT:	General Agreement on Tariffs and Trade
GENEVA PROTOCOL 1923:	General Protocol on Arbitration Clauses of 1923
GENEVA CONVENTION 1927:	Geneva Convention on the Execution of Foreign Awards of 1927
GCC:	The Gulf Commercial Arbitration Centre
HAGUE CONVENTION 1927:	Hague Convention of on the Pacific Settlement of International Disputes of 1899
HKIAC:	Hong Kong International Arbitration Centre
IBA RULES OF EVIDENCE:	The International Bar Association's Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitrations
ICAC:	International Commercial Arbitration Court
ICC:	International Chamber of Commerce
ICI:	International Centre for the Settlement of Investments Disputes
ICSID:	International Centre for the Settlement of Investment Disputes
IMAB	Instituto de Mediacao e Arbitragem do Brasil
KADIN:	Indonesian Chamber of Commerce
KLRCA:	Kuala Lumpur Regional Centre for Arbitration
LCIA:	London Court of International Arbitration
MODEL LAW:	Model Law on international commercial arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985
MOSCOW CONVENTION:	Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technological Co-operation.
NEW YORK CONVENTION:	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
NCC1:	National Cooperative Insurance Co.
OPIC:	The Overseas Private Corporation OPIC
PANAMA CONVENTION 1975:	Inter-American Convention on International Commercial Arbitration of 1975
PCA:	Permanent Court of Arbitration at The Hague
RIYADH CONVENTION:	The Riyadh Convention on Judicial Cooperation of 1983
SAMA:	Saudi Arabian Monetary Agency

SIAC:	Singapore International Arbitration Centre
TAO:	Thai Arbitration Office TAO
TICA:	The Tunis International Arbitration Centre
UCP:	Uniform Customs and Practice for Documentary Credits
UNCITRAL:	United Nations Commission on International Trade Law
UNCC:	United Nations Compensation Commission
UNCTAD:	U.N. Conference on Trade and Development
UNIDROIT	International Institute for The Unification of Private Law
UNIFIED CONVENTION 1931:	The Unified Convention on Investment of Arab
VENAMCHAM	Venezuelan-American Chamber of Commerce and Industry (VENAMCHAM)
WASHINGTON CONVENTION:	Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965
WIPO:	Intellectual Centre for the Resolution of Intellectual Property Disputes
YEARBOOK COMMERCIAL ARBITRATION	ICCA's Yearbook of Commercial Arbitration (published by Kluwer)

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Chapter 1

INTRODUCTION

1. THE HISTORICAL BACKGROUND

(a) Generally

Arbitration is now generally accepted as a principal method of solving disputes in international commercial transactions. The effectiveness with which its institutions are embedded locally differs from one nation to another. This research examines the state of practice in Saudi Arabia. At this point, it is important to recognise that arbitration is not a new way of settling disputes in the Islamic community in general and the Kingdom of Saudi Arabia in particular. However, the recent history of arbitration in the Saudi legal community has not been smooth. When the basic law of Arbitration Royal Decree No. M/46 dated 12/7/1403H 1983 was issued it was not consistently applied. This made the legal community and government officials think seriously about reforming it.

Because of our belief in international arbitration, this study takes a panoramic view of commercial disputes in Saudi Arabia. Firstly, we examine the place arbitration held in pre-Islamic and Islamic history; secondly, where modern Islamic arbitration practice stands among other regional and international arbitration laws, and thirdly, we consider what might be done to reform it. In particular, it is very important to see how far Saudi Arabia, with its current arbitration law, is able to cope with the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. It is also necessary to explore whether Saudi Arabia has the capacity or flexibility to find a legislative instrument that differentiates between national and international arbitration. It is also important in this regard to establish a distinction between national and international public policy, and regulate the relationship between arbitral tribunals and the courts on those grounds.

At a time when practitioners are calling for the internationalisation of arbitration, I believe that it is my duty as a former Secretary of the Arbitration Board at the Chamber of Commerce and Industry in Riyadh, Saudi Arabia, to draw upon my experience in order to discuss, evaluate, and present the situation as it stands today. It is also my responsibility to propose a route towards harmonisation with minimum international standards of arbitration. It is not sufficient merely for me to state all the historical and modern principles and theories of arbitration, which many Arab international jurists have already documented. The idea of

providing a historical background to arbitration is not solely for the purpose of historical research. However, as we will see in later chapters when we describe the Saudi legal system, *Shari'a* law and Islamic jurisprudence are the main laws of the land, and they are applicable whenever there is a statutory vacuum. Therefore, an Islamic solution has to be found as a result of discussing any problem related to arbitration in this research.

Also, the purpose of this part is to set down the reasons that have made people believe that Saudi Arabia, of all the Arab Middle Eastern countries, is indeed the one in most need of a well-developed arbitration system, since some of the major banking and commercial activities are not permitted to come before the *Shari'a* courts. Common practice proves that the international investor refuses, most of the time, to arbitrate in the Kingdom, and also how some comments to make about the supervision of the judicial bodies over foreign arbitral awards. All these factors have to be considered when starting the process of evaluating arbitration practice in Saudi Arabia.

(b) Arbitration Before the Existence of Islam

It is very important to understand the concept of arbitration in the Arab mentality in the era before Islam. The best way of doing this is by describing the social and cultural systems as well as the ways of settling disputes.[1]

Arbitration and the Social Life of Arabs

Pre-Islamic literature indicates that Arabs knew about arbitration before the emergence of Islam (Mojamha al Amthal *by* Abu al Fadel Almidany Vol. 2 1352H:499-500). At that time, it was the predominant means of settling disputes between individuals, and also between tribes. At that time, there was no organised form of justice, and therefore the main way of solving disputes was to consult an ordinary person, who was usually an elder. The tribal system was the dominant system in the Arabian Peninsula. Each tribe had its own territory, which separated it from various other tribes. The pivot of the tribal system of government was the tribe's ruler (the *sheikh*), who was responsible for many things such as external relations, internal relations, and some times arbitration within his tribe. That position was inherited by certain ranks through succession. Very often, we find in pre-Islamic poetry, someone who took pride in the fact that

[1] Many of the primary sources consulted were Arabic books, translated for the purposes of this research project.

the presidency came to him voluntarily with no effort, since it has been held by was his father and his other relatives' before him. The poet Thu' El Sbah Aladuany says:

> "We are the Givers of Justice, and our justice is unassailable."
> (Ibn Qutaba *in* Al Airian 1986:476 and Qatura 1995:23)

The tribal communities in the Arabian peninsula were not familiar with the judicial system as we understand it today (Abu Taleb1982:27). The settlement of disputes was a matter that related to the concerned parties in the first instance. The person who undertook settlement was an ordinary person who did not enjoy either any public authority, or judicial immunity. The person fulfilling this role was given the title *hakam* – the ruler or judge, and his powers for settling disputes were not vested in him by the tribe's leader *(sheikh)*. Rather, his selection was made and powers given, by the disputing parties. The disputing parties normally selected an individual who had particularly valuable qualities, such as the knowledge of the habits of the tribe, or who was renowned for being just, honest, truthful and impartial, intelligent and able to understand quickly, and therefore able to settle their disputes.

Arabs used to select as rulers (judges), people of honour, honesty, truthfulness, authority and experience. Pre-Islamic history indicates that certain families used to inherit the mission of arbitration. The sons of the individual who usually acted as arbitrator were given a chance to become acquainted with all types of disputes, and the way in which they were settled', like the tribe of Bny Sahem (Othman 1989: 38). The people were convinced that these sons had the mental ability and necessary knowledge and experience to settle the suits and disputes. Furthermore, at that time there was nothing to prevent women from acting as arbitrators. History has preserved the names of some women who acted in this capacity and were famous for it (Othman 1989: 38). Among them is Hetam Bent Al Ryan about whom poetry has been written:

> "If Hetham says something, believe her. It is the truth".
> (Mojamha al Amthal *by* Abu al Fadel Almidany Vol. 2 1352H:499-500).

The Arabs were also familiar with specialised arbitration. We find that they often resorted to clergymen and clergywomen to settle their disputes (Othman 1989: 38). The reason for this is probably because it was assumed they were able to ask for the support of metaphysical powers, and that these powers then enabled them to know the truth. A second reason could also be that they were the most experienced with regard to the habits and traditions prevailing in their communities, and therefore most able to reach fair and just solutions of the problems to hand (Qatura 1995:18). The Arabs before Islam were also familiar with the so-

called `marketplace arbitrator' or the `*souk* judge' who used to sit in *Okaz* market to settle the commercial matters of people. Okaz was the main market in the Arabian Penninsula. It was the place where traders, politicians and, even royals, came every year to sell and buy what they needed. This market had arbitrators who not only settled classic trade disputes, but also more unusual issues, such as arguments between two people as to who had a more noble background.

There are no accounts or stories about any of these arbitrations, but it is mentioned that the Emperor of Faris (present-day Iran), would send his messengers to sell expensive items so he would know who were the Arab high society, so he could depend on them for his own interests (Al Afgani 1996:281). There were no specific rules to determine the subjects or matters that could be submitted to the arbitrator. Consequently, we can say that the arbitrator was a specialist in the settlement of any dispute, whether it related to inheritance, possession, or criminal matters such as murder, robbery or adultery. Moreover, arbitration before Islam was not limited to traditional legal disputes, but extended to disputes outside the conventional context of the law. This is the reason why it was common for two persons or two tribes to come to an arbitrator to determine who was the more noble, or of higher rank.

At this time, arbitration tended not to be organised formally. Accordingly, upon settlement of a dispute there were no formal procedures for the arbitrator or the adversaries to follow (Hassan 1964: 51-52). Moreover, there was no specific place for the arbitrator to carry out his job. Though he very often settled disputes at his home, there was nothing to prevent him from doing so somewhere else. Generally, we have no information to indicate that the arbitrators received fees or wages for settlement of disputes. We can understand that the selection of a person as arbitrator was considered an honour rather than a financial compensation. Moreover, most of the arbitrators at that time came from high-ranking families and, therefore, did not need any financial reward (Othman 1989 38).

As we mentioned above, the arbitrator did not practise as part of a public authority and therefore his judgment was not in itself binding on the adversaries. Also, there was no machinery for enforcement in place, so the parties could ignore judgments. In our view, however, there were several reasons for making the losing party accept judgment and carry it out. For example, the fact of not executing the award would affect his reputation which might lead, if it became known, to the refusal of that arbitrator or other arbitrators from the settlement if any dispute to which he was party. Consequently, we can say that the losing party was subject to the ruling of arbitration under the authority of tribal influence and customs, or the authority of public opinion, or fear of fighting, which could take place if the judgment was not accepted.

Laws and Customs of the Arabs

Arab arbitrators had no written laws but referred to their customs, traditions, experiences and practices (Othman 1989: 39). Sometimes, an arbitrator would pass judgment upon his view of what was justice. They would accept a system that went along with their concepts and understanding and in time, it would become an unchangeable custom. Each tribe had their separate customs and traditions, different from those of other tribes, though some also had various customs and traditions in common (Othman 1989:39). For example, there were very different ways of treating hostages at the end of inter-tribal war, ranging from execution, to slavery, to release. Similarly, the treatment of women, children, and the elderly also varied from tribe to tribe. Some examples that could be given in this regard include the fact that the eldest son was allowed to marry his father's wife. This practice was eliminated at the coming of Islam and was forbidden in the *Qur'an:*

> "Do not marry any woman whom our fathers have already married, unless this is a thing of the past; it is a shocking act and disgusting, and the worst possible way"
>
> (The Sura of Women, Verse 22)

Women were not allowed to inherit anything, as they were considered the property of the husband, who only had the duty to feed them.

Shalabe, discussing the system of judgments in his book `Fajer Al Islam', quotes Mr. Ahmed Amin, a famous Egyptian historian. He says:

> "The Higaz people received from the civilised world nothing but some traces of Judaism and Christianity and some of their wisdom and philosophy in an indirect way. They had some jurisprudence principles of the settlement of their disputes. They also had some characteristics in the field of financial and non-financial matters which they practised in the light of what was left to them from the law of Abraham and his son Ismail, Peace be upon Them, and what was conveyed to them from the law of Moses, which entered their country with the Jews who brought it from Al-Sham (that part of the Middle East where Lebanon, Syria, Iraq and Jordan are today). We can say that the Arabs were a nation that knew neither reading nor writing nor mathematics. So illiteracy and lack of common knowledge collaborated to keep the Arabs at that time from developing their culture and science. They had no culture of their own that was built on known foundations. They had no sciences written in any books. But they had lots of knowledge in various fields such as astronomy, astrology and medicine, which they inherited from their grandfathers and other surrounding cultures." (1983:39).

The judgments of the Arab *hakam* introduced several procedures and traditions, which have survived for a very long time. In marriage, for instance, besides the traditional Arabic marriage, which is carried out by an engagement, dowry and a contract before witnesses, other types of marriages were introduced. For example, "The *Shigar* marriage", which comes as a

result of a conciliation or agreement by the adversaries in a certain dispute under which each of the two parties would marry his daughter to the other, so each woman was considered as a dowry for the other (Shalabe 1983:45). There are also indications from our reading, in this field, that judgments before Islam did not give inheritance to the youngest son of the deceased, and that the inheritance would pass to the brother of the deceased or the uncle of the youngest child. The role of the uncle, in such a case, was to act as guardian to the young child, and not to use the money for his own benefit, but for that of the child. The guardian, moreover, should give the son his father's money when he reached adolescence. Because of this bad practice before Islam, the *Qur'an* asked Muslims to be trustworthy in dealing with orphans:

> "Give the relatives their rights"
>
> (The Sura of Al Esra,Verse 26).

Arab scholars have tended to present the world before Islam as one of religious disorder with a political and economic system in chaos, and evidence of unfairness in judgments and arbitrations. Some philosophers such as Ibn Khldon, quoted by Shalabe, described this state in a book, which dealt with the status of Arabs before Islam:

> "They had no limit in taking monies. They did not care for rulings and judgments and preventing people from wrongdoing. They cared for the monies they took."
>
> (1983:47)

Imam Mohammed Abdo Saed, in the *Tawheed* message, quoted in Shalabe, also describes the Arab customs and traditions before Islam:

> "The Arab nation was made up of conflicting tribes involved in wrongdoing and each tribe took pride in killing its sister tribe, slaying its heroes and capturing its women as a result of a particular dispute involving murder, rape, robbery, debt or other wrongdoing."
>
> (1983:47)

Stories of Prophet Mohammed - Arbitration Before Islam

In a famous pre-Islamic dispute between the Arab tribes over the re-building of *Al Kabh*[2], which was destroyed by a fire and heavy rains, causing the walls to crack. The people of Kuraesh wanted to re-build and restore the *Kabh.* This entailed everybody participating in the reconstruction process, but when it came to the holy part of the *Kabh,* everybody wanted to take the lead in the re-building of this particular section and consequently, the tribes of Kuraesh had

[2] Al Kabh is considered by Muslims to be The House of Allah (God) built by Prophet Abraham. At the present time, Muslims pray towards Mecca wherever they are.

a dispute and as a result tribal wars were about to break out. A person called Omeah Ibn Al Mogerah, suggested that the people of Kuraesh should arbitrate the matter, instead of fighting. Due to the fact that the Prophet was well known for being a trustworthy individual, even before Islam, everybody suggested that he should act as arbitrator. In the midst of their discussion the Prophet entered the Mosque, so they placed the dispute in his hands. His decision was so simple. He suggested bringing a piece of fabric, placing a building block in the centre with a member from each tribe holding a corner of the fabric, thus eliminating any squabbling and ensuring it became a joint tribal effort (El Serah Al Nabwba *by* Ibn Hesham 1411H Vol. 2:19).[3]

(c) Arbitration After the Emergence of Islam

After the emergence of Islam, the concept, definition, and theory of arbitration developed further, as will be seen later when we describe the Islamic Schools of jurisprudence. However, in the early stages of Islam, it is important to mention the organisation of the government, and this will include the official ways of settling disputes. In Islam, disputes no longer became a matter of concern to the parties alone, but also to Islamic society as a whole. In the early stages, we will see that judges would spend years without having any disputes brought before them, thus indicating the uncontentious way of life Muslims led at the beginning of the Islamic era.

The Era of the Prophet Mohammed

Islamic law appeared first in the Arabian Penninsula at the beginning of the 7th century. Muslims believe that Islamic law came to correct the corruption in their belief, manners and behaviour. They also believe that Islamic law confirmed what was right and enforced it, and prohibited what was wrong, and indicated the benefits of the good and the disadvantages of the bad. It is worth mentioning that Islam is considered by Muslims to share common roots with Judaism and Christianity. Muslims believe in the *Torah* and the *Bible,* as well as Abraham, Moses, and Jesus Christ, and that their religion is considered to be an elaboration of these religions (Shalabe 1983:25).

It is customary in Western legal theory to separate judicial authority from legislative authority and executive authority. But the situation at the time of the Prophet Mohammed was not like this. The Prophet was the sole point of reference for legislation. Muslims would refer to him to find out the rules of Allah (God) for their affairs. The Prophet was the first judge and

[3] This state of affairs is further described in Qatura 1995:21-22 and Shalabe 1983:39.

arbitrator of Islam. Adversaries used to go to him with their disputes. He would hear their statements and then give judgement. Allah (God) would sustain his judgment (jurisprudence), if it was correct, otherwise Allah would reveal to him the correct decision and then pass a new judgement. The *Qur'an* says:

> "If you should quarrel over anything, refer it to God and the Messenger, if you believe in God and the Last Day; that will be better and finer in the long run"
>
> (The Sura of Women, Verse 65).

This situation changed after the death of the Prophet, as we will see in later stages. Life at that time is perceived to have been simple. Social order was attributed to the Prophet's influence. Life was considered to be a journey, at the end of which there was a final destination, and human beings would have to work in good faith to reach their peaceful destiny, Heaven.

During this time, the Prophet Mohammed set out for the Islamic community. the rules by which they had to live as Muslims. He gave many different pieces of advice in many different situations, and Muslims today follow these very same rules in many aspects of their lives. The Prophet is considered the first arbitrator in Islam. It was God who asked him, in verses of the *Qur'an*, to act as an arbitrator between Muslims. The *Qur'an* says that:

> `Muslims will have no faith unless they appoint you as arbitrator.'
>
> (The Sura of Women, Verse 65)

Though he became famous for refusing to hear the parties on their first application, in order to force them to make efforts to settle their dispute peacefully, the Prophet Mohammed still solved many problems in his lifetime, either related to family matters such as marriage, divorce, or to labour relations. In labour relations, for example, the Prophet instructed the employer:

> "Give the employee his wages before their sweat has dried."
>
> (Abu Huraera *in* Kashf Al Kinah wa mozeal Al Albas 1985:160)

Also, at the time of war the Prophet asked Muslims not to cut trees, kill animals, women, children or the elderly.[4]

[4] This was the Prophet's message to his people when they had to defend themselves against the warring of the non-believers in Bader (the first Islamic war).

As mentioned above, at that time, life was very simple and people possessed a very strong faith in their Prophet and religion. In certain circumstances, the Prophet would remind the parties of the punishment inflicted by God on those who presented a false claim. This can been seen in the case of the two men who came before him, requesting settlement of an inheritance dispute, but had no documents to prove their claim. The Prophet informed them that as a tolerant person he would decide in favour of the party who was better represented, but if either of them came with a false claim, he should consider himself as being in Hell. The parties wept, and in order to be sure that neither took more than they deserved, they decided to divide the inheritance equally between them (Nel Alatwar *by* Alshokani 1971: 314).

Another case which should be mentioned, is that of the woman who came before the Prophet (Hend Bnt Otba) complaining that her mean husband had not given her enough money to feed herself or her child. She said that she could have taken the money, but feared to, since that could be considered as stealing. The Prophet considered her case and decided she was free to take enough money for food for herself and her child. This principle was developed in Islamic jurisprudence to give the wife the right to ask for a divorce in similar cases (Al Gandor 1992:244).

The Era of Orthodox Caliphs

An era now known as that of the Caliphs followed the death of the Prophet Mohammed. The judicial system in the era of Abu Bakr Al-Siddique (the first caliph in Islam) remained as it was in the era of the Prophet Mohammed (Peace upon Him). Caliph Abu Bakr undertook the settlement of disputes himself, as he was the Public Ruler. Reading the references that are available, they do not show that Muslims desire an alternative method of dispute settlement. Moreover, the second Caliph, Omar Bin Al-Khatab spent two years without anybody submitting a dispute to him. Abu Bakr did not separate the settlement of disputes from the governorship, because of the governor's small workload, at that time (Arnos 1934:12). When the Islamic nation expanded in the era of Omar Bin Al-Khatab, (the second Caliph), and the Arabs mingled with other nations who had recently embraced Islam, the governor's duties grew heavier thus requiring the separation of the judicature from the governorship. Consequently, Caliph Omar appointed people to administer justice in some parts of the Islamic areas such as Koufa, Bisra (in Iraq) and Egypt because it had become impossible for the caliph or his deputy to combine public affairs with the settlement of disputes. The situation developed to such an extent, in the area ruled by Caliph Omar, that the personnel who took on the duties of the judicature were paid

from the public treasury, and were officially called judges *(qade)* (Akbar Al qudah *by* Wakeah 1950: 105-106).

Up until the era of Othman Bin Affan, (the third caliph), the judge used to sit between the adversaries in his house. This situation developed over time, and he started to sit in a public place such as the local mosque. When his professional obligations grew, Othman Bin Affan specified a special building for the judicature. Inspite of the sedition and disorder that had started to enter into Islamic society in the time of Ali Bin Abi Taleb (the fourth caliph of the Prophet), Caliph Ali did not neglect the judicature or other matters of state (Arnos 1934:17).[5]

In general, the judicature was independent and respected in the era of the orthodox caliphs. Judges were selected for their wealth of knowledge, good manners and piety and also those who showed the ability to make jurisprudential judgments. Moreover, the orthodox caliphs looked after their judges' well and gave them guidance. One example of this is the letter of Omar Bin Al-Khatab to his judge, Abu Mousa Al-Ashari in Al-Koufa (in Iraq) encouraging him to restore `justice and fairness' amongst his people. During this period, judges based their judgments, if possible, on the Holy *Qur'an,,* otherwise they used the *Sunnah* which is a collection of the Prophet's sayings and actions. If they did not find an appropriate ruling, they would go out and inform the people of the situation, and ask them if anyone had witnessed the practices of the Prophet Mohammad. If no such authority existed, they would then consult the highest, most trustworthy people in the Islamic community, who would then rule on the case (Arnos 1934: 19 and Othman 1989:47-48).

As shown above, generally in Islamic law, the judge or scholar has to give priority to the words of the Holy *Qur'an* when giving an opinion. For example, some matters relating to inheritance are mentioned in the *Qur'an* and, therefore, not open to scholarly interpretation or to alteration by reference to other sources. When the *Qur'an* specifies that a man should inherit double that of a woman, it is because women in Islam are not required to finance their families. The man has that duty, even if the woman is richer. Of course, this is not a binding requirement, since men and women are free today to arrange their finances as they wish.

Similarly, the *Qur'an* stipulates that Muslims should pray five times a day and give *zakat* (charity), without mentioning exactly how they should pray, or how much money they should pay as *zakat*. It was left to the Prophet to show Muslims how to carry out these key Islamic practices.

[5] New Islamic groups existed in this era and whilst some were strict, others were more tolerant.

During this period, the judges had neither books nor records to enter their judgements in because the people accepted the judges' rulings, and sentences were carried out immediately. Due to the fact that judges passed sentences and enforced them at the same time, it is clear that there was no distinction between the executive and judicial roles in Islamic society. Also, it is worth mentioning that many researchers such as Othman noted that the judges' jurisdiction was limited to civil matters. On the other hand, since criminal matters were very limited, they remained under the jurisdiction of the caliphs (1989:47-48).

In reading the old Islamic books, there is no mention of the reasons why the judges' jurisdiction was only limited to civil matters, although it is reasonable to assume that one of the reasons was that Islamic society was very small at that time, and any problems were therefore controllable by the Islamic caliphate. It is also likely that the amount of crime was limited.

The Era of Bani Omiah and Bani Abbasis (Third and Fourth Islamic Eras)

Moawiah Bin Abi Suffian became caliph in the year 661H and changled the caliphate system to a hereditary system. The caliphate continued in the Bani Omiah era until their last caliph (Morwan Bin Mohammed) was conquered and killed by Abbasis in the year 750H, when the caliphate was transferred to the Abbasis Empire (Shalabe 1983:126). Despite the turbulence and disorder, which dominated the Islamic community before the establishment of the *Amawi* government, the judicature was not affected. It continued to be independent from politics. Rulings would even be imposed on the governors themselves. During this period, the judges did not record their judgments in digests since the judgments were carried out either by themselves or their deputies. However, some of the judges in Egypt, appointed by Moawiah, thought it appropriate to record past rulings and establish precedents. At that time, the judges more often made jurisprudential interpretations, not abiding by a particular opinion. At this point, the four Islamic creeds had not yet been developed, so the judge based his ruling on the *Qur'an* and *Sunnah.* If he did not find a ruling, he looked into the previous consensus of scholars, and if he did not find anything there he would make his own jurisprudence. But often he would refer to the caliph or the governor for his opinion (Arnos 1934:30).[6] The Amawis people were famous for being devoted to and caring for their judges, respecting their rulers, and selecting the best, most pious, devout and God-fearing people for this job.

[6] The caliph at that time was someone with a strong religious background and therefore many matters would be referred to him for his decision.

At the beginning of the Abbasi era, scientific, economic and social activity flourished. Jurisprudence made large strides towards perfection and excellence. Its context widened to include all the new developments of modern culture. The activity of scholars did not stop at solving existing problems. They started contemplating matters that had not occurred, and exerted their best jurisprudential efforts in the rulings on such assumptions. Scholars had different opinions, and consequently the four Islamic creeds of Al-Hanabila, Al-Hanafia, Al-Shafiah and Al-Malikia appeared, which will be elaborated on at a later stage (Arnos 1934:40).

Naturally, a situation such as is described above, would have influenced the judges and therefore parallel streams of jurisprudence developed, each associated with its own creed. Each judge now followed a particular creed on which he based his rulings. The parties would refer to a judge who followed their creed. Judges were appointed in territories according to the creed of the majority of the people. In Iraq, for example, the Hanafi judges were in the majority. In Morocco, the judges were from the Maliki School, and in Egypt the Shafi judges were in the majority. If the parties came to a judge who did not observe their creed, he would refer them to a judge who did, to settle their dispute. Eventually, each town would have four judges for each of the four creeds (Madkor 1964.30).[7] At this time, a new judicial title appeared (Supreme Judge - *Qadi al Qudah*), whose duties included the appointment and discharge of judges, as well as the supervision of their work. His office was called *Dewan Qadi al Qudah* - the Bureau of the Supreme Judge, and his employees included many experts (Arnos 1934:96-97). The Abbasis have been criticised for intervening in the judicature in order to ensure that the sentences were passed according to their wishes. This made several scholars refrain from taking judicial office because they feared saying something contradictory to Islamic law in response to the wish of the caliph (Shalabe 1983:131).

During this period, the jurisdiction of the judge expanded from civil cases to encompass criminal matters (Ibn Kaldon 1322H:192). The judges wore distinctive clothing; they wore black, which was the trademark of the Abbasis (Hassan 1964:309). They wore long caps with black turbans on their heads. Judges started to have clerks to assist them. During this time, the judges depended on their creeds when passing judgment, as we have indicated. All such judgments fell within Islamic law and jurisprudence, as foreign laws had not entered the practice, at the time.

[7] The founders of these Islamic creeds did not have any problems with each other. They simply had differences in the preferences they gave to the different sources of Islamic jurisprudence. At the same time, these creeds were so flexible that they were practised differently in different Islamic cities.

The Judicature in the Ottoman Era (The Fifth Islamic Era To Date).

The Islamic world came under the rule of the Ottomans in the year 1516 when they took over many parts of the Arab world including Egypt. It was not long before most of the Islamic world was under their control. It remained so until the end of the Ottoman Empire during the First World War 1914-1918. The Ottomans kept the judicature for themselves in terms of the right to appoint an Ottoman judge for each part of their empire. He was called the soldiers' judge, *(Qadi Al Askar)*, who would appoint his deputies according to the prevailing creed in each region. The ruling of the Deputy would be entered only when approved by the soldiers' judge (Abu Taleb 1982:39).

Several Islamic historians have noted that among the worst things the Ottomans imposed upon the Islamic world, was their expansion of the definition of the phrase `Islamic religious tolerance' (Abu Taleb 1982:39). Accordingly, they did not apply Islamic law to the non-Muslims who were under the rule of the Ottoman Empire, nor to a greater extent to foreigners. The Ottoman Empire, for example, had consular courts with the jurisdiction to decide disputes arising between foreigners, or between foreigners and Muslims. This led to the introduction of several foreign laws, and the application of Islamic law was limited to civil matters only.

In the mid-nineteenth century, some jurisprudents codified the Chapters of Transactions and judicature from the Hanafi creed jurisprudence. The codification was called "The Judicial Regulations Magazine – *Majalet al ahkam Aladleah*". The regulations of the *Majalet* were applied in several countries that were subordinate to the Ottoman Empire. Also, Mohammed Qadri Basha (one of the most famous pashas of Egypt and an Islamic thinker), took a similar step by codifying the *Waqf* (endowment regulations), according to the Hanafi creed and called it `The Judicial Law And Justice To Eliminate Any Endowment Problems" – *Kanon Al A Awkaf*). He also codified the marriage regulations in a book called *Ahkam Alahwal Al Shakseah.* However, future legislators never used these regulations (Abu Taleb 1982:40).

In Libya, Sheikh Mohammed Amir formulated the regulations of transactions in the Maliki creed. Also, in 1306H Sheikh Mohammed Hafiz, an Islamic Sheikh in Tunis formulated the Regulations of the Maliki School in the same way as mentioned above. In Saudi Arabia, finally, Sheikh Ahmed Al Maky, the Supreme Judge of the *Shari'a* Court, drafted some

codifications based on the Hanbali School. However, Islamic legislators never used them (Abu Taleb 1982:40-41).[8]

Foreign laws remained dominant in most Islamic countries. In several Islamic countries which were colonised, the coloniser imposed its power on the judicature. Even when these countries got their political independence, Western laws were applied. Nevertheless, some of these countries are experiencing today what is called 'Islamic awakening', and are calling for the application of Islamic law. It is important therefore that a country like Saudi Arabia, which has never experienced political Islamic movements should try to modernise Islamic law, so it can be clear and applicable in all types of disputes, as we will see later in the project.[9]

(d) Introducing the Four Jurisprudence Schools

The General View

Even though we have concentrated on the official ways of settling disputes in the different Islamic eras, mentioned above, it doesn't mean that people did not go to arbitration. This was reflected in the different opinions on arbitration mentioned in each of the jurisprudence schools. Sometimes the parties would not refer to the judge to settle their disputes, but would rather resort to someone who was not a judge to act as arbitrator, either because the judge was far away or to minimise the procedure, or for some other reason. As we have indicated before, arbitration was known in the pagan eras, before Islam. The rank of arbitrator is less than that of judge since he is chosen by the parties and not appointed by the authorities.

Arbitration is one area of commercial law where *Shari'a* law is sometimes applicable and this demonstrates that some features of the teachings of *Shari'a* schools are still relevant today, particularly in cases where there is a statutory vacuum. Therefore, it is very important to highlight the aspects of arbitration in the four Islamic schools.

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[8] These thinkers became active in codifying Islamic jurisprudence because they believed that Muslims were starting to loose their legal identity.

[9] This does not mean that the general principles mentioned in Islamic jurisprudence are different from the principles mentioned in Western laws. For instance, in the law of contract common doctrines exist in Islamic jurisprudence, such as those rules relating to offering an acceptance, consideration, duress, mistake, misrepresentation, events, where a contract is considered frustrated, etc..

The Hanafi School

The Hanafi School was established in Kufa (Iraq) by Abu Hanifa Al Noman ibn Thabit (699-767 AD). This school was developed in a unique era when the Arab nations started to mix with other nations, such as the Farsi Empire (Shalabe 1983:171). This school was characterised by subjective opinion (*ra'y*), which was the result of discussions among his followers, where each one would have an opinion in a specific matter, which was then submitted to him for a final decision. However, he was never so extreme as to think that his opinion was the right one. Priority was always given, moreover, to the *Qur'an* and the sayings of the Prophet Mohammed (the *Sunnah*). This school didn't stop at just dealing with traditional problems that faced Islamic society. However, new problems were examined and often anticipated by the use of reasoning by analogy (*qiyas*).

Furthermore, recommended and equitable opinion (*istihsan*), and a consensus of opinions (*ijma*), constituted other very useful principles of jurisprudence. In this school, however, custom (*urf*) was not a source of law but an authoritative reference in case of a lack of other sources (Shalabe 1983:172). The Hanafi doctrines hold that arbitration is legal because it is less complex then resorting to the courts. Moreover, they hold that arbitration is legally quite close to compromise (Mu'in el-Hukkam *by* Altrabusly 1973:24-25).

The Maliki School

The Maliki School was founded by the jurist Malik ibn Anas (713-795 AD). He was born in Medina (a holy place in the Arabian Penninsula) (Shalabe 1983:184). Since it was developed in the town where Islam first appeared, it is considered to have been established in a unique academic atmosphere. The most valuable piece of work in this school is a book called *Al-Muwatta*, which contains the selective consensus (*ijma*) of Medina legal scholars, and is mainly based on the *Qur'an*, the Prophet's sayings, deeds (*Sunnah*), and by analogical reasoning (*qiyas*).

The Maliki School is characterised by its preference for local Medina customs, since it is assumed that it is taken directly from the Prophet. Public good or interest (*maslaha*), is an additional valid principle of jurisprudence in this school (Shalabe 1983:184). The Maliki scholars have trust in arbitration unless it contains a flagrant injustice. The effect of the arbitration is restricted to the parties and it has no effect on third parties (Tabisrai el Hakam *by* Ibn Barhun 1958: Vol. I:55).

The Shafi School

Abdullah Muhammad ibn Idris Al-Shafi, the jurist, born in Egypt (796-819 AD) founded the Shafi School. It is considered to be a development of the jurisprudence of Higaz (Western Saudi Arabia) and Iraq (Shalabe 1983:192). Even though, at the very beginning, Sheikh Shafi was influenced by the Hanafi and Maliki Schools, he soon founded his own independent school and method of thinking. His method, however, gives the impression of being torn between new ideas and traditional teachings.

The source of jurisprudence in this school varies. Shafi stressed the equal importance of the *Qur'an* and the *Sunnah.* Also, some attention was paid to consensus (*ijma*). However, reasoning by analogy (*qiyas*) was not of great importance in this school (Shalabe 1983:195). This school holds that arbitration is legal whether or not there is a judge in the town where the arbitration has arisen. However, according to this school, arbitrators have a lesser role and status than judges, as their appointment may be revoked, whereas judges may not be dismissed. According to this school, arbitration is particularly efficient when there is widespread corruption among the judges (Adab al kaji *by* Al Mawardi 1971:379).

The Hanbali School

This School was founded by the jurist Ahmad ibn Muhammad ibn Hanbal (780-855 AD) who was born in Baghdad, his father having passed away when he was a child. His mother raised him therefore, and directed him to study religion and jurisprudence (Shalabe 1983:200). He had the chance of obtaining a religious education from Sheik Al Shafi. And also what assisted him in his education was the opportunity of travelling to many parts of the Islamic community such as Yemen, Mecca and Medina. This school is centred on the *Qur'an* and the sayings and deeds of the Prophet (*Sunnah*). This school made few concessions to personal reasoning (*ra'y*), reasoning by analogy (*qiyas*), and even consensus (*ijma*). This school, moreover, is strict in its religious rituals but tolerant in commercial transactions (Shalabe 1983:200-201). The Hanbali School holds that arbitration is legal and has the same binding effect nature as when made by a judge. It also holds that the award made by the abitrator (who must have the same qualifications as a judge), is imposed upon both of the parties who chose him (Al Mughni *by* Ibn Qudama 1367H:107).

(e) The Concept of Arbitration in Islamic Jurisprudence

As mentioned above, arbitration has been developed in Islamic jurisprudence and therefore, this is the right time to mention briefly the concepts related to arbitration.

Arbitration Agreements and Arbitration Clauses

Academic writers have commented on the question of whether arbitration agreements are binding. What we have to know in this regard is that arbitration agreements are valid and not binding. They do not eliminate the jurisdiction of the courts and they are revocable, rather than binding (Adab al kadi *by* Al-Mawardi 1971:383). The *Medjella* condition for the validity of arbitration agreements, on the other hand, is that the dispute must already have arisen, and the parties must have agreed to arbitrate by offer and acceptance. The arbitrator must be appointed by name, and finally must have the capacity to be a witness (Durar Al Hukkam Fi Sharh Madjallat Al Ahkam, Article 1848 *by* Haidar).

Finally, as quoted in El-Ahdab, Ibn Taimiyya (one of the students of the Hanbali School which is officially applied in Saudi Arabia) concludes that any contract is binding unless it is contrary to public policy or deals with a purpose forbidden by God (1999:24 -25).

The arbitration clauses, on the other hand, were never considered or mentioned in Islamic jurisprudence (Saleh 1984:48). If this was ignored, it was not for a religious reason, but because trade relations with the Islamic community were not as extensive and advanced as they are today.

Arbitrators

The arbitrator must have the qualifications of a judge, and must maintain them until the arbitration is over. As mentioned in the *Medjella*, the arbitrator in Islam has to be Muslim, male, wise, free, and have a sense of fairness (Al Ahkam Al Sultania *by* Al-Mawardi 1973:65-66).

Having a certain amount of knowledge of *Shari'a* is a very useful instrument in order to avoid having the award set aside, should it be contrary to Islamic public policy.[10]

What has to be understood at this point is that the requirement that the arbitrator must be a Muslim is based on the *Qur'an*:

> "God will never grant disbelievers any way to [harm] believers"
>
> (The Sura of Women, Verse 140)

In addition to the requirement mentioned in the *Qur'an*, the requirement that the arbitrator has to be a male is based on the tradition that the Prophet Mohammed specifically left to the Muslims. The Prophet states:

> "No people will succeed if they refer such matters to a woman. "
>
> (Nel Al Alatwar by Al Shokani 1971:297)

The Good Conduct of Arbitration in Islamic Jurisprudence

A good-quality arbitration means strict equality of treatment. This requires fair dealing with litigants regardless of their race, nationality, wealth etc. The arbitrator in Islam is not authorised to decide the case without hearing both the plaintiff and the defendant, unless the arbitrator discovers that the subject matter of the dispute is forbidden in Islam, such as discovering that the source of the debt has resulted from gambling or other forbidden activities:

> "Whenever you judge between people, you should judge with [a sense of] justice."
>
> (The Sura of Women, Verse 58)

The arbitrator must give the parties the opportunity to submit their evidence, and there must be no time limit for so doing. Furthermore, the limit in this regard has to be within the discretion of the arbitrator, and it has to be highly flexible. The arbitrator in Islam has to adopt a very important principle when hearing the parties, and that is to consider whether substantive truth prevails over procedural technicalities. This principle is taken from a saying of the Prophet Mohammed:

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[10] Chapter 2 will give examples of the forms of supervision by the judicial body over arbitral awards in order to verify that it does not contain anything that is contrary to Islamic public policy.

> "I am only a man and, when you come pleading before me, it may happen that one of you will be more eloquent in his pleading and, as a result, I adjudicate in his favour according to his speech. If it so happens and I give an advantage to one of you by granting him a thing which belongs to his opponent, he had better not take it because he would be given a portion of hell."
>
> (Nel Al Alatwar by Al Shokani 1971:314)

The Award

As we have seen earlier, arbitrators in Islam have to settle their disputes according to minimum principles of fairness and according to Islamic public policy.

Most academic writers in Islam show that arbitration awards are final and binding on the parties (Al Tarbulse 1973:47). Furthermore, those academic writers who believe that awards have a jurisdictional nature, would call for considering the award final and having the effect of a court judgment. Also, the minority of academics who believe that arbitral awards are of a contractual nature, would consider as final, those awards which are based on the binding force of the contract. However, the binding element must be between the parties and nobody else, except when the intervention of the judge is applicable.

The General Principles of Enforcing the Award

In common practice the intervention of the judge is necessary, even if some Islamic academic writers are of the opinion theoretically, that awards are enforceable in themselves (Mu'in el-Hukkam *by* Al Tarbulse 1973:47). The duty of the judge, in such cases, would be to ensure that the award does not contain a flagrant error or injustice, or is contrary to public order. The award, moreover, has to be based on the *Qur'an* and the *Sunnah*. Also, the award has to show the minimum duties of the parties, and their obligation to respect their contracts, unless they forbid what is authorised and authorise what is forbidden in Islam.

The Request for Appeal or its Setting Aside

As we have seen already, the arbitral awards in Islamic jurisprudence have to be considered final and binding on the parties. Those who believe that arbitration has a jurisdictional nature think that arbitration cannot be set aside, unless there is an error on the face of the award. Such an error could happen if the arbitrator were to grant more than was requested

by the parties, or failed to address one of the claims. On the other hand, those who believe in the contractual nature of arbitration tend to suggest that the award may be set aside on the same grounds as a contract, and that would be apparent in the case of a lack of consent (Mu'in el-Hukkam *by* Al Tarbulse 1973:29). The request for setting the award aside can be filed at the highest court in the Islamic community. An appeal would be considered if the judge sets aside an award, or makes a new judgment with regard to the dispute.

Enforcing Foreign Arbitral Awards

As quoted in El Adhab, Abu Zakaria Al Ansari took the view that the arbitration taking place in an Islamic country should be considered as foreign, if both parties to the dispute were foreigners and the subject matter of the dispute was legal in their own religions (1999:51). As can be seen from this opinion, it recognises the concept of international public policy, which is well known in today's commercial arbitration practice. This opinion, however, is not unanimously accepted, and many Islamic writers believe that any arbitration that takes place in an Islamic community must be subject to Islamic law, regardless of the parties' nationality or religion. (Iman Abu Yussef *in* Badaei al Sanaei (1982:132).

When the arbitration takes place outside an Islamic country the situation is less clear. Some writers hold that the arbitration will be foreign and Muslim law does not apply whether it is of a civil, commercial or criminal nature (Abu Hanifa *in* Badaei al Sanaei 1982:132). Others like Abu Yussef, who is one of the students of the Hanafi School, mention that arbitration will only be considered foreign in criminal cases, in order to avoid double sanctions (Badaei al Sanaei 1982:132). The third view holds that the arbitration would be foreign only if it is between non-Muslims, but as soon as Muslims become involved, the arbitration ceases to be foreign regardless of its nature, whether civil, commercial or criminal (Mawaheb Al Jalil *by* Al Katab 1329H:355). Since we have an idea about the concepts and traditions of arbitration, and the official ways of settling disputes in different eras before and after Islam, it is important to see how these affect the practice in modern times in Saudi Arabia. To reach such a target, requires an explanation of the society that we are dealing with, since it constitutes a classic Islamic jurisdiction.

2. THE DEVELOPMENT OF THE SAUDI ARABIAN SYSTEMS

(a) Generally

Since the present theme concerns the concept of arbitration in pre-Islamic and Islamic history, it will be useful at this point to describe the region and the legal system in general terms. Any amendments to any arbitration law have to be based on the circumstances and traditions surrounding the legal system of the country under discussion. Therefore, we have to describe the Saudi Arabian legal system within the context of both the traditional concept of Islamic arbitration, and those reforms that evolved during the Kingdom's modernisation. This will help us to reach an understanding of how the situation should be amended and operated in the future.

(b) The Early Development of the Saudi Political System

Before the existence of Saudi Arabia, the Arabian Penninsula was divided into several parts. Some were under the control of the Ottoman Empire, others lived a primitive and tribal life until the coming of the first Saudi regime in the Najd area. The Hejaz area (the western part of Saudi Arabia) on the other hand, continued to submit to the Ottoman Empire until Sharif Hussein proclaimed independence at a later stage (Al-Johany 1984:55).

King Abdulaziz, the founder of Saudi Arabia, experienced international conflict when Kuwait was an area of political competition between the superpowers. As everybody in the region believes, Germany was eager to obtain the Baghdad railroad franchise, and wanted the railroad to start from Kuwait so it could spread its influence into the region, and exploit its natural resources. Russia, moreover, was competing with Germany and wanted to put obstacles in its way. England, on the other hand, was afraid of losing its influence in the region because of German competition (Othomean 1996: 245).

King Abdulaziz was witness to all these events during his stay in Kuwait. Many historians believe that he took the chance of acquainting himself with the nature of political conflict in the region and obtaining wide experience. Shortly after that, King Abdulaziz was able to regain the realm of his fathers, and unify the competing tribes into one country in order to concentrate power in the hands of a central government and to apply Islamic rules (Al –Johany 1984:56). A common feature of many newly formed states is that they follow the approach of administrative concentration, aiming for centralised control. In the context of Saudi Arabia, this process of centralisation evolved over time. In 1926, prominent persons throughout the Kingdom convened a meeting in Al Masjid Al Haram (The Mecca Great Mosque), and

pronounced Abdulaziz as the King of Al-Higaz and the Sultan of Najd. Shortly after that, these persons and scholars convened a meeting to name the country, The Kingdom of Saudi Arabia (Um Alqura Issue No. 123, 1927).[11] Since many of these dignitaries were religious, it should be noted that since the establishment of the Kingdom of Saudi Arabia, it has been associated with a religious reform movement. This movement was led by Sheikh Mohamed Bin Abdul Wahab, which made many Arab historians think of it as the birth of a new Islamic school, although it is actually based on the *Sunnah* schools.

It is worth noting, moreover, that the King did not immediately use a central body for the government. He appointed, instead, governors for all the regions, who would receive his instructions directly, in accordance with the circumstances prevailing in each region. Each governor, who had complete authority in all matters in his area, with the exception of military and foreign matters, was considered a personal representative of the King in his region (Al-Johany 1984:62). The aim of the King at this time was to avoid making revolutionary changes and to recognise the customs and traditions prevailing in different areas of the country.

(c) The Early Development of the Saudi Administrative System

Prince Saud, the eldest son of King Abdulaziz, governed the Najd region, and was in direct contact with his father in all matters concerning the tribes of the Najd area. At that time, the Prince was considered the administrative governor of his area and responsible for all internal affairs. Furthermore, finance administrators, judges or arbitrators would refer matters to him either for assistance or for execution. The Prince would have a sitting area called the *Al Dewan*, where he would hear all matters relating to the area under his authority, and would then refer them to the competent bodies. The Prince would also supervise the execution of all Islamic judgments and awards (Al-Johany 1984:65). It is worth mentioning that if a village did not have a judge, the Prince himself would have the duty of settling all types of disputes in that particular village or tribe (Al-Johany 1984:65). As mentioned, King Abdulaziz did not want to make revolutionary changes by forming a centralised government. People in that region were used to entering the King's or Prince's *Al Dewan,* without any prior formal procedure, when wishing to make a complaint. The tribal system among the people of the Najd region was still predominant. Therefore, in the early years of the Kingdom's formation, there was no immediate move to establish modernised central departments or administrations, as this would have been considered a revolutionary change, which had to be avoided at this delicate stage.

[11] Um Alqura is considered the official newspaper through which new laws and government policy are announced.

The administration of the Higaz region, on the other hand, was subject to special circumstances, which differed from those in the Najd and its attached regions. When King Abdulaziz entered Mecca in 1924, he made no change to the government's already established bureaux. Judiciary courts, moreover, continued their jurisdiction in Mecca Al-Mukaramah and no changes were made. King Abdulaziz established the National Council in Mecca to run its affairs, which it continued to do until the King appointed Prince Faisal as Deputy General Administrator of the Higaz region (Othomean 1996:302).

The National Council in Mecca is considered to be the first governmental body to have been established by King Abdulaziz (Um Alqura, Issue No. 3, 1924). It is also considered to be the nucleus of the Council of Ministers, which still exists today, and also the General Shura Council (Consulting Council), which was created in the second stage of the Kingdom's formation. The latter council continued for 30 years, until it was dissolved following the assassination of King Faisal, only to reappear after the Gulf War in 1990.

Advanced Development in the Administrative System

The development of the oil industry on the one hand, and an improvement in the country's financial situation on the other, have led to an improvement in services, and new areas of development. At that stage, hospitals, schools and post offices etc. were built. Shortly after that, the authority of the central government gradually became stronger, until it finally covered all parts of the state (Al Johany 1984:87-88). The present governmental arrangements date from King Abdulaziz's Royal Decree, issued in 1953, which established the Council of Ministers. After that time, the Council passed through various modifications to become more concentrated and comprehensive. After all the amendments, the Council of Ministers had the authority of full supervision over all-important affairs of state for all ministries. It laid down the jurisdiction of the Council by giving it the power to determine the policy of the state, both domestically and internationally (Al-Johany1984:88). It also indicated the role of the Council in approving the annual budget, the final account, opening new credits, covenants, franchise contracts, the formation of joint stock companies, licensing foreign companies to work in the Kingdom, conciliation in conflicts in which the government is a party, the creation of new jobs, the appointment of senior employees, and the disposition of properties of the state (Al-Johany 1984:88-89). The Council of Ministers Regulations is considered to be the modern constitution of the Kingdom, whilst the Holy *Qur'an* is considered to be the original one.

The Council of Ministers is considered to be the authority that eventually made the central government strong and finally enabled it to control governmental departments across the entire Kingdom. It comprised the office of the Presidency of the Council of Ministers, the Secretariat General of the Council of Ministers and the Board of Experts.

It is worth elaborating on the Board of Experts, since it is the legislative body in the Kingdom of Saudi Arabia. Article 45 of the Regulations of the Council of Ministers stipulated the establishment of the Board of Experts within the administrative structure of the department, its authority, and its financial aspects. The Royal Decree No 168 of 1974 stipulated that the department be attached directly to His Royal Highness, the second deputy of the Council of Ministers, and to consist of a president to be selected from legal specialists, a vice-president and some legal advisers, highly qualified in legal studies.

3. THE SAUDI LEGAL SYSTEM

(a) *Shari'a* Courts

The *Shari'a* courts in Saudi Arabia were first formally organised in 1927, but were subject to some general regulations that applied to all parts of the judiciary. Since the legal system is based on Islamic *Shari'a*, *Shari'a* courts have general jurisdiction over all types of matters. However, in common practice, we could say that they have jurisdiction over civil and criminal matters only. From a structural point of view, the *Shari'a* judiciary is a four-tier system, alongside the Board of Grievances and other judicial commissions, which were established at different times.

- *The Supreme Judicial Council:* This is the highest judicial authority, considering only matters of general principle referred to it by the sovereign or by the Ministry of Justice. It is composed of ten members and a chairman who holds the rank of minister. Its functions are administrative, consultative and judicial (Nader 1990:3).

- *The Appeals Court:* This court hears appeals from the decisions of the lower courts. There are two circuits of this court, one in Riyadh and one in Mecca. The courts are structured to include three different departments. The types of matters, moreover, are criminal, personal statute cases, and any other category that does come under any of the *Shari'a* courts (Nader 1990:3).

- *The General Courts:* These courts are considered to be the superior courts in the Kingdom. They were established by a resolution of the Ministry of Justice on the recommendation of the Supreme Judicial Council. Generally, they have jurisdiction over all *Shari'a* matters, but not over what falls under the jurisdiction of the Divisional Courts (Nader 1990:3).

- *The Divisional Courts:* These courts were established by a resolution of the Minister of Justice. They have jurisdiction over non-serious and financial claims not exceeding SR 8000, but excluding matters relating to maintenance and property (Nader 1990:3). It is important to mention that it is very rare to see parties arbitrate in matters that were originally under the authority of *Shari'a* courts. This is perhaps because most of the matters handled by those courts are not arbitratable in the first place, since most of the cases there are criminal-related matters.

(b) The Board of Grievances

The Board of Grievances was established by King Abdulaziz in 1954, who heard complaints and grievances in his *Dewan* (the King's public sitting area), in order to resolve them personally (Nader 1990:4). The establishment of the Board of Grievances occurred in two stages. Firstly, it was established by King Abdulaziz, and secondly, pursuant to Article 17 of the Regulations of the Council of Ministers (Nader 1990: 4). Initially, we could compare the establishment of the Board of Grievances with the Jurisdiction of Equity, which is central to English law. Through readings in comparative legal studies, legal experts have endeavoured, over the centuries, to expand the authority of the King's courts in England. However, the courts became overburdened by all these new cases. Consequently, it became necessary to change the common law and its procedure, which had became too burdensome for the Council. The alternative was to submit a petition to the King in his Privy Council, who would then pass judgement according to equity, without adhering to the rules and regulations of the law (Elliott and Quinn 2000:78-79).

The situation in Saudi Arabia was somewhat similar in that the parties had the opportunity to enter the King's *dewan* to submit their problems in order to find solutions in accordance with equity, instead of going to a *Shari'a* judge or arbitrator to settle their dispute in a formal way. In 1953, the Board was established formally within the Council of Ministers and its agenda was limited to receiving complaints, investigating them, and suggesting a draft decision to be sent to the concerned body, which might either accept or reject the given

reason(s) behind each case. The matter would then be addressed to the King, who would take whatever decision he deemed appropriate (Nader 1990:4).[12]

In 1954, the Board became autonomous by Royal Decree No. 2/13/8759 headed by a president with the rank of minister who is responsible to the King. Now the Board has residual jurisdiction over several matters. Basically it is responsible for the administrative justice in the Kingdom, which is to say it resolves complaints by members of the public and private bodies against any action by administrative bodies or agencies. It also has jurisdiction over commercial disputes and enforcing foreign judgments and arbitral awards in the Kingdom of Saudi Arabia (Nader 1990:4).

(c) Judicial Commissions

It was important for the Kingdom to continue coping with the new economic and commercial transactions and therefore new regulations had to be passed to take this into account (Nader 1990:5). Many regulations were progressively issued for companies, commercial papers, trademarks, labour relations etc. This legislation, of course, was not mentioned in detail in *Shari'a*, and therefore special judicial commissions were established to settle disputes and punish offenders under these new regulations. The Commission for the Settlement of Commercial Disputes, whose jurisdiction had been transferred to the Board of Grievances, was an early example (Nader 1990:6). At a later stage, several judicial commissions were established. Perhaps the most important commissions worthy of elaboration are the Commercial Paper Commission and the Commercial Agency Commission which both operate under the supervision of the Ministry of Commerce. In addition to these, other committees were established to hear matters that were still considered inconsistent with the principles of *Shari'a*, such as the Committee for Solving Banking Disputes under the supervision of the Saudi Arabian Monetary Agency, SAMA; and the Committee for Solving Insurance Disputes under the supervision of the Ministry of Commerce.[13]

This is not the right place to discuss whether the situation in Saudi Arabia conforms to what may be described as legal parallelism. However, there is a fear that this might occur in the future because of the presence of two different paths in Saudi legal education, which is divided

[12] See Royal Order No. 20941 (7/2/1388H) directing *Shari'a* courts not to hear complaints by private parties against the government authorities before referring the case to the King and receiving his permission

[13] It is important to mention that many of the commissions that operate in Saudi Arabia are in the process of being transferred to the supervision of the Ministry of Justice instead of being under several governmental bodies. This is for the purpose of Saudi Arabia's efforts to fulfil the requirements of the WTO (World Trade Organisation) membership.

between *Shari'a* and Comparative Law. Many people in the legal community believe that the reforms in the legal system, including the reforms needed for Arbitration Law, can be viewed from two perspectives. This has made many people in the legal community ask for the unification of legal education in the Kingdom, so legal issues can be seen from a single perspective. At this stage, however, it is important to mention some of the judicial commissions, in order to get a general idea of how they operate.

Committee for Negotiable Instruments

Established in 1968, this committee has branches throughout Saudi Arabia[14]. Each branch has a chairman and two members appointed from legal experts in the Ministry of Commerce. In general, the Committee hears complaints referred by the Chambers of Commerce, if conciliation or mediation has not been successful. It is worth mentioning that the Committee deals with the types of matters that were not mediatable prior to the present economic problems, which Saudi Arabia has been facing since the Gulf War[15]. For example, writing a dud cheque is a prosecutable offence in most countries, including the developing countries of the Middle East, but not in Saudi Arabia. A resolution by the Minister of Commerce requires the plaintiff in such cases to submit his or her complaint to a Chamber of Commerce for mediation in order to give the defendant a good chance to make all the required payments.

Commercial Agency Commission

This Commission sits at the Ministry of Commerce in Riyadh and is composed of three members appointed by the Minister of Commerce, one of whom is a legal consultant[16]. The purpose of this Commission is to enforce the Commercial Agencies Regulations to try and solve amicably problems of that kind. The Minister of Commerce must confirm all penalties imposed by the Commission (Commercial Agencies Regulations Article 21). The parties, moreover, have the right to appeal all types of decisions to the Minister within fifteen days of the date that the party, or its representative actually received notice of the decision (Commercial Agencies Regulations Article 21). It is worth mentioning that many Commercial Agency disputes end in arbitration in Saudi Arabia, even though mediation is a required step in this type of commercial

[14] Royal Decree No. 37 (11/10/1383). Also, Ministry of Commerce & Industry Resolution Nos. 353 & 354 (11/5/1388) & 357 (16/5/1388). Certain procedures and formalities relating to the Committees have been recently updated.

[15] Based on the author's own experience

[16] For more details, see Commercial Agencies Regs. Implementing Rules, Minister of Commerce Resolution No. 1897, Art.21 (1981).

activity.[17] On the other hand, other types of Commercial Agency activities such as the Agency for the Distribution of Tobacco Products are not allowed to come before the courts, and arbitration through the Ministry of Commerce is the only way of resolving such a dispute. [18]

The Commission for Solving Banking Disputes

This Commission operates under the Saudi Arabian Monetary Agency, which is popularly known by its acronym, SAMA. Established in 1952 it is considered to be the Kingdom's Central Bank (Nader 1990:23). As a central bank, SAMA fulfils important functions. First, it seeks to maintain the stability of the currency and control the exchange rate of the Riyal. Second, it supervises and monitors the banking system of the Kingdom, laying down bank regulations, granting licences to banks and money exchanges and maintaining banks' registers. Third, SAMA regulates the money supply through the issue of currency (Nader 1990:23). In addition to these functions, it has a commission, which acts as a judicial body for resolving banking disputes. When it comes to highlighting the possible place of arbitration in these types of disputes, it can be seen from common practice that most international investors (banks), who would tend to act as lenders in these types of banking activities, would prefer to refer their disputes to international arbitration centres, and not to Saudi arbitration.[19]

The Committee for Solving Insurance Disputes

As will be mentioned in Chapter 2, insurance is one of the activities not yet well defined under Islamic Law and, therefore, the *Shari'a* courts will not hear any claims relating to it (Royal Order 1648). However, the insurance business exists in Saudi Arabia, as required by many national and multinational companies. Most of the insurance companies operate in the Kingdom through a commercial agent, either through a trade establishment, or another commercial entity. Furthermore, insurance companies are not incorporated under the Saudi Arabian law, even though they are listed for statistical purposes at the Saudi Ministry of Commerce.

The claims that arise from an insurance contract have to be heard by a specialist committee at the Ministry of Commerce (Royal Order 1648). In normal circumstances, this

[17] This is based on the author's experience as a former Secretary of the Arbitration Board at the Chambers of Commerce in Riyadh, Saudi Arabia

[18] Due to the fact that *Shari'a* courts did not allow Tobacco and Music cases, Royal Order No. 1648 dated 15/7/1386H was issued to allow the Ministry of Commerce to arrange for tribunals or arbitration proceedings to take place.

[19] This is based on the author's own experience

committee always refers the parties to mediation or arbitration, if the claim exceeds one hundred thousand SR (Saudi Riyals). The stipulation has lead to the idea of establishing an insurance arbitration centre within the Saudi Chambers of Commerce.[20] Once approved by the Ministry of Commerce, all awards or judgments in these matters are final. If a party fails to complain to the Ministry of Commerce within the period of time specified in the arbitration regulations, the Ministry has to approve the arbitral award (Articles 18,19,20 and 21).

Other Judicial Committees

Other committees have been established for various reasons, such as the Committee for Combatting Commercial Fraud, the Committee on Fraud and Deceit in Dealings with the Government, and also the Customs Committees. It should be noted that owing to the Kingdom of Saudi Arabia's attempt to enter the WTO (World Trade Organisation), there are some arrangements for all these committees to operate under the supervision of the Ministry of Justice.

4. CONCLUSION

As we now have a general idea of the legal, administrative and political background in Saudi Arabia, in Chapter 2 we will elaborate on the arbitration laws in that jurisdiction that exist today or have done so in the past. The background contained in Chapter 1 should assist us in knowing what has to be done in the Saudi arbitration system and practice and, more importantly, why such developments have to take place.

[20] The author has suggested establishing an insurance arbitration centre at the Chamber of Commerce and Industry in Riyadh, Jeddah since 50% of the cases are insurance related. This came as an alternative to Dr. El Ahdab's suggestion in 1993, to form an association with his Arab International Arbitration Centre.

Chapter 2

SAUDI ARBITRATION LAWS

1. THE DEVELOPMENT OF THE ARBITRATION LAWS

(a) The General View

Initially, Saudi Arabia had no comprehensive system for the regulation of arbitration. Generally speaking, conciliation and arbitration were regarded as a valid means of resolving disputes within the private sector, but the courts were legally required neither to give effect to any parties' arbitration agreements nor to have the arbitral awards automatically enforced. The Kingdom's close contacts with the international community, especially after the discovery of oil have made it even more necessary to develop a set of arbitration rules. The development process can be divided into different stages.

(b) Arbitration Under Commercial Court Regulations

Shari'a practice does not distinguish between commercial and civil transactions. However, there was nothing to prevent the legislature from using whatever means necessary, to serve the community and public interests, based on the so-called (*Masaleh al Morsalah*).[1] The first arbitration law, therefore, was taken from the Ottoman laws, which relied heavily on the French laws passed in 1807. It was issued by Royal Decree No. 32 in 1930 and used for a considerable time despite its poor wording. The law comprises 633 clauses in four major chapters, the first dealing with Land Trading, Maritime Trading, Commercial Contracts, and Taxes. Articles 493 – 497 were the arbitration-related clauses, and although at that time they were used by traders, it is difficult to assess the efficacy of the law, due to the lack of documented precedents on which one could rely (Al Bejad 1999:9).

(c) Arbitration in the Saudi Chamber of Commerce

As soon as the first Chamber of Commerce in the Kingdom was established in Jeddah in 1946, as one of its duties, it began to exercise a conciliation and arbitration role between its members. As the activities of the Chamber of Commerce expanded, it became necessary to

[1] It is a religious duty imposed upon any Islamic ruler to look after the needs of his society. This include the passing of laws and regulations based on the needs of the society for issues not dealt with comprehensively in the *Qur'an* or the *Sunnah*

formulate a new law organising the activities of the Chambers, and setting forth the terms of reference. Therefore, the regulations of the Chamber of Commerce and Industry were passed under Royal Decree No. M/6 in 1980. This gave the Chambers of Commerce the power to organise arbitration. This can be seen in the following articles:

> "Article 5 states: "The Chambers of Commerce and Industry are authorised in the following matters...." The settlement of commercial and industrial disputes by arbitration if the parties agree to refer the dispute to them"
>
> Also Article 37-3 states: " The exercise of arbitration and the settlement of commercial and industrial disputes if the parties of the dispute agree to refer it to them, and where the parties belong to more than one Chamber or one of the parties is a national and the other a foreigner".

Also, Article 69 of the executive by-laws of the Chambers of Commerce and Industry issued by regulation of the Minister of Commerce No. 1871 dated 1983 under the heading 'Arbitration and Settlement of Disputes' reads as follows:

> "The Board of the Chambers of Commerce and Industry shall set the rules concerning the running of its work and issue the financial and administrative by-laws necessary for the handling of its affairs. It shall exercise all authority that will enable it to realise its purposes"

It should be noted that Arbitration Law M/46, described below, neither overruled nor repudiated the previous arbitration law, and perhaps this encouraged many Saudi jurists to call for the establishment of an arbitration centre within the Chambers of Commerce.[2]

(d) The Use of International Arbitration by Saudis

According to the files that we have available, it can be seen that between May 1975 and September 1979 thirteen requests for arbitration were filed with the ICC in Paris arising out of disputes involving Saudi parties. Significantly, one of these cases was rejected since both parties were Saudis, and it was claimed that the function of the ICC was to resolve disputes of an international nature. Furthermore, it was argued that under Saudi law, arbitration is only a voluntary means of settling disputes and may only be conducted if both parties agree to arbitration as the means of settling their disputes. One such case was the famous *Westland Helicopters v. The Arab Organisation* involving the Arab Organisation for Industrialisation (AOI), consisting of Egypt, Saudi Arabia, the UAE and Qatar. The AOI was intended to promote the defence industries of these four countries. Accordingly, the AOI set up a joint

[2] When the author was the Secretary of the Arbitration Board at the Chamber of Commerce and Industry in Riyadh, he worked at establishing an insurance arbitration centre within the Chambers of Commerce since 50% of the arbitration cases were insurance matters

venture company with Westland Helicopters, but there was a dispute that went to arbitration. The ICC decided that the four governments were bound by the arbitration agreement and not only by AOI as a company (28 ILM 689, 691 (1989) p.663).

The success of international arbitration to which a Saudi private sector company is a party, differs from one case to another, leading us to believe that the situation was unclear. For example, one such successful arbitration took place in Geneva in 1979. This involved resolving a dispute about a contract between a Saudi company and a European firm wishing to construct a road in Saudi Arabia. The Arbitration Board had a Muslim umpire, and Swiss law was applied instead of Islamic principles. The arbitrators, moreover, were authorised to sit as an *'amicable compositeur'*. This dispute was resolved in favour of the Saudi party and the award was easily enforced in the country of its rendering. Some commentators thought that the reason why this award was settled so easily was because one of the arbitrators was Muslim (Lerrick and Mian 1987:176).

(e) Arbitration Regulations Royal Decree No. M/46

During the last two decades in Saudi Arabia, the significance of arbitration has increased as a means of resolving business disputes. In response to this phenomenon, Saudi Arabia issued its first independent arbitration regulations in 1983, and its rules of implementation thereunder, in 1985. The process of developing these regulations can be divided into two different stages:

Advisory Committee Work

The need to pass independent arbitration regulations was the underlying force pushing for the establishment of an Advisory Committee, with representatives from the Ministries of Justice, Commerce, the Council of Ministers, and Board of Grievances. The Advisory Committee would meet at the Chambers of Commerce in order to prepare a draft for the arbitration regulations. Their aim, at the time, was to cope with what was needed for insurance and construction disputes. Since, at that time, Saudi Arabia was not a party to the New York Convention of 1958, international arbitration was not a consideration. The Committee's work resulted in the drafting of the present arbitration regulations, which are considered to be the first independent arbitration regulations ever passed in the Kingdom of Saudi Arabia.

Examining the Work

Bearing in mind that it is more than fifteen years since the law was first passed and many businessmen have resorted to it to settle their disputes, the time may be right to assess the law and express an opinion on its effectiveness, more especially in relation to domestic arbitration. Certainly, the Kingdom's endorsement of the New York Convention in 1993, necessitated the Kingdom to look into its arbitration law in order to distinguish between domestic and international arbitration. It also has to regulate the Board of Grievances' supervision over arbitral awards, since it has jurisdiction over enforcing foreign arbitral awards in the Kingdom. In other words, now could be the appropriate time to set out the reasons why the regulations need to be changed, taking into account the different economic and practical issues currently prevailing in Saudi Arabia.

2. WHY SAUDI ARBITRATION LAW AND INTERNATIONAL ARBITRATION?

(a) Generally

There are many elements that contribute towards considering the reformation of the laws of arbitration. First, at the present time Saudi Arabian business relations with the international community have necessitated major reforms. And since some of the major business activities such as insurance and banking are not acceptable in *Shari'a* courts, we can say that Saudi Arabia needs a well-developed law of arbitration more than any other country in the region.[3]

(b) International Banking

Many Saudi and international companies undertake business in Saudi Arabia especially in the oil and gas sector. They usually finance their projects through local and international banks. The term 'Syndicated Loan' describes a structure whereby a large number of banks lend funds for a long period of time to a single borrower (Wood 1995:5 Tennekoon 1991: 45).

In these types of transactions the lenders, including local and international banks, want a valid security interest, which gives them preference over other creditors. Since Saudi Arabia

[3] In Islamic Law there is a concept that the contract is the law of the parties, which is equivalent to the freedom of contract concept known in English law. Therefore, many contracts are acceptable under Islamic Law, until the appearance of what is contrary to Islamic general principles.

does not have special legislation or statutes dealing with pledges and collateral, the whole thing is governed by the basic rules of contracts in *Shari'a*, and most of the time international banks prefer English law to govern the contract. They would also refer to international arbitration centres such as the LCIA. It is very important, at the present time, to assess the possibility of the Kingdom acknowledging and respecting the principals of international public policy in international business relations, since some of the banking practices, such as interest, are still under jurisprudential debate between well-respected Islamic scholars.

(c) Insurance

The contract of insurance in any jurisdiction is basically governed by the rules, which form part of the general law of contract. But, equally there is no doubt that over the years it has attracted many principles of its own, to such an extent, that it is perfectly proper to speak of an international law of insurance. Some of the principles owe their existence to the fact that the documents of the standard insurance contract are mainly in the form of a policy, having long been drafted in a fairly internationalised way (Birds 1997:1-11). Saudi Arabia could not keep itself apart from the insurance industry, as mentioned above, since many of the large multinational companies operate in the Kingdom's oil and gas fields. These projects, moreover, have to be insured and reinsured in the Kingdom and elsewhere.[4]

Even though Islamic cooperative insurance is taking place in the Kingdom at the present time, Islamic courts still refuse to hear any type of insurance claims, since there is no clear determination on the legality of the activity itself under Islamic law. And, therefore, arbitration is the only way of resolving local or international insurance disputes, in these types of transactions.[5]

(d) Issues Related to Local Arbitration Practice

In most business activities to which a Saudi citizen or entity is party, the foreign party would have some comment to make on Saudi arbitration law. As we know, one of the driving

[4] It should be noted that regional insurance companies, including international insurance companies, operate in Saudi Arabia in the form of a commercial agency agreement with a Saudi national. The first Saudi (officially registered) insurance company is the NCCI [National Co-operative Insurance Company], which was legalised by Islamic scholars since the concept of its insurance is on a cooperative basis.

[5] Royal Order No. 1648 dated 1386H was passed based on a suggestion of His Highness, the Minister of the Interior to resolve insurance disputes through arbitration. In confirmation of this policy, His Royal Highness, the Second Deputy of the Council of Ministers issued a letter No. 133/M dated 1415H to the Minister of Commerce regarding an insurance case that has been rejected by the Board of Grievances. The letter suggested organising arbitration for the parties.

goals for using Saudi arbitration law is the simplification of the litigation process. The parties, therefore, could submit their dispute to an arbitration tribunal set up by themselves in order to arrive at a final award, instead of submitting the dispute to the judicial body having jurisdiction over the subject matter. Many legal advisors would especially comment on Article 20 of the Arbitration Regulations, which states that:

> "An award of arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute, this order shall be made on the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in *Shari'a*"

In practice, however, the situation is different. Courts normally agree to consider all types of objections to awards by the arbitral tribunals. They consider, moreover, those related to the form and the substance of an award and pass judgments without setting any time limits on the process. This has resulted in having foreign investors refuse to arbitrate in Saudi Arabia and using international arbitration centres instead. Another point of concern, which is also discussed between Saudis and foreign investors, is in the 1958 New York Convention and the relevant power of the Board of Grievances to set aside an international arbitration based on public policy grants, which is considered in Article 5 of the said Convention itself. This means that Saudi Arabia must pass a new law drawing a distinction between national and international public policy, like other countries in the international business community, and also because Islamic jurisprudence is aware of that distinction, as we have seen in Chapter 1

3. ARBITRATION LAW M/46

(a) Generally

As mentioned previously, this law is the first independent arbitration law in the Kingdom of Saudi Arabia. When it was formulated, the international principles of arbitration were adapted as a way of modernising arbitration in the Kingdom. Many people in the Saudi legal community believe that it has not been operating successfully. They believe, moreover, that the biggest problem is the supervision by judicial bodies of arbitral awards. It will be useful for us therefore to get a general idea of this law and compare it with common practice in a variety of different situations.

(b) Arbitration Agreement

An agreement by the parties to submit a dispute to arbitration is the first step of modern arbitration, either locally or internationally. Therefore, Article 1 of the Arbitration Regulations provides that:

> "Arbitration may be agreed upon in a specific existing dispute, or agreed in advance to arbitrate any dispute arising as a result of the execution of a specific contract."

Article 1 validates arbitration in any arbitratable matter, and it does not only have to be limited to commercial matters.[6] The arbitrability, however, is determined in accordance with Islamic law, which states that arbitration is not possible in matters were reconciliation is not allowed, such as punishments, allegations of adultery between spouses, and all matters related to public order or public policy (Article 1 of Arbitration Regulations Implementing Rules).

Before the issuance of the arbitration regulations, any lay or juristic person, whether of Saudi or non-Saudi nationality, could enter into arbitration with the Saudi Government, and this situation remained only until 1962. Before that, the Saudi government frequently chose arbitration as a means of resolving disagreements between itself and private parties.[7] In that year, however, the Council of Ministers passed Resolution No. 58 dated 25th June 1963, which prevented arbitration between all Saudi governmental bodies or ministries on the one hand, and individuals, companies or private organisations on the other. We believe that this change occurred due to the lack of trust in arbitration as a means of solving disputes.

Though government agencies still resort to arbitration either nationally or internationally, they do not proceed before obtaining prior approval from the Council of Ministers, as provided in Article 3 of the Saudi Arbitration Regulations. It states furthermore

> "Government bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers. This provision may be amended by a resolution of the Council of Ministers".

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[6] For example, disputes relating to non-commercial property rights, civil debts or financial transactions, and the like may be resolved by arbitration.

[7] See for example the Agreement between Saudi Arabia and The Japan Petroleum Trading Co. Dec. 10 1957, art. 55 (Gov't. Press 2nd ed. 1964) (disputes to be resolved finally by a panel of five arbitrators sitting in Saudi Arabia); Agreement between Saudi Arabia and Pacific West Oil Corp. Feb 20, 1949, art.45 (Gov't Press 4th ed. 1964) (disputes to be finally resolved by three arbitrator panel); Agreement between Saudi Arabia and Trans-Arabian Pipe Line Co. July 11, 1947 art.23 (Gov't Press 2nd ed. 1965) (providing for three-arbitrator panel sitting in Jeddah).

The State, furthermore, had to decide in accordance with its own economic and social policy, which disputes may or may not be settled by arbitration.

(c) Enforceability

The enforceability of the arbitration agreement has developed over time and this development can be seen in two different stages.

Before Saudi Arbitration Law M/46

For a considerable period, arbitration had a bad image in the Arab Middle East and elsewhere in the developing world. These countries, in general, saw arbitration as a means of allowing industrialised colonial countries to escape from their national jurisdiction (El-Ahdab 1999:558). This was the reason why, before the recent Saudi Arbitration Regulations, Saudi Arabia did not expressly provide for the enforcement of arbitration agreements, or clauses, or for the stay of judicial proceedings brought in violation of such agreements. The efficacy of such an agreement would depend completely on the parties' respect for their contractual obligations, in general.

In addition, if the parties were bound by a valid arbitration clause, judicial bodies were not barred from directing the parties to proceed to arbitration prior to hearing the case. Islamic law judges, prior to rendering judgment, might urge litigants to proceed to conciliation or arbitration. Because Saudi Arabia was never a party to the Geneva Protocol of 1923, which ensured arbitration clauses were enforceable internationally, the judiciary might take jurisdiction over the case any way, despite the existence of a valid arbitration clause. As quoted in Lerrick and Mian:

> "The Saudi Court would hear the case out of concern that the arbitrators would not properly apply the correct legal rules. This situation would, in particular, arise where the parties agreed that the arbitration proceedings would be held outside Saudi Arabia. The implementation of jurisdiction in such a case would be predicated upon the pleadings of a Muslim party that he distrusted any arbitration performed outside the Kingdom by non-Muslims. The defence could be sustained even though the outside arbitrators were Muslims."
>
> (1987:155)

After the Existence of the Arbitration Regulations

It was recognised in Saudi Arabia in 1985 that an agreement to arbitrate, like any other agreement, must be capable of being enforced in law. Otherwise, it would be a mere statement of intention, which is morally binding but without legal effect. And therefore, Article 7 of the Saudi Arbitration Regulations represents a significant departure from any previous practice. It provides that:

> "Where adversaries agree to arbitration before a dispute arises, or where a decision has been issued sanctioning an arbitration instrument in a specific existing dispute, the subject matter of the dispute may only be heard in accordance with the provisions of this law."

This is based on an international custom in international commercial arbitration called by Redfern and Hunter, 'the policy of indirect enforcement' (1991:5). However, in some cases the Board of Grievances heard cases despite a valid arbitration clause between the parties. [8]

(d) Arbitrators

The requirements for an arbitrator under Saudi law are no different from those in other international arbitration laws. Article 4 of the Saudi Arbitration Regulations provides that:

> "An arbitrator is required to be of experience, good conduct and full legal capacity. In the case of several arbitrators the number must be an odd one."

Also Article 3 of the Arbitration Regulations Implementing Rules states that:

> "An arbitrator shall be a Saudi national or Muslim foreigner of the liberal professions or otherwise. He may be a public official upon approval of the department to which such official belongs. If there is more than one arbitrator, the chairman shall be knowledgeable in *Shari'a* rules and the commercial regulations, custom and traditions in effect in the Kingdom.

Moreover, one of the main requirements that constitute an issue in the practice of international commercial arbitration is that the arbitrator has to be a Muslim, and male in order to arbitrate in Saudi Arabia. Many legal advisers in Saudi Arabia, such as Dr. Mohammed Nader, have suggested that this issue has to be eliminated from Saudi law. Nader justifies this by pointing out that the reason for excluding a non-Muslim in Islamic legal history was because

[8] This is based on the author's experience in the case between Al-Hoshan Ltd v. Al-Hajez Ltd when one of the parties submitted the dispute to the Board of Grievances even though they had an arbitration clause in their contract. Furthermore, the other party did not stay the judicial proceedings on the grounds of having a valid arbitration clause. When the dispute went to the Appeal Division of the Board of Grievances, it ruled that since the parties had a valid arbitration clause, they must go to arbitration.

he was an enemy *(harbi),* or a protected person *(thimmi),* and that non-Muslims are now no longer classified in such terms (1995:12-13). He states, furthermore, that the justification for excluding a woman from being a judge was a lack of capacity and inexperience, but this no longer is the case (1995:13).

The importance of this issue will be readdressed in Chapter 8 when we deal with developing Islamic law in general, and arbitration issues, in particular.

(e) Procedure for Approving the Agreement

As mentioned above, in the initial stages of the arbitration process, the parties must obtain approval for their arbitration clause or arbitration document from the judicial body having original jurisdiction over the subject matter of their dispute. Such a document has to be in Arabic, and it has to state the nature, the facts, and all the documents related to the dispute. Article 5 of the Saudi Arbitration Regulations states the following

> "Parties to [the] dispute shall file an arbitration instrument with the authority originally competent to hear the dispute. This instrument shall be signed by the adversaries or by their officially authorised attorneys and by the arbitrators and shall state the subject matter of the dispute, names of adversaries, names or arbitrators and their consent to decide on the dispute. Copies of the documents relevant to the dispute shall be attached."

In this regard, it has to be stated once again that many lawyers in Saudi Arabia are looking forward to seeing the Chambers of Commerce becoming more involved in this process, since it could take some time in the Saudi courts to have the arbitration agreement approved.[9]

Place of Arbitration

Even though the Saudi arbitration law is silent on whether the parties should use the Chambers of Commerce as the body where the arbitration has to be held. Usually, the cases are always sent directly to the Chamber of Commerce in the region where the parties have filed their case. This is to ensure that the parties will get the legal and secretarial services needed for the arbitration. This practice has encouraged many lawyers in the field of arbitration to suggest

[9] The approval of the arbitration agreement in some cases could take over five months. This happens because of disagreement between the parties over the choice of Chairman of the Arbitral Tribunal or the amount of the arbitrators' fees etc.

the need for the establishment of an arbitration centre.[10]

The Applicable Law

As mentioned before, Saudi Arbitration Regulations are silent on the issue of distinguishing between Saudi and foreign arbitrations. However, it is important to mention that Article 39 of the Arbitration Regulations Rules of Implementation requires awards to be issued in accordance with Islamic law in order for them to be executed in Saudi Arabia. It states furthermore that:

> "Their awards shall be made in accordance with the provisions of the Islamic *Shari'a* and regulations in effect"

Rules of Procedure and Evidence

Article 36 of the Arbitration Regulations Rules of Implementation generally requires that arbitrators comply with Islamic litigation principles, such as a party's right to confront the opposing party, to present its arguments, defences and documents, and to examine the documents relating to the case. Islamic law, in general, does not prohibit any other litigation principles in other comparative jurisdictions. It should be noted that common law principles may be applied in an insurance case, as seen in the case of *Al-Sharq v. The National Cooperative Insurance Company [NCCI].*[11]

Moreover, parties in general are permitted to introduce both oral and documentary evidence, and are also entitled to ask for a reasonable period of time to arrange for production of their documents.

(f) The Award

When the case is ready to be finalised, the arbitrators will issue a decision in order to close all arguments. Article 38 of the Arbitration Regulations Implementing Rules states the following:

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[10] The author has made modifications to this suggestion by proposing the establishment of an insurance arbitration centre since there is a good partnership between the Ministry of Commerce which has original jurisdiction over insurance disputes and arbitral tribunals hearing insurance matters. In addition, insurance disputes represent 50% of the arbitration cases handled by the Chambers of Commerce

[11] Due to the fact that some lawyers preparing the defence for Al-Sharq Co were Germans and Saudis, it wasn't useful for them to use the cross-examination system in the arbitration and therefore, they changed their minds over applying English law to the substance and procedure of the dispute.

> "When the case is ready for decision, the arbitral tribunal shall declare the proceedings closed and bring the case under review and deliberation. The deliberations shall be held in camera and may be attended solely by the arbitral tribunal which collectively heard the proceedings. Subject to the provisions of Articles 9,13 14 and 15 of the Arbitration Regulations, the tribunal on closing the proceedings or at another hearing shall fix a date for making the award."

After this decision is made, no further clarifications or documentation may be submitted except for the Arbitral Tribunal's permission, in which case the other party has to be informed (Article 40 of the Arbitration Regulations Implementing Rules).

Formal requirements will be apparent within the award. The award, moreover, is required to be reasoned, to be given in writing and in Arabic. Article 17 of the Arbitration Regulations Implementing Rules provides that:

> "An award document shall contain in particular the arbitration instrument, a summary of the statement by adversaries and their papers, the reasons for the award, its text, date of issue and the signatures of the arbitrators; where one or more arbitrator refuses to sign an award, this shall be stated in the instrument of the award."

Neither the regulations nor the implementing rules provide specific grounds for objections beyond the violation of the principles of *Shari'a* law, which is a major part of Saudi public policy. This type of violation would permit the judicial authority to refuse to enforce an award under Article 20, which states:

> "An award of arbitrators shall be enforceable when it becomes final by order of the authority originally competent to hear the dispute. This order shall be made on the request of any of the concerned parties after ascertaining that there is nothing that prevents its enforcement in *Shari'a*.."

The parties on the other hand are not barred from raising any objections based on a lack of fairness, lack of valid arbitration clause or agreement, or the arbitrators' lack of impartiality, abuse of their authority, or exceeding their authority, as stated in the judicially approved arbitration document.[12]

Prior to Arbitration Regulations

Prior to the Royal Decree M/46 domestic arbitral awards were not automatically enforceable, and no formal procedures were performed by the party seeking execution of the

[12] This information is based on the author's own experience.

award, except by the rules of the local governors.[13] In the case of commercial disputes, as seen before when describing the Saudi legal system, the competent authority with jurisdiction over commercial matters was the Commission for the Settlement of Commercial Disputes. It could either make amendments to the award on whatever grounds, or rehear the entire case on its merits, including full pleadings and receiving of evidence. The Commission for the Settlement of Commercial Disputes would, in general, enforce arbitral awards without involving the governor as long as such awards did not enter into conflict with the rules of Saudi law or public policy. Any award, for example, involving the payment of interest *(riba)* or any other prohibited transactions under Islamic law, would not be enforced (Lerrick and Mian 1987:167).

After Royal Decree M/46

The situation was somewhat different after Royal Decree M/46. The arbitral awards then became officially final and enforceable by the executive body on issuance of an enforcement order by the appropriate judicial authority. This can be seen in Article 20 of the Regulations, as stated above.

In order for an award to be technically enforceable, it must be subject to a judicial review in order to determine whether the award is fully consistent with *Shari'a* and public policy. Any illegal provision in the award, however, would be cancelled without affecting the validity of the award as a whole.[14] The situation in common practice even goes beyond Article 20, and this can be seen in some cases when the award becomes appealable, like a court judgment, as mentioned below when describing the types of supervision practised by the Saudi courts.

Moreover, this situation leads us to focus on the extreme degree of supervision granted to the judicial bodies, which have original jurisdiction over arbitratable matters. Such supervision is considered to be one of the major problems blocking the way for the Saudi Arabian legislature to adopt the UNCITRAL Model Law. At this stage, therefore, it is important to create an understanding of the judicial supervision over arbitral awards by using some precedents, as examples. This will be important especially when we describe in Chapter 5 the minimum standards of supervision mentioned in the UNCITRAL Model Law.

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[13] See Rules Governing New Powers of Regional Governors, Minister of the Interior Resolution, para 2(1), Umm al-Qura, 5/5/1395 H (resolution unnumbered) (governors may hear any private right complaint).

[14] In this type of situation the award would be sent back to the arbitral tribunal to correct whatever provision in the award constituting the meaning of interest *(riba,)*, which is prohibited in Islamic legal practice.

4. FORMS OF SUPERVISION

From the practice that we have seen in Saudi arbitration, we can see that there are two major types of supervision. The first type is called Formal Supervision, and the second Subjective Supervision.

(a) Formal Supervision

Since the duty of the arbitrator ends with the issuance of the award, the party who wants to execute the award has to follow the necessary procedure. The order to execute the award has to be filed by the winning party at the court having original jurisdiction over the subject matter. In practice, the competent authority in Saudi Arabia will formally review the award in order to make sure that it was issued according to the minimum standards of a court judgment.[15] If such requirements were not adhered to, the judicial bodies in Saudi Arabia would have the right, or perhaps the duty, of sending the award back to the arbitral tribunal in order to have it reissued in a form that fulfils all the requirements.

This tradition is always present in the practice of arbitration, and there is general anxiety in the legal community about it. Some lawyers seem to take the view that even if a formal fault is apparent in the arbitral award, (for example, lack of the arbitrators' reasoning), this fault should not prevent the execution of the award, especially if it was written by professionals other than lawyers or former judges.

Moreover, the situation is illustrated by the judgment of the Board of Grievances over the arbitration award of *Al Hoshan Ltd v Al Farhan Ltd.* This case commenced when the lawyers of Al Hoshan Ltd submitted a complaint to the Board of Grievances claiming that Al Farahan Ltd had not paid the remaining balance out of a total of 1,481,436 SR due to them as a result of carrying out a sub-construction contract in Jeddah. The two parties had agreed that the nature of the dispute could be resolved through arbitration and therefore, they submitted an arbitration agreement to the Board of Grievances for approval. After a while the Board of Grievances sent the award back to the Chamber of Commerce to have some formal requirements fulfilled since it lacked clear legal reasoning, being in the form of a technical opinion. It also stated that the final award had been sent directly to the Board of Grievances,

[15] This is based on the author's own experience in some of the cases. Take, for example, the case between Al-Hoshan Ltd v. Al-Farhan Ltd when the Board of Grievances rejected the award on the grounds that it was written in the form of an opinion and not a judgement

without holding a final hearing, as required by Article 41 of the Saudi Arbitration Regulations and Implementing Rules. It states:

> "Subject to articles 16 and 17 of the Arbitration Regulations, awards shall be made by majority voice. The chairman of the arbitral tribunal shall pronounce the award at the hearing fixed therefore."

We believe that this type of supervision is in the Saudi practice because of the traditions of the judges and courts. These traditions, moreover, were transferred or taken to arbitral tribunals.

(b) Subjective Supervision

What we need to be concerned with at this stage is whether the supervision practised by some judicial bodies in the Kingdom of Saudi Arabia goes beyond the Saudi arbitration regulations. Article 20, as we have seen before, requires compliance with *Shari'a* principles. Such supervision in common practice could lead to the case being heard again, or perhaps commenting on an issue that did not fall under the jurisdiction of the arbitral tribunal, in the first place. This practice can be seen in the Board of Grievances judgment No. 35/T4/1415H, 1995 concerning the arbitral award in the case of *Tohama Construction Co. Ltd v. Hondi Construction Co. Ltd.*

The facts of this case are that Hondi, a South Korean based company and main contractor entered into three different sub-contracts with Tohama for the completion of work at King Fahad Hospital. The main problem was the failure by Hondi to complete the work according to the overall timetable. Tohama complained that the three contracts were supposed to be carried out according to three different timetables and that Hondi failed to make the construction site available to Tohama as stipulated in the agreement.

Hondi, on the other hand, stated that the main contract with the Ministry of Health had been extended, thus causing a delay in issuing the plans for the construction work to be carried out by Tohama. Also, Hondi complained that the quality of the work carried out by Tohama was not up to standard and the insufficient number of construction workers had delayed the work. After going through the details of the case, the arbitral tribunal issued an award requiring Hondi to pay Tohama the amount of 46,000.000 SR. In addition, it ordered the release of all the security deposits paid by Tohama to Hondi, including the security of the so-called 'Execution of the Work in Good Faith'.

When this case came before the Board of Grievances, Hondi was successful in having the case heard again, and getting a judgment to reduce the above-mentioned amount to 27,853,472 SR. In addition, some of the other claims were eliminated on the grounds that they maintained the so-called *Riba* (interest, in banking terms), which is prohibited under Islamic financial practice. The commentators involved in this case, including Mr. Osamma Al Sleem, Former Secretary of the Arbitration Board, stated that the judgment of the Board of Grievances over this arbitral award included issues that did not fall under the jurisdiction of the arbitral tribunal in the first place.

As can be seen in this case, the so-called *partnership* between the courts and the arbitral tribunal was not very efficient, and the Board of Grievances was dealing with the arbitral award as if it was a judgment passed by a lower court.

Furthermore, a party who agrees to arbitration, as a private method of resolving disputes, may find himself brought unwillingly before the courts. In most cases, important Saudi business families would hesitate to use arbitration because of the great possibility of the arbitration ending up in court, as seen above.[16]

(c) The Crisis of Arbitration

Even though arbitration has become a principal method of solving disputes in the Saudi legal community, the cases that we have seen prove that arbitration has difficulty in reaching its objectives within this community. To understand the situation, it is necessary to go to the source of the issue and those related to it. The Arab Middle East, like any other part of the developing world, has experienced political, economic and cultural changes that have affected many things, including their legal systems. Consequently, they looked at arbitration as a way for industrialised countries to escape from the national courts in the countries where they had projects.

Legal Issues

As we have seen, when we described the development of the Islamic and Saudi legal systems, the Ottoman Empire ruled over a long period of time in the Arab Middle East. Many people in the Muslim world believe that Islamic jurisprudence ceased to develop when the

[16] This will lead us to think of developing other Alternative Dispute Resolution [ADR] mechanisms in Saudi Arabia as will be seen in Chapter 8.

Ottomans took control of the Arab world. This opinion is based on the fact that the Ottomans went to extreme lengths in defining the so-called *religious tolerance,* which allowed them to establish foreign courts in their territories (Abu Taleb 1982:38-39). The result was that foreign laws were introduced, instead of developing Islamic jurisprudence to cope with the changes that faced the Muslims then and now. The international arbitrator has, in most cases, avoided applying Islamic law in any modern international arbitration. The award made in the dispute between *Saudi Arabia* and *Aramco* is an excellent example. The arbitral tribunal held that:

> "In view of the insufficiency of Muslim law as interpreted by the school of Imam Ahmad Ben Hanbal and as the law in force in Saudi Arabia contains no determined rule concerning oil exploitation.. it is necessary to resort to the general principles of law.."
>
> ((1963) 27 I.L.R.117)

Similarly, in arbitration involving the *Sheik of Abu Dhabi v. the Petroleum Development Corp.* Lord Asquith held that:

> "If there exists a national law to be applied, it is that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the *Koran*, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial arbitration."
>
> ((1952) 1 I.C.L.Q. 247)

The same situation was found when Sir Alfred Buckhill stated in the case of *The Governor of Qatar v. The International Marine Oil Co. Ltd:*

> "I need not set out the evidence before me about the origin, history, and development of Islamic law as applied in Qatar or as to the legal procedure in this country. I have no reason to suppose that Islamic law is not administered there strictly, but I am convinced that this law does not contain any principles which would be sufficient to interpret these particular contracts."
>
> ((1953) 20 I.L.R. 534 :)

These cases led to some strong reactions which had a disastrous effect on trust in the arbitration system in Arab countries (International Handbook on Commercial Arbitration 1998 Vol.1:18).

Political Issues

As we know, most Arab Middle Eastern countries have been colonised at some time. Most of the Western countries had invested, during this period, in big projects and wanted to protect their interests by adding arbitration clauses to their agreements. The Arab countries at

that time associated this with a possible attempt by Western countries to avoid their national courts. As a result, some Arab countries such as Libya and Algeria, issued laws prohibiting arbitration where government agencies were involved. Algeria, moreover, filed a memorandum at the Conference of Chiefs of Member States of OPEC, renewing its accusation, not against arbitration, but against the lack of adaptation to the requirements and needs of the Third World. The Memorandum notes that:

> "If arbitration is not adapted to the peculiarities of the situation of Third World countries, the latter will be forced to create their own arbitration system, which would have exclusive jurisdiction, unless they give jurisdiction to their national courts".
>
> (International Handbook on Commercial Arbitration Vol. 1 1998:18)

As seen before, Saudi Arabia followed the Arab countries in that the Saudi Council of Ministers took the decision to prohibit arbitration in disputes between either the Saudi State, or ministries, or state agencies on the one hand, and a person or corporation, on the other (Resolution No. 58 (June 25, 1963)). This decision was made in 1962 and many commentators thought it was a reaction against the award made in the Aramco case, and also the whole situation in the developing world.

Issues Related to Modern International Arbitration

The Saudi private sector entered into international arbitration prior to the issuance of any independent Saudi arbitration regulations. Some arbitration was successful, as we have seen, but in some cases it was not.[17] In one case, settled in 1980 between a United States corporation and a Saudi company, the arbitration was scheduled to take place in London, conducted in the English language. When the arbitrators made the initial determination, they decided to apply English law instead of Saudi law, even though the latter was the applicable law according to some legal advisors involved in the case.

In 1978, another case involved allegedly defective raw material shipped to the Saudi party. The arbitrators in this dispute rejected the contention that Saudi law should be applied, even though, according to some commentators, the applicable conflict of law rules suggested Saudi law.

[17] The cases given here are examples from Saudi Business and Labour Law by Lerrick and Main. The names of the parties were not mentioned in the book nor can they be found in other sources and therefore, they have been mentioned as examples, without references, and therefore not included in the Table of Cases.

Another example is a 1979 case between a European subcontractor and a Saudi contractor. The proceedings were held in Paris and three arbitrators of European nationality went to hear the case. The Saudi party argued that Saudi law should be applied for the following reasons:

- That the principal contract of which the sub-contract was a part, was entered into by the Saudi Government through one of its ministries.
- That all the events relating to the sub-contract – negotiations, performance and termination – had occurred in Saudi Arabia

The arbitrators in this case, however, rejected these arguments in reaching their decision. The applicant was awarded damages for an amount less than the full contract price. The Saudi party on the other hand, was aware that the award could most probably not have been enforced in Saudi Arabia, since none of the arbitrators were Muslim and the arbitrators had sat outside of the Kingdom applying non Saudi-Islamic law in the proceedings. However, it chose to pay the award.

5. CONCLUSION

Of course, there are reasons why international arbitration has had difficulties in reaching most of its objectives in the Arab Middle East in general, and in the Kingdom of Saudi Arabia, in particular. Arbitration was not preferred due to its association with colonising countries escaping the national jurisdictions of developing countries. This is the reason why most of the Arab Middle Eastern countries are described as non-friendly to arbitration in general (International Handbook on Commercial Arbitration Vol. 1 1998:18). Also, as can be seen in the earlier description of the history of the different Islamic schools, Islamic jurisprudence stopped developing during the Ottoman era, due to the extreme adoption of foreign laws. As a result, the concept of modern arbitration, and all the related issues such as public policy were never developed in a country that follows Islamic jurisprudence, such as Saudi Arabia and other parts in the Middle East.

At this point, we will move on to the subject of international arbitration law and see the standards contained in it. This will help us, at a later stage, to see how the practice of arbitration, either in Islamic jurisprudence or in the Saudi practice, can be developed.

Chapter 3

THE ENVIRONMENT THAT DEVELOPED INTERNATIONAL ARBITRATION

1. THE BACKGROUND

(a) Generally

In this chapter we will address the necessity for commercial communication between countries. We will also briefly discuss the new international economic order, which has resulted in the need for an international commercial arbitration system. We will then elaborate on the major characteristics of international trade and arbitration.

(b) The Need for International Communication

As we saw when we addressed the Arabic tribal system in Chapter 1, people in the past could not live in isolated communities. Each group felt a pressing need to communicate with others to secure and facilitate its means of living. Therefore, those groups whether in their primitive form as tribes, or in their modernised political forms as governments, always needed to communicate with each other (Abu Heff 1975:20). Therefore, trade between different areas of the world has carried out throughout history. In fact, much of the world was discovered by those people looking for business opportunities in different parts of the globe in the 15th and 16th centuries despite the risks involved in travel (Jackson, Davey, Sykes 1995:4). The global changes brought people closer in thinking about trade. Previous centuries had seen isolation caused by lack of communication between societies, but in modern times nations increasingly felt interdependent and therefore nearly all the nations of the world came together about every decade to discuss how trade could be freer and better (Folsom, Gordon, Spanogle 1991:9).

The 20th century can be characterised as the century of global change for several reasons. First, as a result of two major world wars, two worlds were formed and a third joined them in the de-colonisation decades of the 1960s and 1970s (Mistelis *in* Fletcher, Mistelis, Cremona 2001:3).[1] With the collapse of the Soviet Union, a number of emerging markets are now in place with their legal systems in transition. This resulted in a legal revolution reforming

[1] The membership of the United Nations increased from 50 states in the 1950s to 188 states in the late 1990s.

the existing domestic laws and also the laws harmonised by various formulating agencies (Mistelis *in* Fletcher, Mistelis, Cremona 2001:3). With the introduction of different national commercial codes in the second half of the last century, the world experienced a desire for the harmonisation of law. The conflict of laws adequately served national legal interests.

However, in the final decade of the 20th century harmonisation of law entered a new era. The emerging economies are in the process of rewriting their laws and as Dr. Mistelis says:

> "While national identity is important, an effort is also made to ensure that internationally recognised standards or harmonised law forms the bulk of this modern legislation"
> (Fletcher, Mistelis, Cremona 2001:4)

For the reasons mentioned above, international arbitration has emerged as the preferred method for the settlement of international business transactions. Moreover, as seen by practitioners, the application of a national substantive law by the arbitrators is more difficult than when applied by national judges. This is understandable because judges normally apply national law, since it is the law they have been trained in for many years. Also, arbitration deals with international trade disputes, while national courts deal with national cases that concern national interests.

(c) Arbitration v National Laws

Arbitration became important as a means of overcoming the rigidity and lack of clarity of national laws throughout the world. The types of problem that can be found in national laws differ from region to region. At this point we will move on to highlight this problem of national laws that made arbitration important through the last century.

Inadequacy

International practitioners see some national laws as inadequate for international commercial relationships. Take for example the three major Arab Gulf cases, mentioned in Chapter 2, in which the arbitrators found that national laws were not sufficiently adequate to be applied to international commercial transactions. In one of the arbitrations involving *Abu Dhabi,* it was held that:

> "If there exists a national law to be applied, it is that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the *Qur'an*, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."
>
> ((1952) 1 I.C.L.Q. 247)

The same was also true of *Qatar,* where in one dispute an arbitrator stated:

> "I need not set out the evidence before me about the origin, history and development of Islamic Law as applied in Qatar or as to the legal procedure in this country. I have no reason to suppose that Islamic Law is not administered there strictly, but I am convinced that this Law does not contain any principles which would be sufficient to interpret these particular contracts."
>
> ((1953) 20 I.L.R534))

Also, in the award made in the dispute between Saudi Arabia and *Aramco,* the arbitral tribunal held:

> "In view of the insufficiency of Moslem Law as interpreted by the school of Imam Ahmad Ben Hanbal... and as the law in force in Saudi Arabia contains no determined rule concerning oil exploration... it is necessary to resort to the general principles of law..."
>
> ((1963) 27 I.L.R.117)

In Chapter 8 we will address the solutions as to how Islamic Law could be developed in order to be suitable for international commercial transactions, since it contains most of the doctrines and principles that exist in other jurisdictions such as English law.

Unsuitability for International Trade

Some international practitioners, such as Redfern and Hunter take the view that even well developed modern commercial codes are not necessarily suited for international commerce. The example that they give reads as follows:

> "If a country habitually controls the import and export trade (perhaps permitting such activities only through state corporations) and prohibits the free flow of currency across the exchanges, these restrictions will permeate the national law. Whether or not this benefits the particular country, it is not an environment in which international trade and commerce will flourish. A national law which does not permit the free flow of goods and services across national frontiers may not be the most suitable law to govern international commercial contracts."
>
> (1991:103)

Therefore, international arbitration developed in a way, where if there is any international convention relevant to the dispute, it should be given preference over the application of a national law. Moreover, where the dispute can be easily resolved by resorting to the customs and usages of a particular trade, such customs or usages should be the standard applied even if it is in conflict with the rules of national law (Lew 1978: 582 –583). Therefore, the practice of international arbitration has given a new trans-national legal order, which, if not detached from existing legal systems, is more liberal in its application than existing substantive

law. We will see some examples of these new trends in Chapter 6, when we illustrate the different types of applicable laws related to the substance of the dispute.

(d) Arbitration and Harmonisation

With the growth of non-judicial settlements of disputes, international commercial arbitration, with its liberal approach, became more favoured than national courts, despite its disadvantages, as we will see later in this Chapter. Arbitration is seen as a procedure expressly made for different international trade disputes. As seen above, it is a process where the parties or the arbitrators are free to apply extra-legal standards, such as trade usages and practices, as part of the law of international trade. As a result, a new trans-national legal order has emerged taking precedence over national laws, and a remarkable degree of harmonisation has been achieved among many countries in the application of the law relating to international commercial transactions. This leads us to describe the instruments of harmonisation that have helped develop international commercial arbitration.

International Legislation and International Commercial Custom

This also includes international conventions and model laws (Schmitthoff 1981:22). The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1980 United Nations Vienna Convention on Contracts for the International Sale of Goods, are some of the examples that could be given in this regard. Saudi Arabia became a party to the New York Convention in 1993.[2] However, it did not sign the Vienna Convention, but the Islamic approach does not differ greatly from that of English law, as quoted by Roy Good in describing the position of the United Kingdom:

> "It is open to the parties to incorporate the Convention provision by reference in their contract. In the United Kingdom the sole effect of such incorporation is that the Convention rules are applied as if they had been set out as terms of the contract. Accordingly, an English court would have no duty to apply the Convention as such, but would do so only to the extent that it would apply any other terms of the contract."
>
> (1995:929)

Moreover, the parties in Islamic law are free to adopt the provisions of the Vienna Convention into their contract as long as those provisions do not constitute any conflict with Islamic general principles, such as interest, or pure economic loss, which are not recognised in court practices in Saudi Arabia.

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[2] Royal Order No. (M/11) dated 16/7 1414H corresponding 7th December 1993.

On the other hand, international commercial custom includes commercial practices or standards either codified or uncodified. The examples that could be given for the codified customs are the INCOTERMS, and Uniform Customs and Practice for Documentary Credits (UCP), also, the standard forms in commodity trade GAFTA (Grain and Free Trade Association)[3] or FIDIC (The International Federation of Consulting Engineers).[4]

Hard Law and Soft Law

Hard Law includes international conventions or international customary law. It is so called because one of the parties does not have the liberty of modifying it, although they probably have the chance of amending it in the contract (Fletcher, Mistelis, Cremona 2001:16). One of the examples that can be given in this regard is Article 6 of the 1980 United Nations Vienna Convention for the International Sale of Goods, where the parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions. The New York Convention for the Recognition and Enforcement of arbitral awards is another example of hard law.

Soft Law, on the other hand, includes the provisions mentioned in model laws before their incorporation in the national law. These would include for example, the 1985 UNCITRAL Model Law on international commercial arbitration and the 1994 UNIDROIT Principles of International Commercial Contracts. Even though it has been said that the UNCITRAL Model Law on arbitration is designed for developing countries, as will be seen later, it is important to see what is the position of developing countries in regard to harmonisation in general.

(e) The Position of Developing Countries in Regard to Harmonisation

The majority of these countries gained independence recently, but over the past few years have started to complain about low standards of living and largely retarded economies. They look forward to a developed economy while maintaining their political independence. International trade is a pressing requirement for these countries because it is their means of generating foreign currency, which satisfies essential needs for their current development. Nevertheless, developing countries, in the opinion of Ibrahim (an Egyptian legal writer), still complain of a lack of say in international trade, under the framework of the development

[3] For further information see http://www.gafta.com
[4] For further information see http://www.fidic.org

process, as a result of economic control and lack of equality between international trade forces, in respect of their international share of wealth (1991:39-40).

International Solutions in the World of Trade

The awareness of the need to organise international trade has become more pressing than ever. It is necessary at this point to see the mechanisms created to establish a new international society for trade relations. It should be noted that there are many forms of harmonization, but in our subject, the focus is on the developments made for the practice of international arbitration and the world of trade, since it opened new doors for the practice of international commercial arbitration in general.

The Model Law and its Objectives

The arbitration Model Law owes its origins to a request made in 1977 by the Asian – African Legal Consultative Committee for an operational review of the New York Convention, as will be seen in Chapter 4. It was important at that time to evaluate the efficiency of the New York Convention in the practice of international commercial arbitration. The result of the evaluation made by the AALCC suggested changes to the New York Convention to deal with certain issues such as judicial review of fairness and due process and the implied waiver of state immunity. However, the Secretary General of UNCITRAL made a report and suggested that harmonisation of the enforcement practices of states could be achieved more effectively by drafting a model law to harmonize arbitration practice in all the countries, including the developing world.[5] A final decision was not taken until the final session of the Commission at which the Model Law was adopted. The policy objectives adopted by UNCITRAL in the preparation of the Model Law were described by the Secretary General's report.[6] The objectives were as follows:

- the liberalisation of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine of "autonomy of the will", allowing the parties freedom to choose how their disputes should be determined;
- the establishment of a certain defined core of mandatory provisions to ensure fairness and due process;

[5] Entitled "Study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards." UN Doc. A/CN.9/168.

[6] Entitled "Possible Features of a Model Law on International Commercial Arbitration," UN Doc. A/CN/9/207.

- the provision of a framework for the conduct of international commercial arbitrations, so that in the event of the parties being unable to agree on procedural matters, the arbitration would nevertheless be capable of being completed; and
- the establishment of other provisions to aid the enforceability of awards and to clarify certain controversial practical issues.

The work took four years to complete and a Resolution of UNCITRAL adopted the final text at its full Commission session in Vienna in June 1985. Furthermore, a resolution of the General Assembly of the United Nations recommended the Model Law to member states on December 11th 1985 (Resolution No. 40/72). This shows an example of how the UNCITRAL Model Law became the minimum standard for international commercial arbitration. Its standards, moreover, helped the developing world to overcome the existing arbitration crises in their jurisdictions. Even countries with an advanced arbitration practice, considered the Model Law when redrafting their arbitration laws, such as the English Act of 1996 and the Swiss Law on arbitration, as will be mentioned below.

Developing Countries and the GATT System

Regulations normally denote state interference in a trade organisation, whilst in the second half of the twentieth century, trade regulation became a matter of international concern with the introduction of GATT, and more recently the World Trade Organisation (WTO) and GATS (Fletcher, Mistelis, Cremona 2001: 5).

One of the difficult problems that faced the WTO/GATT system is how developing countries should be integrated into that system. Historically, the developing world was dissatisfied with GATT, and felt it had little influence in GATT decisions and that the dispute settlement system was not useful for them. Also, the developing countries complained that the fundamental GATT principles were unsuited for trade involving them. As a result, they pressed for special treatment in GATT and attempted to create new rules. As Professor Jackson concluded:

> "The issues at Geneva in 1947 did not, viewed from the perspective of the present day, seem to be free trade versus protectionism, or internationalism versus national sovereignty. Each of the groups in the debate desired international control of some things and not of others. Both sides desired to use certain types of trade protective measures but wanted to limited or restrict others. The controversy seemed to be over *which* trade restrictions would be subjected to international control and which not. From the point of view of the less-developed countries, the wealthy countries wanted freedom to use those restrictions that only they were most able to use effectively while banning those restrictions that less-developed countries felt they were most able to use"
>
> (Jackson, Davey, Sykes 1995:1109)

GATT committees of experts have studied the needs of the developing nations on more than one occasion. One of the examples that can be given in this regard is the 1958 Haberler Report, which concluded that the developed countries should lower their barriers to exports of primary products from developing countries. Also in 1984, a GATT sponsored group of experts noted the adverse effect that non-tariff barriers were having on developing countries' exports and called for their reduction.[7] At this point, it is important to mention that it is not our duty, in this project, to evaluate the success of the GATT system for developing countries, since it is outside its scope. The purpose of this scenario is to show how trade regulation became a matter of international concern, and this will definitely have an effect on the necessity for international commercial arbitration in business transactions between traders in different parts of the world. This will lead us to focus on our main subject, and highlight the characteristics of arbitration.

2. WHAT IS INTERNATIONAL COMMERCIAL ARBITRATION?

(a) The Definition of International Arbitration

International arbitration is similar to domestic arbitration, as previously mentioned, when we described the Saudi Arbitration Law System. It is a means by which a dispute can be definitively resolved, pursuant to the parties' voluntary agreement, by a disinterested, non – governmental decision-maker. Or, in the words of the U.S. Supreme Court:

> "a specialized kind of forum-selection clause that posits not only the suits, but also the procedure to be used in resolving the dispute."[8]

It is important to mention in this regard that there are various definitions that have been used to define international commercial arbitration in different parts of the world. Take for example, the definition of Arthur Marriott and H. Brown when they defined arbitration as:

> "A private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law."
>
> (1993:56-57)

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[7] GATT, Trade Policies for a Better Future (1985), (Report of Eminent Persons on Problems Facing the International Trading System).

[8] This definition can be found in the case of Scherk v. Albert-Culver Co., 417 U.S. 506 -519 (1974).

Anyway, all the definitions share the common features of arbitration. As quoted by Gary Born:

> "International arbitration is often chosen, particularly to assure parties from different jurisdictions that their disputes will be resolved neutrally. Among other things, the parties would seek a neutral decision-maker who would be detached from the governmental institutions and cultural biases of either party, applying internationally neutral procedural rules rather than a particular national legal regime. In addition, international arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of trans-national litigation - which can include protracted jurisdictional disputes and expensive parallel proceedings – by designating a single, exclusive dispute resolution mechanism for the parties' disagreements. Moreover, international arbitration is often seen as a means of obtaining an award that is enforceable in diverse jurisdictions."
>
> (1994: 2)

(b) Legal Framework for International Commercial Arbitration

Although international arbitration is a consensual means of dispute resolution, it has a binding effect only by the implementation of a complex framework of national and international laws. As we will see later in the project, international commercial arbitration requires the interaction of a specialized legal regime. Moreover, international conventions, national arbitration legislation, and institutional arbitration rules provide a sophisticated legal foundation for international arbitration and its process. The minimum standards of international arbitration are the UNCITRAL Model Law on international commercial arbitration, which, has to be incorporated as a national law in order to be Hard Law, as seen above. Also, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, and the UNCITRAL Arbitration Rules, were adopted by many international arbitration centres, as will be seen in Chapters 5 and 7.

(c) The Characteristics of International Commercial Arbitration

The popularity of arbitration as a means of resolving disputes in the international business community has increased significantly over the past several decades. Despite its apparent popularity, international arbitration has both strengths and weaknesses as a method for resolving international commercial disputes.

First, international arbitration is often perceived as being advantageous because it offers a means to obtain a genuinely neutral decision-maker. International disputes will always involve the risk of litigation before a national court. This step may be considered as an unsuitable way for many people in the international business community. Moreover, national or local court systems simply lack the competence, resources and traditions to satisfactorily resolve many

international commercial disputes (Fletcher, Mistelis, Cremona 2001:5). In other words, many trade disputes have special characteristics that cannot be understood by judges of national legal systems, and therefore, international arbitration would be the best method of resolving the issues. International arbitration, in short, offers a theoretically competent decision-maker, satisfactory to the parties, who in principle is unattached to either party, or any national or international regulatory authority. But on the other hand, private arbitrators can have some type of connection such as financial, personal or even professional relations with one party, which might compromise the fairness of arbitral proceedings (Born 1994:6).

Second, an arbitration clause, which is carefully drafted, would allow the consolidation of disputes between the parties in a single forum, pursuant to an agreement that most national courts are bound by treaty to enforce. This would help the parties to avoid the extra expense and the multiple judicial proceedings that would take place in national courts (Born 1994:6). However, incomplete or defective arbitration clauses, can result in multiple proceedings. This point is well illustrated by the case of *Abu Dhabi Gas Liquefaction Co. Ltd* v *Eastern Bechtel Corporation*, and *Eastern Corp.* v *Shikawajima Harlima Heavy Industries.*[9] In these cases, moreover, the English Court of Appeal pointed out that if the case had been heard by the English Courts the three 'actors' in the drama could have been ordered to take part in the same set of proceedings, but since the disputes were to be settled by arbitration and by different agreements, it was powerless to order consolidation of the arbitrations without the consent of all the parties. The wording of L. J. Watkins was as follows:

> "There is no power in this Court or any other Court to do more upon an application such as this than to appoint an arbitrator or arbitrators, as the case may be; we have no powers to attach conditions to that appointment. And certainly no power to inform or direct an arbitrator as to how he should, thereafter, conduct the arbitration or arbitrations.
>
> (1982] 2 Lloyds Rep. 425,427)

Third, since many countries are party to the New York Convention, it should be mentioned that arbitration agreements and arbitration awards are more easily enforced in foreign states than forum selection clauses or foreign court judgments (Born 1994:7). However, and as we will see in Chapter 7, in some developing countries, there is still an impression that international arbitration has been developed for Western commercial interests (Sornarajah 6 J. Int'l Arb. 7 (1989)). As a consequence, national laws in many countries, such as Latin America or the Middle East, were hostile towards international arbitration and imposed obstacles to that effect.

[9] (1982) 126 S. J. 524; [1982] Com. L. R. 215; [1982] 2 Lloyd's Rep. 425,427.

Fourth, arbitration offers more flexibility to the parties in terms of giving them the opportunity to have less formal and rigid procedures than when litigating in a national court. Moreover, the parties in an international dispute would have the chance to have greater freedom to agree on appropriate procedural rules and timetables, select technically expert decision-makers, involve corporate management in dispute-resolution and the like (Poznanski 4 J. Int'l Arb.71, 83 (1987)). On the other hand, the lack of a detailed procedural code and an independent decision-maker, could result in creating procedural disputes between the parties (Fletcher 2 J.Int'l Arb.7 (1985)).

Fifth, arbitration would give the parties more chance of avoiding extensive discovery than is common in litigation especially in the United States courts (Born 1994:7). This is generally a good feature since it helps the parties to retain their business secrets. However, in some disputes, the parties insist on having broad discovery rights rather than the simple rights normally available in arbitration (Higgins, Brown & Roach 35 Bus. Law. 1035, 1042 (1980)).

Finally, as stated above, arbitration gives the parties the chance of enjoying confidential proceedings until they receive a final award. This feature protects business confidentiality, allowing the possibility of reaching a settlement in some jurisdictions.[10] However, those good characteristics are not in existence in all the countries since the jurisdictions worldwide are divided between two types, as will be mentioned below.

(d) Overview of Foreign Arbitration Statutes

As any practitioner will be aware, national arbitration laws play a significant role in providing the flexibility needed in the international arbitral process. The national laws moreover, will determine the enforceability of arbitration agreements and awards. It also examines the extent of judicial interference in the arbitral process, whether the interference is with or without the request of the arbitral tribunal, and other important issues. This is the reason for drafting the UNCITRAL Model Law, as mentioned above in order to harmonize these practices throughout the world, including the jurisdictions of the developing countries. However, until the present time, the jurisdictions in the international business community could be divided into two different categories, as follows:

[10] This is based on the author's own experience as a Former Secretary of the Arbitration Board at the Chamber of Commerce and Industry in Riyadh, Saudi Arabia. As understood by Saudi Judges and Arbitrators, the chances of reaching a settlement during the arbitration proceedings are more likely to happen than through Court proceedings.

Undeveloped and Less Supportive National Arbitration Legislation

Many international authors have described how many nations regard international commercial arbitration with a mixture of suspicion and hostility. This impression has been acquired by practitioners in some major parts of the world including Arab Middle Eastern countries and various parts of Latin America (Saleh 1994:49-50 and Cremades 1999:5). In the Arab Middle East, in particular, this problem arises from perceptions concerning the fairness and neutrality of contemporary international arbitration, especially institutional arbitration. As we will see later in the following chapters, some progress towards resolving this issue was made by the establishment of regional arbitration centres that adopted the UNCITRAL Arbitration Rules.[11]

Further to this background, some states require the approval of higher authorities whenever a governmental body is involved in arbitration. Saudi Arabia is one of these states where the arbitration legislation does not effectively enforce agreements (Saudi Arbitration Regulations Art. 3). This issue and the issue of delocalisation are among the reasons why many international analysts believe that the jurisdiction of Saudi Arabia is among the less supportive in the field of international commercial arbitration.[12]

Developed and Supportive National Arbitration Legislation

There are other parts of the world where governments have passed legislation to support the arbitral process, especially in Europe, North America and parts of Asia. Arbitration statutes in England, Switzerland, the Netherlands and France, effectively supports arbitration. They ensure that arbitration agreements and awards can be enforced and also minimum possible judicial interference in the process (Born 1994:35). Arbitration law in England, for example, has been developing for the last 150 years. In Chapter 6, we will explain about the development of internationalisation in England, since the Bramwell Arbitration Code 1883 is considered to be one of the first arbitration codes (Veeder *in* Hunter, Marriott, Veeder1995:13-14). However, the recent legislation which deals with arbitration begins with the Arbitration Act of 1950, followed by the Act of 1975 which gave effect to the New York Convention on foreign awards, and the

[11] In addition to our highlighting the major international arbitration centres in this chapter, in Chapter 5 we will describe the most important arbitration centres in the Arab Middle East that we believe helped in overcoming the difficulties related to trusting arbitration as a way of resolving disputes. Those arbitration centres moreover have adopted the UNCITRAL Arbitration Rules.

[12] There will be some explanation about the status quo of international arbitration of some other countries in Chapter 7 and there will be some solutions and suggestions to the Saudi Arbitration practice in Chapter 8.

Arbitration Act of 1979 which related to appeals to the court over arbitral awards. In England, the most recent Act, the Arbitration Act of 1996, which received Royal Assent on 17 June 1996 and came into force in 1997, currently governs arbitration. This Act came into being because at some point English law was felt to be out of step with newer developments overseas, especially with the UNCITRAL Model Law adopted by many countries. Although the 1996 Act does not incorporate the Model Law wholesale, the provisions of the Model Law have been considered and taken into account in many parts of the Act (Lord and Salzedo 1996:IX). London has always been a major centre for commercial arbitration, therefore at some point it felt that it was under threat from rival jurisdictions. The 1996 Act, therefore, was meant to enhance England's competitive position as an international arbitration centre by making the law both accessible and intelligible (Lord and Salzedo 1996:IX).

France, as another example, created a supportive regime for international arbitrations. It was one of the first countries to sign the New York Convention.[13] Moreover, France modernised its arbitration law in 1981. These new provisions are found in Book IV of the New Code of Civil Procedure. The first part, Titles I-1V regulate domestic arbitration. The second part, Titles V-VI regulate international arbitration. The 1981 Decree provides for the enforceability of arbitration agreements in both existing and future disputes (Articles 1458-1466). Non-arbitrability has not been invoked to any significant extent by French Courts except in bankruptcy and labour matters. French courts generally provide the parties to an arbitration agreement with substantial autonomy, in respect to the choice of law, procedural rules, selection of arbitrators, and the like (Articles 1443, 1460, 1494, 1496). In addition, French Law permits courts to order provisional measures in aid of arbitration (Article 1457). Among other things the law, permits actions to annul arbitral awards made in France, but only on limited grounds, similar to those in the New York Convention, as will be seen in Chapter 4 (Articles 1502 – 1504).

On the other hand, Swiss international arbitration is governed primarily by their Federal Law on Private International Law 1989 (Lalive 4 Arb Int'l 2 (1988)), where the parties have the freedom to agree on procedural and substantive laws (Articles 182 –187). Judicial interference, moreover, in the arbitration process is very limited, since the courts would interfere only in issues regarding provisional measures and issues of evidence (Articles 183, 184, 185). With respect to foreign arbitral awards, their courts would enforce the award without entering into the process of a substantial judicial review. This review, would be limited to that provided by the

[13] Signed 25 November 1958; ratified 26th May 1959; published in J. O. of 6 September 1959. Taking effect on 27th November 1989, France withdrew its commercial reservation to this Convention (published in J. O. of 23 February 1990).

New York Convention (Article 194). As to awards made in Switzerland, actions to vacate them are also limited to the grounds mentioned in the above Convention (Article 190). The parties in any international arbitration can agree to exclude even this review, by proving that no parties are domiciled in Switzerland (Article 192).

3. TYPES OF ARBITRATION

In the field of arbitration, the arbitration itself can be national or international. It also can be ad hoc or institutional. In this regard, we will mention the different types of arbitration

(a) Institutional and Ad Hoc

Institutional arbitration and ad hoc arbitration are two distinct methods of proceeding and the differences between the two are described below:.

Ad Hoc Arbitration

An ad hoc arbitration is one that is conducted under the rules of procedure, which are adopted for the purpose of the arbitration. Moreover, the rules of procedure may be drawn up by one of the non-commercial international organisations, such as The UNCITRAL Arbitration Rules. They could also be drawn up by the parties, or by the arbitral tribunal or by some combination of the two.[14] Ad hoc arbitration often takes place under the provisions of a submission agreement (Redfern and Hunter 1991:13). We assume that one of the best advantages of this type of arbitration is that it could be shaped to meet the wishes of the parties and the facts of the particular dispute, but it needs the co-operation of the parties and their advisers for this to be done efficiently and effectively.

Institutional Arbitration

Institutional arbitration is one that is administrated by one of the many specialist arbitral institutions under its own rules of arbitration. It should be mentioned that this particular type of arbitration maybe wholly or semi-administrated. An example of a wholly administrated

[14] Many of the large international commercial arbitrations where an estate agency is a party would be based on the ad hoc system. For example, see the arbitration between Aminoil v The Government of Kuwait. 21 I.L.M. 976 which we will address in Chapter 6.

arbitration is that of ICSID where their centre provides a full service to the arbitral tribunal. An example of semi-administrated arbitration is those conducted in England under the rules of the Chartered Institute of Arbitrators. In these cases, the Institute appoints the arbitral tribunal and then leaves it to them to communicate with the parties, arrange meetings and hearings and so on (Redfern and Hunter 1991:13). There are many institutions in the world, amongst which are the American Arbitration Association, AAA; The International Chamber of Commerce, ICC; the International Centre for the Settlement of Investment Disputes ICSID; the London Court of International Arbitration, LCIA; etc. In the Gulf States on the other hand, there are a number of international arbitration centres, which will be addressed later on in this project.[15] We assume that the automatic incorporation of a book of rules is one of the principle advantages of institutional arbitration. In the event of one party being unwilling to arbitrate or refusing to appoint an arbitrator, the book of rules will contain provisions under which the arbitration may proceed. For example, the ICC rules stipulate that if any of the parties, although duly summoned, fail to appear without valid excuse, the Arbitral Tribunal shall have the power to proceed with the hearing (ICC Rules Art. 21.2). Another important advantage is the availability of trained staff in most of the arbitration centres, who will ensure that an arbitral tribunal is appointed, that the payments and expenses of the arbitrators are made, and more importantly, that the arbitration is run as smoothly as possible.

However, the major disadvantage in this type of arbitration is that it may prove to be expensive. Moreover, in the opinion of Redfern and Hunter, the *ad valorem* basis adopted by the ICC makes this type of arbitration extremely expensive (1999:49). This will be described at the end of this chapter, when we highlight the major international arbitration centres in the world.

(b) Differentiation Between Domestic and International Commercial Arbitration

The term "international" is used to mark the difference between arbitrations, which are purely national or domestic and those which, in some way, transcend national boundaries and so are international or, in the terminology adopted by Judge Jessup, "transnational" (Yale Law School, 1956). The practice in the international business community provides two types of distinctions and they are based either on the international nature of the dispute or the nationality of the parties.

[15] Furthermore, there will be a full description of all international and regional arbitration centres in this chapter as well as chapters 5 and 7.

The International Nature of the Dispute

The International Chamber of Commerce adopted the nature of the dispute as a way of deciding whether or not under its rules, an arbitration was international. At the beginning in 1923, it only considered business disputes as international if they involved nationals of different countries but, at a later stage, the ICC altered its rules in 1927 to cover disputes that contained a foreign element even if the parties were nationals of the same country. Due to the fact that the ICC is located in France, it greatly assisted in the development of French arbitration law, as mentioned above. Moreover, this wide interpretation of the term "international" is to be found in Article 1492, which simply provides that arbitration is international when it involves the interests of international trade, meaning that the definition looks to the subject matter of the dispute rather than the nationality of the parties. The former French colonies such as Algeria followed this approach in defining what is meant by international arbitration (Algerian Code of Civil Procedure Article 458).

The Nationality of the Parties

An alternative to the above is to focus attention on the parties. This means considering the nationality, place of residence, or place of business of the parties involved. It is an approach that was adopted in the European Convention of 1961.[16] Switzerland is an example of a country in which the nationality of the parties determines whether or not an arbitration is international. Moreover, since January 1989 international arbitrations located in Switzerland are governed by Swiss international arbitration law, and are deemed to be international, where at the time the arbitration agreement was concluded, at least one of the parties was not domiciled or habitually resident in Switzerland (Lalive 4 Arb. Int'l 2 (1998)). The nationality test is also used by the United States for the purposes of the New York Convention, but arbitration agreements between United States citizens or corporations are excluded from the scope of the Convention, unless their relationship involves property located abroad, envisages performance or enforcement abroad, or has some reasonable relation with one or more foreign states (US Code, Title 9 (Arbitration)).

[16] European Convention on International Commercial Arbitration made at Geneva, April 21, 1961 – United Nations Treaty Series (1963-64) Vol. 484.p. 364. No. 7041.

The Model Law Approach

Even though Chapter 5 focuses on the comparisons between the Model Law and Saudi Arabitration Regulations, it is worth repeating that this law has a unique approach in terms of defining what is international in the context of international commercial arbitration. The Model Law was specifically designed to apply to international commercial arbitration. The official report on the Model Law stated that in considering the term international it would appear to be:

> "Necessary, though difficult, to define those terms since the Model Law is designed to provide a special legal regime for those arbitrations where more than purely domestic interests are involved".
>
> (UN Doc. A/CN 9/207)

The definition adopted in the Model Law is as follows:

> "1(3) an arbitration is international if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States: or
> (b) one of the following places is situated outside the State in which the parties have their places of business:
> i. the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
> (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."
>
> (UNCITRAL Model Law Article 1 (3))

As mentioned above, we can see that this definition combines the two criteria mentioned earlier. The importance of the distinction between domestic and international arbitration is that if the arbitration is domestic, the national judiciary may exercise control over arbitration by reviewing the subject matter of the dispute, and this could be taken to an extreme in some countries like Saudi Arabia, as seen in Chapter 2. However, if an arbitration is considered international, the national courts in a developed system would avoid involvement in the dispute since the scope of international arbitration is wider than that of domestic arbitration. Moreover, international commercial arbitration, as described by Redfern and Hunter:

> "The distinction is important in practice. Amongst states which have a developed law of arbitration, it is generally recognised that more freedom may be allowed in an international arbitration than is commonly allowed in a domestic arbitration. The reason is evident. Domestic arbitration usually takes place between the citizens or residents of the same state, and such arbitrations will involve claims which are small in amount, although often important in principle."
>
> (1991:14-15)

It should be noticed that the distinction is important because this will have its effect on the level of court support needed in the arbitration. Such support will be highlighted in this chapter, but at this stage it is important to address the applicable laws of international arbitration.[17]

4. THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

(a) Generally

Parties in the international business community usually go to arbitration to avoid the application of a national system. However, any international commercial arbitration could be subject to as many as five national systems of law or legal rules. It would be too much to expect that there is no material difference between them. At this point, we will move on to describe the types of law involved in this process.

(b) The Law Governing the Capacity to Arbitrate

In any contract, the parties must have the legal capacity to enter into it. The situation is no different when it relates to arbitration. To determine the issue of capacity, this depends on the nationality of the individual or the place of incorporation for a corporation and is recognised in the New York Convention and the Model Law.[18] Enforcement in this regard may be refused if the parties to an arbitration agreement were under incapacity. Furthermore many states do impose restrictions on themselves or their agencies to enter into arbitration agreements. A leading example is Saudi Arabia as mentioned in Chapter 2 (Decree No. 58 June 1963). In France, furthermore, legal persons of public law may not enter an arbitration agreement unless the restriction is waived by decree, but state agencies may validly submit disputes arising out of industrial or commercial activities to international arbitration. This appears to have been settled definitely by the Paris Court of Appeal in *Myrtoon SS. v. Ministere de la Marine Marchande* (*Revue D'Arbitratage* (1973), p.263).

(c) The Law Applicable to the Arbitration Agreement

An agreement to arbitrate is the foundation stone of the arbitral process. It may be contained in an arbitration clause or it may take the form of submission to arbitrate. If the agreement is contained in an arbitration clause, it is recognised in international practice to have

[17] The explanation of the type of support would be better explained after highlighting the concept of public policy either national or international

[18] This can be found in the New York Convention Article V.1 (a); also that could be found in the Model Law Art. 36(1)(a)

its own autonomous existence and considered independent of the main contract, but is usually governed by the same law that governs the substantive rights of the parties under the main contract (Dicey and Morris 1987:534). However, since a submission agreement is not part of the main contract between the parties, it may very well be subject to a governing law different from that to which the main agreement was subject. As we will see later in Chapters 4 and 5, the New York Convention and the Model Law both mention the necessity for a valid arbitration agreement as a precursor to a valid arbitration and enforceable award.

(d) The Law Applicable to the Arbitration Proceedings

This is the law that is referred to as the Curial Law in the United States, and the *lex arbitri* in Europe.[19] This law, moreover, is the law of the place where the parties have agreed to arbitrate. The matters that go under the law of the *lex arbitri* are related to arbitrability, the validity of the arbitration agreement, the jurisdiction of the arbitrators, the interim measure of protection, whether the arbitral tribunal is able to decide *ex aequo et bono,* the form of the award and other matters. As we have seen before, national laws do not deal consistently with the issues mentioned above. Some national laws moreover impose significant limits on the conduct of the arbitration, and local courts would have great power in their supervision.[20] Other systems give freedom in conducting the arbitral process, as we mentioned before under the heading of supportive arbitration laws.

(e) The Law Applicable to the Substance of the Dispute

When a dispute arises out of a contract, the question would be according to what rules this dispute may be resolved. Modern international arbitration has developed new theories in the process of choosing the applicable law. The main modern principle that most modern arbitration laws would take is the autonomy of the parties, and that is the freedom of the parties to choose the law that governs their contract (Redfern and Hunter 1991:97).[21] Most of the time, the parties will choose a national law. However, there may be arguments against the choice of a particular national system, as mentioned previously in this Chapter. Furthermore, the refusal could be on the grounds that there are differences between specific national laws, and the unsuitability for international trade, such as the *Aramco* case. Where the parties have not agreed

[19] The phrase Curial Law appears most notably in American textbooks and judgments, but *lex arbitri* has a wider international recognition.

[20] For example, and as we will see in Chapter 7, foreign lawyers may not be permitted to appear in arbitration conducted on national territory or arbitrators may be prohibited from ordering discovery or administering oaths.

[21] There will be further discussion on the applicable laws in Chapter 6 "Internationalisation of International Commercial Arbitration".

upon the law governing their dispute, the arbitral tribunal must select such a law. In doing so, the tribunal must in principle refer to a conflict of laws rules. Although the historical practice was to apply the national conflict of laws rule of the arbitral situs, more recent practice appears to be moving towards the recognition of an international body of conflict of law of rules. Many developed nations grant international arbitrators substantial discretion in selecting an appropriate set of conflict of laws rules and choose an applicable substantive law (UNCITRAL Model Law Article 28 (2)). Also the rules of leading arbitral institutions contemplate choice of law decisions by the arbitrators. For example, the UNCITRAL Rules provide that failing agreement by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules, which it considers applicable (UNCITRAL Rules, Article 33). The practice, at the present time, is known as the so-called direct approach, where the arbitrators do not refer to any conflict of law rules. In Chapter 6 we will address all the historical developments of the choice of law in this regard, since it is one of the aspects of the so-called internationalisation of international commercial arbitration.

(f) The Law Applicable to Enforcing the Arbitral Award

Parties who go to the trouble and expense of taking their disputes to international arbitration do so in the expectation that unless a settlement is reached along the way, the arbitral proceedings will end with an award. They expect that the award will be final and binding upon them. As will be mentioned in Chapter 4, the New York Convention plays a central role in the enforcement of international arbitral awards. A principle purpose of the Convention was to make it possible to enforce in one country an award made in another. Where the New York Convention is applicable, Article 3 imposes a general requirement on signatory states to enforce arbitral awards. It provides:

> "Each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies, than are imposed on the recognition or enforcement of domestic arbitral awards"

Several aspects of the Convention give special force to the Article 3 requirement and underscore its drafters' goal of facilitating transnational enforcement of arbitral awards. Most importantly, the Convention presumes the validity of awards and places the burden of proving invalidity on the party opposing enforcement. Moreover, awards are not subject to "double exequatur" and need not be confirmed in the arbitral situs before enforcement can be sought

abroad. In addition, as Article 3 expressly provides, signatory states may not impose procedural requirements that are more onerous than those applicable to domestic arbitral awards. Article 5 of the New York Convention sets forth a limited set of grounds for non-recognition of an arbitral award. We will discuss these in Chapter 4, but what should be mentioned now is the concept of public policy, and how it has been developed by modern international arbitration practice, since it could be one of the main grounds for refusal under the New York Convention, as we will see in Chapter 4.

5. CONCEPT OF PUBLIC POLICY IN ARBITRATION

(a) Generally

Public Policy or *L'Ordre Public* as it is called in French law, is a set of rules governing the laws of a country, which may not be breached. They are a set of political, economic, social and ethical regulations that governs society. But the actual requirements of public policy vary from one state to another. The concept of public policy is flexible and varies depending on time and place. An issue of public policy in one country may not be considered so in another. For example, it would be normal to see a dispute between a wine producer and a distributor in England. However, this would be considered against public policy in a strict Islamic country like Saudi Arabia, and possibly some other parts of the Middle East. Another example is smoking, which was deemed to be against public policy in Saudi Arabia, and now isn't.

The practice of international arbitration has developed a distinction between national and international public policy, because there was fear that the concept of public policy would be used as an excuse for not enforcing an award. At this point, we will describe what is meant by domestic public policy and international public policy.

(b) The Concept of Domestic Public Policy

One area in which it is feared that public policy maybe used as an excuse for exercising state control over arbitration, is that of antitrust. As seen in the *American Safety* case the reaction of the court was as follows:

> "A claim under the antitrust laws is not merely a private matter...Antitrust violation can affect hundreds of thousands, perhaps millions of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than the Courts"
> (391 F.2d 821,826 (2d Cir.1968))

However, as seen subsequently in the *Mitsubishi* case, the court allowed an arbitration involving antitrust claims to continue: but added this word of warning:

> "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws have been addressed."
>
> (473 U.S. 614, 628 (1985))

The problem of domestic public policy was notably discussed at the ICCA New York Congress in 1986, and the ICC Institute of International Business Law and Practice Conference, October 1990 in Paris. But the scholars have failed to agree and in the opinion of Redfern and Hunter, it is possible that too much has been made of the problem. It seems unlikely that the interference of the courts will result in a rehearing of the whole dispute. Perhaps the most that a court would be expected to do is to make sure that the arbitral tribunal took into account the relevant antitrust issues in reaching its decision (1991:444).

(c) The Concept of International Public Policy

Due to the differences in public policy between one nation and another, the idea of international public order emerged. The Egyptian writer, Fahmy tends to take the position that the issue at hand does not concern protecting the interests of a specific state. It takes into consideration, however, another issue, which is the protection of international solidarity. This requires every country to contribute to the development of relations between nations in order to create mutual understanding and promote peace on the grounds that international trade is the best venue for communication between nations, as well as the exchange of resources (1995: 32-33).

The differences between the domestic public policy requirements of states means that there is a risk that one state may set aside an award, which another state would regard as unimpeachable. With this in mind, the concept of international public policy has been developed by French jurists and embodied in the new French code of civil procedure. Moreover, this code allows an international arbitral award to be set aside if the recognition or execution is contrary to international public policy (Article 1502.5). In doing so, the law recognises the existence of two levels of public policy, the national level, which maybe concerned with purely domestic considerations, and the international level, which is less restrictive in its approach.

There is nothing new so far as arbitration is concerned in differentiating between national and international public policy. However, this can be found in the legislation and judicial judgements of many countries like the US Supreme Court decision in the *Scherk v. Alberto-Culver Co.* case. What is new, however, is that domestic public policy considerations in the New York Convention and the Model Law may be replaced by considerations of international public policy.[22] On this basis, an international award will not be set aside simply because it fails to conform to domestic requirements. However, international public policy will look to the broader public interest of honesty and fair dealing.

As we have seen, certain countries have drafted a national law for international arbitration and another for domestic, such as the French law mentioned above. Many Middle Eastern practitioners we have met at seminars and symposiums believe that this distinction is an ideal solution for countries not willing to change their consideration of domestic public policy in their arbitration laws. We believe, furthermore, that this is ideal for Saudi Arabia in order to ensure that the judicial intervention in international commercial arbitration is kept to the minimum. This will lead us to highlight the supportive role the courts should offer in the course of an international commercial arbitration.

6. THE ROLE OF THE NATIONAL COURTS IN THE ASSISTANCE OF INTERNATIONAL ARBITRATION

(a) Generally

The relationship between national courts and arbitral tribunals differs from one country to another. It is sometimes said that the relationship between national courts and arbitral tribunals is one of partnership (Redfern and Hunter 1999:341). Moreover, arbitration may depend upon the agreement of the parties, but it is also a system built on law. National courts could exist without arbitration but arbitration could not exist without the courts. Moreover, if there is a partnership between arbitrators and the national courts, it is one in which each has a different role to play at different times. As quoted in Redfern and Hunter, Lord Mustill, a leading English lawyer has compared the relationship between courts and arbitrators to a relay race.

> "Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement

[22] In Chapter 6 we will highlight the suggestions of leading practitioners such as Judge Holtzmann and Judge Schwebel in discussing the new trends in international commercial arbitration as well as the issue of public policy.

from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award".

(1999:343)

At the beginning of arbitral proceedings, national courts have the task of enforcing the agreement to arbitrate, if one of the parties should seek to repudiate from it. At the end of the arbitral process, national courts must also enforce the arbitral award, if the losing party is not prepared to carry it out voluntarily. During the arbitral process moreover, the arbitrators must take charge of the proceedings, set time limits, organise meetings and hearings, issue procedural directions, consider the arguments of fact and law put forward by or on behalf of the parties and make the award. At this stage we will address all those issues that are dependent on the support of the courts.

(b) At the Beginning of the Arbitration

It is possible to identify at least three scenarios in which the intervention of the court maybe necessary at the beginning of the arbitral process. These are the enforcement of the arbitration agreement, the establishment of the arbitral tribunal, and challenges to jurisdiction.

Firstly, a party to an arbitration agreement might decide to issue proceedings in a court of law, rather than take the dispute to arbitration. Most courts in the international business community are prepared to enforce the agreement to arbitrate by refusing to accept any proceedings in court and by referring the parties instead to arbitration.[23]

Secondly, if the parties have failed to make adequate provision for the constitution of an arbitral tribunal and if there are no applicable institutional or other rules, the intervention of a national court is usually required. Also, the intervention of the court will be required if there is any issue relating to the independence or impartiality of an arbitrator.[24]

Lastly, if any issue is raised as to the jurisdiction of the arbitral tribunal, the final decision on jurisdiction rests with the relevant national court, either the court in the seat of arbitration or the court of the state, or states in which recognition and enforcement of the arbitral award is sought.[25]

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[23] The position of the UNCITRAL Model Law on this subject will be addressed in Chapter 5.
[24] The position of the UNCITRAL Model Law with regard to the establishment of the arbitral tribunal will be addressed in Chapter 5.
[25] The position of the UNCITRAL Model Law in this regard will be addressed in Chapter 5.

(c) During the Arbitral Proceedings

Once an arbitral tribunal has been constituted, most arbitrations are conducted without any need to refer to a national court. There may be times, however, when the involvement of a national court is necessary to ensure the proper conduct of the arbitration. It may become necessary, for instance, to ask for the competent court to assist in taking evidence or to make an order for the preservation of property, which is the subject of the dispute, or to take some interim measures of protection.

In these circumstances, someone could ask if the arbitral tribunal itself has the power to issue interim measures, should the help or intervention of a national court be necessary. The answer to this question is obviously, yes, since the arbitral tribunal in most of the jurisdictions may not have the necessary powers. Take for example, the Greek Code of Civil Procedure that states:

> "The arbitrator may not order, amend or revoke interim measures of protection."
>
> (Article 889)

Also, the Italian Code of Civil Procedure which states:

> "The arbitrator may not grant attachment or other interim measures of protection."
>
> (Article 818)

Secondly, the arbitral tribunal cannot issue interim measures until the tribunal itself has been established. In practice it takes time to establish an arbitral tribunal and during that time, vital evidence or assets may disappear. National courts may be expected to deal with such urgent matters, and an arbitral tribunal that is not yet in existence plainly cannot do so.

The third factor that makes practitioners understand why the assistance of a national court maybe necessary, is that the powers of an arbitral tribunal are genuinely limited to the parties involved in the arbitration itself. It seems that in ICC arbitrations, for example, interim measures are very frequently given in the form of an award (Schwartz 1993 ICC Publication No. 519). This emphasises the limited extent of the arbitral tribunal's power since an award is the only valid method enforceable against the parties to the arbitration. In practice, this limitation can cause serious problems in multi-contract, multi-party disputes, if there are different arbitration agreements relating to one economic transaction, as mentioned before under the heading of Characteristics of International Arbitration (Paragraph 3).

It should be noted that an application to a National Court for interim measures should not be regarded as incompatible with the agreement to arbitrate. The judgement of the United States, Third Circuit in *McCreary Tyre & Rubber Co. v. Seat SpA,* is illustrative of a situation in which a national court was criticized for considering an application for interim relief as incompatible with agreement to arbitrate (501, F.2d 1032 (3d Cir. 1974)). As quoted in Redfern and Hunter, an American lawyer by the name of Hulbert, states:

> "The McCreary decision represents an extreme statement of the position that local provisional remedies are simply and in principle inapplicable in a case subject to arbitration. There is no trace of any consideration of whether, in the circumstances, an attachment might have assisted the eventual enforcement of the award, thus rendering the arbitral process more efficacious. The rationale of the decision appeared to preclude any such analysis".
>
> (1999:348)

The Measures Under Consideration

The first category is evidence. Since an arbitral tribunal does not in general possess the power to compel the attendance of relevant witnesses, it may be necessary to resort to the courts, particularly if the witness is not in any employed or other relationship to the parties to the arbitration, and so cannot be persuaded by them to attend voluntarily. Some national arbitration laws, such as the Swiss law, follow the approach adopted by the Model Law as will be seen in Chapter 5 (Swiss Act 1987 Art. 184 (2)). Some have set out the position more fully, such as the English Act 1996 (English Arbitration Act Section 43).

The second measure is aimed at preserving the status quo. In practice, there are many cases in which an award for damages does not fully compensate the injured party. This may include damage to reputation, loss of business opportunities and similar heads of claim, which are real enough, but difficult to prove and to quantify even if they are considered to be legally admissible.

For example, a manufacturer may refuse to continue supplies under a distribution agreement, alleging breach of contract. If the distributor does not receive the supplies, for which he had contracted, he may not be able to fulfil the contracts that he in turn has made. This may cause damage to his reputation, and to the network of agents that he has established. In such a case, the distributor would no doubt wish to argue that the status quo should be maintained, and that the manufacturer should continue to supply him, pending resolution of their dispute by arbitration.

The *Channel Tunnel* case had a chequered history reflecting the difficult issues raised in this type of situation between the national courts and the arbitral tribunals. It started when Eurotunnel applied to the English court for an interim injunction to restrain TML from carrying out its threat not to carry working unless its claim of £70 million was paid in full ((1993) A.C.334 at 367).

It should be noted that there are issues of court support at the end of the arbitration and these will be dealt with when we address the New York Convention 1958 on the Enforcement of Foreign Arbitral Awards, in Chapter 4. At this stage, we will address the major arbitration centres in the world that came in existence to cope with the developments of arbitration as mentioned in this chapter.

6. AN OVERVIEW OF LEADING ARBITRAL INSTITUTIONS

(a) International Chamber of Commerce and International Court of Arbitration

The ICC's International Court of Arbitration was historically regarded as the world's leading international arbitral institution. It was established in Paris in 1923. The ICC has played an important role in promoting international laws on arbitration, such as the New York Convention, and it is considered to be the world's leading organisation for international commercial arbitration.[26] It should be noted that the so-called International Court of Arbitration is not a court in the sense of a court of law, it is however the administrative body of the ICC with representatives from many different countries. The Secretary General and other counsels have to be multi lingual in order to deal with the different nationalities involved in the day-to - day work of the ICC. It should be noted that the ICC have issued new rules that came into effect in 1998.[27]

While enjoying a first class reputation, the ICC has sometimes been criticized for selecting arbitrators from a narrow circle of candidates and for having stagnated somewhat in recent years. The ICC is also widely regarded as charging unusually high administrative fees in order to support its centralised staff, which is one of the disadvantages of using institutional arbitration as mentioned in this chapter.[28]

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[26] Take for example the ICC reports that out of a total of more than 8000 cases submitted at the end of 1996, more than 5,000 were filed after 1980.

[27] For a commentary on the 1998 Rules of Arbitration, in English and French, see Verbist and Imboos, "The New 1998 ICC Rules of Arbitration", *Revue de Droit des Affaires Internationales, Paris, International Business Law Journal*, (No. 8 of 1997). pp. 991

[28] For more information about the Centre see http://www.iccwbo.org

(b) London Court of International Arbitration

The London Court of International Arbitration is by a fairly substantive margin the second most popular European Arbitration institution. It was founded in 1892 and was known as the London Chamber of Arbitration and was renamed the LCIA in 1986. Although the LCIA is formally independent, it is sponsored by the London based Chartered Institute of Arbitrators, the Chamber of Commerce and Industry and the Corporation of the City of London. Historically arbitrators used to be senior English lawyers, but at the present time, however, the LCIA's effort is to internationalise its focus in order to have diverse appointments (Born 1994:15 –16). It should be noted that the LCIA has its own Book of Rules revised in 1998, which are designed to take the arbitral tribunal step by step through the procedures of the arbitration.[29]

(c) The American Arbitration Association

The American Arbitration Association based in New York was founded in 1926. The AAA describes itself as the world's largest arbitral institution. For example, in 1992 it administrated more than 60,000 arbitrations or other forms of alternative dispute resolution (AAA 1992 Annual Report, Issued 1993). Outside the United States, however, the AAA is often seen as a national institution, and it has encountered difficulties appealing to non-US companies and counsel. In recent years, AAA has sort to broaden its appeal particularly among non-Americans and therefore, in 1991 it introduced international arbitration rules, revised in 1997, which reflect the UNCITRAL Arbitration Rules.[30]

(d) The WIPO Arbitration Centre

The WIPO arbitration centre was established in 1994 under the auspices of the World Intellectual Property Organisation (WIPO).[31] It is based in Geneva and has an excellent modern set of rules both for mediation and arbitration. Several factors led to the decision to set up the WIPO Arbitration Centre:

- The growing importance of intellectual property in the world economy and the way in which is transcends national boundaries, particularly in knowledge-intensive industries such as computers, semi-conductors and electronics, pharmaceuticals, chemicals and motor cars;
- The growth of Alternative Dispute Resolutions; and
- The highly technical nature of intellectual property disputes

(Dr. Francis Gurry, 1995, a talk to the International Arbitration Club)

[29] For further information on the LCIA see http://www.lcia-arbitration.com
[30] For further information on the AAA see http://www.adr.org
[31] For information on WIPO see http://www.arbiter.wipo.int/center/

7. CONCLUSION

As we have mentioned in this chapter, the increase in international trade has resulted in the development of arbitration. However, more work needs to be done in regard to the efficiency of enforcement of arbitral awards around the globe. Therefore, many important regional and international conventions have taken place over the last century. We will, therefore, now highlight those important conventions and treaties.

Chapter 4

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

1. BACKGROUND

(a) Generally

Historically, international arbitration has followed two streams; public law arbitrations between states and commercial arbitration. Both types of arbitration have been known for many centuries. The ancient Greeks, for example used arbitration between states (Hammond Arb. Int'l 188 (1985)). Commercial arbitration was well known to the Romans during the era of their domination of Europe. In some ways the modern international arbitrator acts in the ancient Roman tradition of the *Praetor Peregrinus,* an official appointed to deal speedily with disputes involving foreigners and travelling merchants, who helped to establish the *lex mercatoria.*

However, regulation of international arbitration in the form of multilateral conventions did not appear until the end of the nineteenth century. The Hague Convention of 1899 was one of the practical achievements of the Hague Peace Conference of that year. That Convention established the Permanent Court of Arbitration and, although little used, the Convention itself was, in modern times, the first positive action taken by a group of states to provide a general method for the peaceful resolution of disputes between themselves. Also, the Montevideo Convention which was made in 1889 and provided for the recognition and enforcement of arbitration agreements between certain Latin American states (Montevideo Convention Articles 5, 6 and 7).[1]

In modern times, if enforcement is sought in an international dispute arising in a country other than that where the judgment was rendered, recourse has to be made to bi-lateral enforcement treaties, or to international conventions such as the Lugano Convention[2] or the Brussels Convention[3]. However, as mentioned in Chapter 3, the modern world has discovered that the most effective method of creating an international system of law governing their trade

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[1] The Treaty is published in an English translation in *Register of Texts of Conventional and other Instruments concerning International Trade Law, Volume II* (1973) United Nations, p.5.
[2] EC EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 1988.
[3] Brussels Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968.

relations, is international commercial arbitration through international conventions and more recently through the Model Law that we are going to describe in Chapter 5. The international conventions that favoured arbitration as a peaceful method of dispute resolution, first took the form of agreements between friendly states, such as the Treaty of Friendship, Commerce and Navigation, by which the states agreed to grant each other favourable trading conditions and to submit any disputes to arbitration with provisions for enforcing ensuing awards (Redfern & Hunter 1999:64).

Internationally, it is generally easier to obtain recognition and enforcement of an international award than of a foreign court judgment. This is because the network of international and regional treaties for the recognition and enforcement of international awards is more widespread and better developed than corresponding provisions for the recognition and enforcement of foreign judgments. Indeed, this is recognised as one of the advantages of arbitration as a method of resolving international commercial disputes, as already seen in Chapter 3.

The successful party in an international commercial arbitration expects the award to be performed without delay which is a reasonable expectation. The purpose of arbitration, unlike mediation and other methods of dispute resolution, is to arrive at a binding decision on the dispute. Once this decision has been made in the form of an award, it is an implied term of every arbitration agreement that the party will carry it out (Mustill and Boyd 1989:47).

In arbitration, enforcement of the award by the State is not necessarily a natural consequence. The main difference compared to enforcement of court judgments is that arbitral tribunals are constituted by the parties' agreement, specifically for the purpose of settling disputes arising out of or in connection with a particular contract. After an arbitral tribunal has rendered its final award, it is *functus officio.*

The award is made by a private tribunal, which does not have *imperium* and sovereignty comparable to state courts. In order for an award to be enforceable it depends on a system of national law providing for recognition and enforcement of arbitral awards by national courts. The first problem one might encounter is that the national Court does not recognise the arbitration award. Secondly, once the award is recognised there is the problem of review. How far can judicial review of the award go? Should it be restricted to safeguarding the most basic notions of due process and public policy, or should it entail review on the merits?

These problems are dealt with in a number of international Conventions and bi-lateral treaties, which are concerned with international commercial arbitration. The first modern and genuinely international convention was the Geneva Protocol of 1923, which was drawn up on the initiative of the ICC and under the auspices of the League of Nations, which was quickly followed by the Geneva Convention of 1927. We will address those conventions but not before we have addressed the regional conventions that helped in developing the concept of arbitration in different parts of the world, such as the Middle East.

2. REGIONAL CONVENTIONS

(a) Generally

As in many other parts of the world, many conventions have been concluded on a regional level in the Arab Middle East and elsewhere. The Gulf States, including Saudi Arabia, concluded that responding to those conventions was a necessary part of coping with the economic, cultural and political goals of the Arab world. As we have stated before, after the independence of the Arab states they took the burden, or the responsibility, for national development by investing their own natural resources. This was quite clear in the case of Arab states that possessed natural resources of special significance, like oil and minerals. However, those countries lacked the expertise and the technology needed for such developments. Furthermore, they did not have the `know how' to execute such projects unless they dealt with industrial countries. On the other hand, like other countries who had gained independence recently, the Arab states were keen to safeguard their independence and sovereignty. Therefore, they avoided submission of their disputes to foreign courts, as a result of transactions with developed nations, because this would affect their sovereignty and bypass their national jurisdiction (Fahmy 1995:106).

On the other hand, while industrialised countries find an attractive market in Arab states who are willing to participate in the execution of large contracts, at the same time, they fear nationalisation and control of foreign capital by the said Arab states. Industrialised countries furthermore might try to avoid submission of their disputes to Arab courts on the grounds of a lack of clarity in the local laws of those states, as mentioned before. As a result of this situation, both parties approached each other with caution (Fahmy 1995: 106). Yet the necessities of commercial relationships between these countries, and the search for a solution to their disputes resulting from trade relations, prompted them to seek to develop the concept of arbitration in

Arab countries and then move on to an international level. This can be seen in a number of Arab conventions and treaties as follows:

(b) The Riyadh Convention on Judicial Cooperation of 1983

On 6 April 1983, the member States of the Arab League signed a Convention on Judicial Co-operation in Riyadh, which repealed the previous convention of the Arab League of 1952 on enforcement of judgments and awards.

This Convention, which came into force in October 1985, provides in its preamble that "the legislative union between Arab countries is a national objective which must be reached in order to accomplish global Arab unity. The judicial cooperation between the Arab countries should be total and encompass all judicial fields in a manner which enables them to participate positively and efficiently in the consolidation of the efforts existing in this field."

This Convention reaffirms the enforceable character of arbitral awards made in a contracting State without consideration of the nationality of the party in favour of whom it was made. The Riyadh Convention is a step forward for those Arab States that have not signed the New York Convention, but was a step backwards for those who did sign it (El-Ahdab 1998 IHCA Vol.I:21) To enforce an arbitral award made in another Arab country, the Riyadh Convention requires that leave to enforce be obtained in the country where the award was made (Article 34 (b)). Thus, a leave to enforce from the originating country is required, which is not the case in the New York Convention as we will see later.

(c) The 1974 Agreement on the Settlement of Disputes Between Arab Investment Receiving States and Nationals of Other Arab States and The 1980 Agreement on the Investment of Arab Capital in Arab States

When the oil "boom" occurred in 1973, certain Arab countries decided to use the ICSID Convention of 1965 by making an Arab version in the form of an "Agreement on the Settlement of Disputes between Arab Investment Receiving Countries and the Nationals of other Arab States" (the "Inter-Arab Agreement").

The Agreement was signed on the 10th June 1974[4]. The Council of Arab Economic Unity approved the Agreement at its meeting of December 1974 (Decision No. 663). This Agreement came into force on the 20th August 1976. It reflected the desire to establish an Arab

[4] Jordan, Sudan, Syria, Iraq, Kuwait, Egypt, Yemen, Libya and the United Arab Emirates signed the Agreement.

Common Market, which was one of the main preoccupations of another agreement called the "Unified Convention for Investment of Capital in the Member Countries of the Arab League" signed on 27th November 1980 and it came into force in September 1981 (El-Ahdab 1998 IHCA Vol.I:24).

Prior to this, an agreement had been signed for the creation of an "Inter-Arab Agency of Investment Guarantees", which came into force on 1 April 1974, and which also referred disputes to arbitration. The arbitration which takes place thereunder is conducted according to its provisions, and not by virtue of the 1974 Agreement for Arab Investments (El-Ahdab 1998 IHCA Vol.I:24).

(d) The Amman Convention on Commercial Arbitration

On the 14th April 1987, the Arab Convention on Commercial Arbitration, an initiative of the Council of the Arab Ministers of Justice, was signed in Amman.[5]

The Convention established "The Arab Centre for Commercial Arbitration" in Rabat (Amman Convention Article 4). Awards made under the auspices of the Centre may only be set aside by a commission appointed by the Bureau of the Centre (Amman Convention Article 34.3). Enforcement must be granted by the Supreme Court of each Member State, and may be refused only for reasons of public policy (Amman Convention Article 35). This Convention, like other regional conventions, is of limited international interest in that it restricts submissions and pleadings to the Arabic language, and the proceedings it contemplates are thus not accessible to most parties to international commercial agreements.

3. OTHER REGIONAL CONVENTIONS

(a) Moscow Convention

The Moscow Convention was signed in 1972. The original signatories were those Eastern European States, which formed the Council for Mutual Economic Assistance, however, some former member States have either ceased to exist or have withdrawn their membership.[6]

[5] It has been followed by the following thirteen Arab countries: Jordan, Tunisia, Algeria, Djibouti, Sudan, Syria, Iraq, Lebanon, Libya, Morocco, Mauritania, the Yemen Arab Republic and Yemen Democratic People's Republic.

[6] Poland, the Czech Republic and Hungary have withdrawn, so it only applies to Bulgaria, Cuba, Mongolia, Romania and Russia

The Convention provides that an arbitration award shall be final and binding (Moscow Convention Article IV.I). Enforcement proceedings must be brought within two years of the date of the award and the three grounds of refusal of enforcement closely parallel those in the New York Convention, namely lack of jurisdiction, denial of a fair hearing and the setting aside of an award (Moscow Convention ArticleV.I).

(b) The Panama Convention

The Panama Convention was signed in 1975 by twelve South American states and was promulgated at the conclusion of the Inter-American Conference on Private International Law in Panama. This Convention represented an important change of attitude away from hostility and towards arbitration, that we have addressed in Chapter 3. The Panama Convention recognizes arbitration agreements for existing as well as future disputes (Panama Convention Article 1). As opposed to the New York Convention, however, it does not provide for the situation that litigation is commenced despite the existence of an arbitration agreement. However, notwithstanding this discrepancy, the key provisions of the two conventions are very similar to each other. According to the House Report by the Judiciary Committee accompanying the Bill at the Panama Convention in the United States:

> "the New York Convention and the Inter-America Convention are intended to achieve the same results, and their key provisions adopt the same standards."
>
> (No. 101-501, 101st Cong. 2d Sess.5 (1990))

Certainly, whether because of the Convention or because of other influences – such as the Model Law – arbitration is becoming a more acceptable way of settling disputes in Latin America and we will discuss that more fully in Chapter 7.

(c) The European Convention of 1961

The European Convention, signed in Geneva in 1961, is a supplement to the New York Convention. It is mainly designed for disputes arising out of contracts between European parties, in particular East/West disputes.

The European Convention does not deal with recognition and enforcement of awards. This is left to other Treaties such as the New York Convention. One of its main features, however, is the limitation of grounds on which awards can be set aside. It provides that the setting aside of an award in a contracting state will only constitute a ground for the refusal of recognition or enforcement of that award in another contracting state, if the award has been set

aside for reasons specified in the European Convention (Article IX.1). It is important to note that these reasons correspond to the first four grounds for refusal mentioned in the New York Convention, which we will discuss later.

4. THE INTERNATIONAL CONVENTIONS

(a) Generally

As noted before, international commercial arbitration has gained a special position due to the expansion of international trade. Parties to a dispute over an international transaction may wish to avoid submission to the judiciary of a particular country. Therefore, international trading contracts usually include an arbitration clause. This increasing importance has led, as we will see later, to the creation of several commissions or entities and centres specialising in arbitration. International organisations and corporations concerned with the rules of the international law of trading contributed to the establishment of specific rules for international commercial arbitration, which address all arbitration-related issues.[7] There was also the necessity of drafting multi-party conventions to address, first, the rules of international commercial arbitration and second, the mechanism of recognising arbitration awards issued in a particular country, but to be enforced in another. At this point, we will discuss the most important relevant international conventions. A special focus will be on the New York Convention since it is the most important tool for the recognition and enforcement of foreign arbitral awards. Moreover, we will mention all the international conventions, but the New York Convention will be highlighted in a separate section in this chapter, because of its great importance in the field of international arbitration.

(b) The Geneva Protocol of 1923 and The Geneva Convention of 1927

The ICC, under the auspices of the League of Nations, drew up the Geneva Protocol of 1923. Similar to the New York Convention, it differentiates between the enforceability of arbitration agreements and awards. The former were to be recognised and enforced internationally, the latter however, only in the state where the award was made. In other words, the Geneva Protocol of 1923 was concerned with ensuring that states who became party to the Protocol would support international commercial arbitration both at the beginning and end of the arbitral process. At the beginning of the process, contracting states would ensure that parties

[7] FIDIC, the Federation International des Ingenieurs-Conseils and GAFTA, Grain and Feed Trade Association Arbitration Rules are among the examples that can be given in this regard.

to an arbitration agreement resolved their disputes by arbitration, rather than by resorting to national courts (Geneva Protocol, Article 4). At the end of the arbitral process, they would at least grant recognition and enforcement to awards made in their own territory (Geneva Protocol, Article 3).

The Geneva Protocol of 1923 was, therefore, limited in range and effect, and was soon superseded by the Geneva Convention of 1927. The aim of this document was to widen the scope of the previous Geneva Protocol and to provide for international enforceability of arbitration awards. Moreover, it provided that an award would be recognised as binding and would be enforced internationally, in the territory of any of the contracting states, subject to certain conditions.[8]

One main problem of the Geneva Convention was the so-called *"double exequatur"* requirement, which has been dealt with, however, by the draftsmen of the New York Convention in Article V as we will be seen later. The Geneva documents have proven to be very successful instruments in furthering international arbitration, in particular as regards enforceability.

Some Arab countries endorsed the Geneva Protocol of 1923, but did not endorse this Convention. It is interesting to note that fifty-three countries endorsed the Protocol but only twenty-four countries endorsed the Geneva Convention for 1927 (Samy 1997:35). It is important to know moreover that Saudi Arabia was not party to any of the Geneva treaties.

(c) The ICSID Convention

The International Centre for the Settlement of Investment Dispute ICSID is a specialised arbitration institution, established pursuant to the so-called "Washington Convention" of 1965. The ICSID Convention is designed to facilitate the settlement of a limited range of "investment disputes" that the parties have specifically agreed to submit to the ICSID. Investment disputes are defined as controversies that arise out of an "investment" and arise between a signatory state or state entity and a national of another signatory state (Reisman 1989 Duke Law Journal: 739). As to such disputes the Convention provides both conciliation and arbitration procedures (Article 28-35). The Convention contains a number of unusual provisions relating to international arbitration.

[8] They were (1) that the award was made pursuant to an agreement to which the Geneva Protocol 1923 applied; (2) that the award was made in the territory of one of the contracting states; and (3) that the parties to the award were subject to the jurisdiction of one of the contracting states.

First, the convention provides that in the absence of agreement by the parties, ICSID arbitrations are governed by the law of the state that is party to the dispute and such rules of international law as may be applicable (ICSID Convention Article 42). Second, ICSID awards are theoretically directly enforceable in signatory states without any method of appeal in national courts (ICSID Convention Articles: 53-54). Third, when a party challenges an ICSID award, the Convention empowers the Chairman of the Administrative Council of ICSID to appoint an ad hoc committee to review, and possibly annul, awards. If an award is annulled, it may be resubmitted to a new arbitral tribunal (ICSID Convention, Article 52). Saudi Arabia is a party to this Convention and it did reserve the right not to submit all questions pertaining to oil or acts of sovereignty to this International Centre, whether by way of conciliation or arbitration, as stated in the Council of Ministers Resolution:

> "After scrutinizing the aforementioned Convention we have found it acceptable and have approved it in its entirety, be it confirmed that the Kingdom reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty, to the International Centre for the Settlement of Investment Disputes, whether by way of conciliation or arbitration.
>
> We hereby declare that we have ratified and concluded the Convention and we undertake, with the will of God, to carry out what is stipulated there in all good faith"
>
> (No. 372 dated 15/3/1394 H and enacted by Royal Decree M/8 1979 AD)

(d) The Overseas Private Investment Corporation "OPIC"

The Government of Saudi Arabia has agreed to accept arbitration in regard to certain differences and claims relating to the Agreement on Guaranteed Private Investment [9], and guarantees of the Saudi Arabian public sector contracts and investments to which it applies. Article 1 provides:

> "In order to increase participation by United States private enterprise in projects bringing new technology to Saudi Arabia, persons eligible under applicable United States legislation may be issued guarantees by the United States Government against loss due to specified risks relating to contracts or investments in Saudi Arabia which are approved by the Government of Saudi Arabia (hereinafter, "Guarantees"). The Government of the United States of America agrees that a contract or investment shall be deemed approved for purposes of this Agreement only if entered into with the Government of Saudi Arabia, or an agency thereof, or otherwise approved in accordance with the applicable laws and regulations of Saudi Arabia."

If a contract or investment is concluded with the Government or one of its agencies, the agreement applies automatically, and no provision as to its applicability need be included in the

[9] Feb. 27 1975, United States – Saudi Arabia, 26 U.S.T. 459 T.I.A.S. No. 8045 (approved by Royal Decree No. M/22 (29/3/1395);l cf. Agreement on Legal Protection of Guaranteed Private Investments. Feb.2 1980 German Federal Republic, [1980] Bundesgesetzblatt II 693 (W. Ger.).

contract underlying the dispute. However, contracts to which a wholly owned government corporation, which would not automatically fit within the definition of agency, was a party could fall within the protection of the agreement, if approval were obtained by means of a Council of Ministers Resolution or Royal Decree. Differences between the parties concerning interpretation of the agreement are initially to be resolved by negotiation. Failing resolution of the controversy within three months of the request for negotiations, the difference shall be submitted at the request of either government to an arbitral tribunal (Agreement on Guaranteed Private Investment Article 3 (a)). The arbitrators in such a case are required to base their decision on the applicable principles and rules of public international law. The Tribunal decision is issued by a majority vote which is final and binding (Agreement on Guaranteed Private Investment Article 3 (c) (ii)).

5. THE NEW YORK CONVENTION ON ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 1958

(a) Generally

With the rapid expansion and increase in international trade after the Second World War, the need became more pressing for an arbitration system that was more in line with international standards (Samy 1997:36). The intention was primarily to solve the most significant problem of arbitration, which is the execution and enforcement of foreign arbitral awards. Although the previously mentioned Geneva Protocol and Convention addressed this issue, awards were not easily implemented because they were required to be final and incontestable in order to be recognised and enforced. Also, the number of countries who endorsed the Geneva Protocol and Convention was not large. In addition to those factors, countries that play a significant role in international trade, like the former USSR and the USA did not endorse them either (Samy 1997:36).

In order to establish new international rules for enforcing foreign arbitral awards, the International Chamber of Commerce (ICC) prepared a draft that was endorsed during its 14th conference held in Vienna in 1953. Moreover, the United Nations' Economic and Social Council (ESOSOC) adopted a presentation of the draft law for discussion. A committee of eight countries also prepared a counter draft law to the ICC's draft (Pietro and Platte 2001:15, Van den Berg 1981:7). In 1956, the Council decided to hold an international conference to consider endorsement of a new convention on recognition and enforcement of arbitral awards. The Conference was held on 20 May 1958 in New York, and after twenty days of discussion the

Conference endorsed on 10 June 1958 a Convention on Recognition and Enforcement of Foreign Arbitration Awards, which was executed on 4 September 1959 (van den Berg 1981:8).

The Convention contains sixteen articles. It does not address all issues of arbitration but is rather, limited to management of recognition and enforcement of foreign arbitral awards in member countries. It also stated that 'The Geneva Protocol of 1923 and the Geneva Convention of 1927 will cease to have effect between member countries on the date of the endorsement of the Convention.'[10] This means that the Geneva Protocol of 1923 and the Geneva Convention of 1927 have become null and void for countries, which joined the New York Convention of 1958. The New York Convention has been described as "the single most important pillar on which the edifice of international arbitration rests," and is one which, "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law" (Schwebel 1996:12 Arb. Int'l: 823). However, its operation has not been without practical difficulties and this is primarily because of the lack of a uniform approach by the courts of various contracting states, to the grounds on which enforcement would probably be refused under the Convention. We will describe below the operation of the Convention, citing some international cases wherever it is applicable which should result in a fuller understanding of the necessity of the UNCITRAL Model Law and its standards.

(b) Recognition and Enforcement

In order to understand the rationale and mechanisms of the Convention, it is necessary to analyse the two main matters to which it applies: recognition and enforcement. It is necessary to offer a brief explanation of what in general the two terms recognition and enforcement, deal with, their essence and their aims.

The Meaning of Recognition

Recognition on its own is generally a defective process.[11] It will usually arise when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will object that the dispute has already been determined. To prove this, he will seek to produce the award to the court and

[10] In fact, at the time of the preparation of this thesis the Geneva treaties were only relevant for arbitral awards made in Portugal or Mauritius. There have been great developments in the practice of international commercial arbitration in different parts of the world as will be seen in Chapter 7.

[11] It should be noted in some countries and other conventions such as the Arab conventions that we have seen earlier, it may be a necessary step along the way to enforcement.

ask the court to recognise it as valid and binding upon the parties in respect of the issues with which it dealt. The purpose of recognition on its own is generally to act as a shield. Recognition is used to block any attempt to raise, in new proceedings, issues that have already been decided in the arbitration that gave rise to the award, whose recognition is sought (Pietro and Platte 2001:22).

The Meaning of Enforcement

By contrast, where a Court is asked to enforce an award, it is asked not merely to recognise the legal force and effect of the award but also to ensure that it is carried out by using such legal sanctions as are available. Enforcement goes a step further than recognition. A court that is prepared to grant enforcement of an award will do so because it recognises the award as validly made and binding upon the parties to it and, therefore, suitable for enforcement. Furthermore, the purpose of enforcement is to act as a sword. Enforcement is a positive step taken to compel the losing party to carry out an award that he is unable or unwilling to carry out voluntarily. Enforcement of an award means applying legal sanctions to compel the party against whom the award was made, to carry it out (Pietro and Platte 2001:23).

(c) Enforcing Foreign Arbitral Awards

The opening statement of the convention has adopted an international attitude. It stated the following:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."
>
> (New York Convention, Art. I.1)

This would mean that an award made in any state (even if not a party to the New York Convention) would be recognised and enforced by any other state that was a party. There is however, a qualification to this flexible internationalist approach and that could be seen when the Convention allowed states to make two reservations. The first of these is the reciprocity reservation; the second is the commercial reservation (New York Convention, Article I.3).

Reciprocity

As mentioned above, the New York Convention provides the following:

> "When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards *made only* in the territory of another Contracting State" (Article I.3)

That is to say that instead of applying the Convention to all foreign awards wherever they are made, the scope of the New York Convention may be limited to convention awards that are made in a state, which is party to the New York Convention. Accordingly, when seeking a suitable State in which to hold an international arbitration, it is advisable to select a state that has adopted the New York Convention, so as to improve the chances of securing recognition and enforcement of the award in other convention countries. This limiting factor should not be exaggerated because the number of countries endorsing the New York Convention grows year by year. The Convention links the world's major trading nations Arab, African, Asian and Latin American countries, as well as Europe and North America. As more countries became convention countries, the reciprocity reservation becomes less significant (Redfern and Hunter 1999:457). Saudi Arabia moreover requires reciprocity in enforcing the convention (Council of Ministers Resolution No. 78 1414H, Article 2). Again, this should not constitute a problem for Saudi Arabia since the number of countries that became party to the New York Convention as mentioned above, is growing year by year

Commercial Relationships

The New York Convention contains a further reservation which entitles a contracting state to declare that it will only apply the convention to differences arising out of the legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration (New York Convention Article I.3).

The fact that each State has its own standards of considering what is commercial, has created problems in the application of the New York Convention. Moreover, relationships which are regarded as commercial by one state are not necessarily so regarded by others. This does not assist in obtaining a uniform interpretation of the Convention which has led to difficulties as can be seen in two major Indian cases. In the first case between *Indian Organic Chemical Limited* v. *Subsidiary 1 (U. S.) Subsidiary 2 (U.S.) and Chemtex Fibres Inc. (Parent*

Company) (U.S.), the High Court of Bombay held that, whilst the agreement under which the dispute arose was commercial in nature, it could not be considered as commercial "under the law in force in India". The judge said:

> "In my opinion, in order to invoke the provisions of [the Convention], it is not enough to establish that an agreement is commercial. It must also be established that it is commercial by virtue of a provision of law or an operative legal principle in force in India."
>
> (1979 IV Yearbook Commercial Arbitration 271)

However, the High Court of Gujarat has since disapproved this decision. In the case of *Union of India and Ors v. Lief Hoegh & Co, (Norway) and Ors*, the plaintiff moved for a stay of legal proceedings that had been commenced despite the existence of an arbitration agreement. The argument in this case was whether or not the contract was commercial in nature. The judge stated the term "commerce":

> "... is a word of the largest import and takes in its sweep all the business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries."
>
> (1984 IX Yearbook Commercial Arbitration: 405 - 407)

Even though some national courts took a flexible approach in defining the word commerce, as mentioned above, the problem remains that each state may decide for itself, under the provisions of the New York Convention, what relationships it considers to be commercial and what, not. Although, in Saudi Arabia there are rules that distinguish commercial activities from civil activities, the situation for arbitration is different in that the *Shari'a* principles allow arbitration in whatever activities are subject for conciliation and mediation (Saudi Arbitration Regulations Article 2). And, therefore, this requirement should not cause any confusion in enforcing foreign arbitral awards in Saudi Arabia.

(d) Grounds for Refusal of Recognition and Enforcement

The various grounds for refusal of recognition and enforcement of an arbitral award in the New York Convention are almost identical to those mentioned in the Model Law that we are going to see in Chapter 5. It is important to mention that the New York Convention does not permit any review on the merits of an award to which the convention applies (The New York Convention Article IV). Also, the grounds for refusal of recognition and enforcement, set out in the New York Convention, are exhaustive. They are the only grounds on which recognition and enforcement maybe refused. Finally, the New York Convention sets out five separate grounds on which recognition and enforcement of a convention award may be refused at the request of the party against whom it is invoked.

It is significant that under the New York Convention, the burden of proof is not upon the party seeking recognition and enforcement but rests with the party refusing it.[12] As we will see below, even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing Court is not obliged to refuse enforcement. The words used in paragraphs 1 and 2 of Article V state that enforcement *maybe* refused and they do not say that it *must* be refused. As mentioned by a leading authority who commented on the New York Convention:

> "As far as the grounds for refusal of enforcement of the Award as enumerated in Article V are concerned, it means *that they have to be construed narrowly.*"
>
> (van den Berg 1981:267 and 268)

The problem at the present time is that not all courts follow this internationalist approach. There are states in which the local courts are unfamiliar with international arbitration and perhaps even suspicious of it. There are also oddities of legislation such as those provisions which used to be found in Indian law, which stated that, where the governing law was that of India, the ensuing award was deemed to be a domestic award, even though the seat of arbitration was in a foreign state. We believe that the Saudi judges will consider this approach whenever Islamic law is applied in an international commercial arbitration. They will have to double check that no provisions in the award are in conflict with Islamic general principles such as prohibiting interest and pure economic loss.[13]

At the present time and as mentioned above, the New York Convention has proved to be a highly effective international instrument for the enforcement of arbitration agreements and more importantly arbitration awards. Indeed, it has been estimated that 98% of awards in international arbitrations are honoured or successfully enforced and that enforcement by national courts has been refused in less than 5% of cases (van den Berg ASA Bulletin 1996:25). Nevertheless, it has made the greatest single contribution to the internationalisation of international commercial arbitration. It is important therefore to shift our focus to the grounds for refusal under the Convention:

- the parties to the [arbitration agreement] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made: or

- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case: or

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[12] This represents a major change from the Geneva Convention of 1927.

[13] Even though no award has been enforced under the New York Convention in Saudi Arabia, this is what the author believes maybe the situation based on his experience as a former secretary of the Arbitration Board at the Chamber of Commerce in Riyadh.

- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(Article V.1)

Recognition and enforcement may also be refused if the competent authority of the country in which enforcement is sought finds that:

- the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

- the recognition or enforcement of the award would be contrary to the public policy of that country."

(Article V.2)

At this stage, it will be necessary to mention these grounds in detail. Even though there have been no precedents that took place in Saudi Arabia in regard to the enforcement of the New York Convention, it would be interesting to imagine how the Board of Grievances would react to any of those grounds mentioned below.

First Ground for Refusal: Invalid Arbitration Agreement

The first ground for refusal of recognition and enforcement under the New York Convention is as follows:

> "The parties to the agreement [...] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made..."
>
> (Article V. 1. (a))

The issue of capacity may arise in relation to states and state agencies. An example of a successful defence based on incapacity is in the *Fougerolle S. A. (France) v. Ministry of Defence of the Syrian Arab Republic.* The administrative tribunal of Damascus refused enforcement of two ICC awards holding that they were 'non-existent' because they were rendered without preliminary advice on the referral of the dispute to arbitration ((1990) XV

Yearbook Commercial Arbitration; .515). An example of an unsuccessful attempt to use this defence could be seen in the Italian case of *Bobbie Brooks Inc. (USA) v. Lanificio Walter Banci s.a.s (Italy).* In this case, the Italian company argued that the agreement to arbitrate printed on the reverse side of the purchase order was not valid under the law to which the parties had subjected it. The Court of Appeal in Florence rejected this defence and allowed the award to be enforced ((1979) IV Yearbook Commercial Arbitration 289). In Saudi Arabia that would constitute a ground for refusal, because Saudi Arabia prevents its' entities and agencies entering into an arbitration without obtaining approval from the Council of Ministers (Resolution No. 58 June 25, 1963). The Saudi Arbitration Regulations also reflects this resolution in its Article 3.

The Second Ground: no proper notice of appointment of arbitrator or of the proceedings; lack of due process

The second ground for refusal of recognition and enforcement of an award under the New York Convention is as follows:

> "(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case...".
>
> (Article V.1 (b))

This is an important ground for refusal under the New York Convention. It is for the purpose of ensuring that the arbitration was conducted with proper notice and fairness. Moreover, it is designed for the purpose of ensuring that the requirements of due process are observed, and that the parties are given a fair hearing especially when they come from different legal cultures, which in some situations creates problems, as we are going to see in Chapter 6.

The court of the forum state will naturally have its own concept of what constitutes a fair hearing. This does not mean however that the hearing must be conducted as it if were a hearing before a national court in the forum state. It is, however, enough if the court is satisfied that the hearing was conducted with due regard to any agreement between the parties and in accordance with the principles of equality of treatment and the right of each party to have a proper opportunity to present its case. This ground could also constitute a reason for not enforcing the foreign arbitral awards in Saudi Arabia. The Court in this case will give consideration to the agreement of the parties as to how they chose their dispute to be determined. For example, if the parties chose to have discovery in their hearing, since the nature of the dispute requires doing so, then this will be regarded as a requirement, even though discovery is not a method of litigation before a Saudi or Islamic judge.

Third Ground: jurisdictional issues

The third ground for refusal of recognition and enforcement of an award under the New York Convention is as follows:

> " (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced...".
>
> (Article V.1. (c))

The first part of this ground for refusal of enforcement under the Convention envisages a situation in which the arbitral tribunal is alleged to have acted in excess of its authority and to have dealt with a dispute that was not submitted to it. According to an authority on the convention, the courts almost invariably reject this defence (van den Berg 1996: Collected Reports: 86).

The second part of this ground for refusal is concerned with the situation where it is alleged that the tribunal exceeded its jurisdiction in some respects but not in others. In such a situation, even if the partial excess of authority is proved, that part of the award that concerns matters submitted to arbitration maybe saved and enforcement ordered. In Saudi Arabia this will constitute a ground for refusal. The arbitral tribunal has to make sure that it did not rule over issues that are not identified in the arbitration agreement, since the Board of Grievances believe in its concurrent control over the practice of arbitration.[14]

Fourth Ground: composition of tribunal or procedure not in accordance with arbitration agreement or the relevant law

The fourth ground for refusal of recognition and enforcement of an award under the New York Convention is as follows:

> "(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place..."
>
> (Article V.1. (d))

[14] To seek examples of this type of control see the Supervision of Judicial Bodies Over Arbitral Awards in Saudi Arabia, mentioned in Chapter 2.

This ground can be seen as a departure from the Geneva Convention of 1927 mentioned above. In that Convention moreover, it was provided that enforcement of an award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance both with the agreement of the parties and the law of the place of arbitration. The New York Convention however, has dropped this double requirement. Moreover, under the New York Convention the agreement of the parties comes first and only if there is no agreement, will the law of the place of the arbitration be taken into account.

In a case *China Nanhai Oil Joint Service Cpn v. Gee Tai Holdings Co. Ltd* that came before the Supreme Court of Hong Kong in 1994, it was argued that enforcement of 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 on the Shenzhen list of arbitrators but not (as specified in the arbitration agreement) on the Beijing list.

After considering the facts, the Judge allowed enforcement of the award to go ahead on the basis that the party objecting to enforcement had taken part in the arbitration knowing that technically the arbitrators were not selected from the correct list. He said:

> "It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the tribunal yet not make any formal submission whatsoever to the tribunal about its own jurisdiction, or to the arbitration commission which constituted the tribunal and then to proceed to fight the case on the merits and then two years after the award, attempt to nullify the whole proceedings on the grounds that the arbitrators were chosen from the wrong CIETAC list."
>
> (1995 XX Yearbook Commercial Arbitration: 677)

In Saudi Arabia, the judges will give great consideration to the agreement of the parties. In a situation identical to the case mentioned above however, the Saudi Judges will consider that the other party has implicitly waived its right to arbitrate according to the agreed arbitral rules. We do not believe that the Judge will have a different point of view than that mentioned above.

Fifth Ground: award not binding: suspended or set aside.

The fifth ground of refusal of recognition and enforcement under the New York Convention is as follows:

> " (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made..."
>
> (Article V.1.(e))

In the Geneva Convention 1927 the word 'final' was used. This was taken by many to mean that the award has to be declared as final by the Court of the place of arbitration and this gave rise to the problem of the *double exequatur.* This meant that an *exequatur* has to be obtained first from the court of the place in which the award was made, in order to show that the award was final. Another *exequatur* then had to be obtained from the court in the forum state in order to have it finally enforced.

Still, some national courts consider it necessary to investigate the law applicable to the award to see if it is binding under that law. According to a commentator the anathema of local particularities which are capable of leading to the setting aside of an international award, should only be given local effect and should be discharged internationally (Paulsson 1996 Columbia University No.2:99). In some countries, moreover, they have taken the view that they will enforce an arbitral award, even if the Courts of the seat of arbitration have set it aside. While the different practices continue, courts in France, Belgium and the United States have shown themselves prepared to recognise and enforce arbitral awards even though the Courts at the seat of arbitration have set them aside. Their justification for this is based on two grounds.

First, the language of Article V of the New York Convention is permissive, not mandatory. The Convention says that the enforcing Court *may* refuse recognition and enforcement and not that it *must* do so. Secondly, the New York Convention recognizes that there may be more favourable provisions under which an award maybe recognised and enforced. In Saudi Arabia there are no precedents by which we can assess the situation. However, as mentioned by Mr. Saleh Salem (former director of the legal department at the Chamber of Commerce and Industry in Riyadh) the Saudi Board of Grievances will not be tolerant in waiving this requirement. Moreover, the award will have to be final at the place where the award has been made, in order for it to be enforced in Saudi Arabia.

Arbitrability and Public Policy

The New York Convention provides that recognition and enforcement of an arbitral award may be refused "if the competent authority in the country where recognition and enforcement is sought, finds that the subject-matter of the difference is not capable of settlement by arbitration under the law of that country..." (Article V.2. (a)). Also, recognition and enforcement may be refused if it is contrary to the public policy of the enforcement state (Article V.2. (b)). Moreover, the question of arbitrability may arise both at the beginning of

arbitration and at the end. It is an issue for the law of the enforcement state and being governed largely by a question of public policy that we have discussed in Chapter 3.

It is advisable that all the countries in the international business community should consider only international public policy and not create obstacles for the enforcement of an award. Take for example, the decision of the Supreme Court in the United States in the case of *Bremen v. Zapata Offshore Co* in which it was said that:

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts."
>
> (407 US 1, 92 S. Ct 1907, 32 L. Ed. 2d 513, (1972))

This is what the Saudi judges have to understand when they apply the doctrine of public policy in foreign arbitral awards, especially that Islamic jurisprudence has made reference to the distinction between national and international public policy, as we will see again in Chapter 8.

6. CONCLUSION

By now we should understand that the New York Convention is easily the most important international treaty relating to international commercial arbitration. The general level of success of the convention maybe seen as one of the factors responsible for the rapid development of arbitration over recent decades as the preferred means of resolving international trade disputes.

In some ways, the various conventions relating to international commercial arbitration (apart from the Washington Convention) operate through the national law of those states which have agreed to be bound by them. It is true that these conventions may be adopted with reservations as to reciprocity and as to the commercial nature of the dispute; and states may apply their own criteria as to the arbitrability of a dispute and as to public policy grounds for refusing recognition of an arbitration agreement or award. Nevertheless, the conventions represent a powerful force for the unification of national laws. Indeed, when considering these different local or national laws, it is often possible to see through the detail of the drafting to a framework derived from a particular treaty or convention. Moreover, there is an important force for internationalism in the shape of the United Nations, which initiated the highly successful

New York Convention, followed by the UNCITRAL Arbitration Rules and, more recently, the Model Law.

The Model Law has added its own impetus to the movement towards uniformity. Even where states do not adopt the Model Law *in toto*, it is unlikely that a country introducing new legislation relating to arbitration will do so without first examining the extensive *travaux preparatoires* and the text of the Model Law itself, or it may well decide to make its own law more accessible to foreign lawyers. At this point we will move on to highlight the UNCITRAL Model Law and its objectives, since in the author's opinion no country in the world can afford to ignore it after signing the New York Convention. Moreover, we will discuss the standards of the Model Law in comparison with the Saudi Arabian Arbitration Regulations and Implementing Rules, since some Saudi practitioners believe that it does contain the minimum arbitration standards, a statement with which the author does not agree.

Chapter 5

THE UNCITRAL MODEL LAW AND THE SAUDI ARBITRATION REGULATIONS

1. THE BEGINNING

(a) Generally

Now that we have considered the major arbitration conventions and treaties, it is important at this stage to examine the UNCITRAL Model Law, which constitutes the third part of the legal framework needed for commercial arbitration. The understanding of this law, moreover, will definitely help us in understanding what is suitable for Saudi Arabia when considering the adoption of the said law. On some occasions, such as a seminar held at Oxford University on 31 July 1999, it was mentioned that the Saudi arbitration regulations contain all that is needed for an international commercial arbitration sitting in Saudi Arabia. At that point, it was felt that a comparative study would help to prove the opposite, so we might understand what steps have to be taken either in the adoption of the UNCITRAL Model Law wholesale, or considering adopting major parts of it in a new Saudi arbitration law. What the people in Saudi Arabia have to know is that the theory of delocalisation has to develop, since it is mentioned in Islamic jurisprudence, as we will see in Chapter 8. Before doing so, it would be useful to highlight the major works of the UNCITRAL as an instrument for harmonisation in the world of trade.

(b) The Work of UNCITRAL

The United Nations Commission on International Trade Law was established in December 1966, with the object of harmonising and unifying the law of international trade.[1] In addition to co-ordinating the work of organisations active in this field, it prepares and promotes the adoption of new conventions, laws and codifications of international trade terms, customs and practices. Membership is restricted to states, but the Commission has close links with United Nations agencies such as UNCTAD, and other organisations concerned with legal matters, such as the AALCC, the ICC, the IBA, the ILA and the UNIDROIT that played a big role in the movement for the internationalisation of commercial arbitration, as we will see in Chapter 6.

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[1] By Resolution 2205 (xxi) of the UN General Assembly dated December 17, 1966.

UNCITRAL's principal method of proceeding to establish a working group for each specific project is as follows. Working groups are normally composed of a limited number of member states. However, states that are not members may attend meetings; in addition, non-governmental international organisations are frequently invited to send experts as observer-delegates, who participate fully in the deliberations. If a project is to be completed by the promulgation of a convention, the draft convention is circulated to governments for comment. Any comments are subsequently submitted to a diplomatic conference, open to all states.

UNCITRAL adopted Arbitration Rules in 1976, Conciliation Rules in 1980, Guidelines for Administering Arbitration under the UNCITRAL Arbitration Rules in 1982, and the Model Law on International Commercial Arbitration in 1985.

(c) UNCITRAL Arbitration Rules

It was realised within UNCITRAL that there was a need for a more unified approach to the basic steps to be taken in arbitration. The need was apparent in ad hoc arbitrations where it was thought desirable to regulate the steps to be taken in arbitration, in order to be reasonably sure of obtaining an award, which would be enforceable under the Convention. Moreover, the United Nations realised that it was important that the procedure should be designed to be suitable for use in common law and civil law countries as well as in developed and less developed nations. Yet this procedural framework could not be set too restrictively, since flexibility of procedure is one of the main advantages of ad hoc arbitration, as seen in Chapter 3. The work was completed within three years. The first draft was published towards the end of 1974, and circulated for consultation (UN Doc.A/CNN.9/97.Nov 4 1974). The General Assembly of the United Nations approved these Rules unanimously in December 1976. It should be noted that although the rules were designed for the use in ad hoc arbitration, many of the world's major arbitration centres now offer to administer arbitration under them, as we will see in this Chapter as well as in Chapter 7.

It also should be noted that the UNCITRAL Arbitration Rules were very useful instruments in the Iran-United States Claims Tribunal, which was established as an arrangement under which the American hostages held in Iran were released in January 1981 in return for the release of Iranian assets frozen in the United States (Presidential Order 12294 Feb. 24th 1981). Also they were useful for the United Nations Compensation Commission that was established in 1991 to resolve the claims against Iraq as a result of its invasion and occupation of Kuwait

(United Nations Secretary Council Resolution 687).[2] In this Chapter, it will not be useful for us to highlight the objectives and the structure of the UNCITRAL Arbitration Rules, since there are no arbitration centres within the jurisdiction with which we are concerned. It should be relevant however just to mention that the rules are divided into four separate sections entitled:

- Introductory Rules
- Composition of the Arbitral Tribunal
- Arbitral Proceedings
- The Award

(d) History of Drafting the Model Law

As mentioned in Chapter 3, the Model law owes it origins to a request in 1977 by the Asian-African Legal Consultative Committee for a review of the operation of the New York Convention, in relation to an apparent lack of uniformity in the approach of national courts to the enforcement of awards. The AALCC suggested changes to the New York Convention to deal with certain issues, such as judicial review of fairness and due process and the implied waiver of state immunity. These proposals led to a Report to the Secretary-General of UNCITRAL who then concluded that harmonisation of the enforcement practices of states, and the judicial control of arbitral procedure, could be achieved more effectively by the promulgation of a model or uniform law, rather than by an attempt to review the New York Convention or to supplement it by means of a protocol (UN Doc. A/CN.9/168).

Moreover, the major reason for this proposal is the fact that most national laws on arbitration procedure were drafted to meet the needs of domestic arbitration, and that many of these laws are in need of revision. A model law could therefore be useful, particularly if it took into account the specific features of international commercial arbitration and modern arbitration practice. Another reason is the divergence existing between frequently used arbitration rules and national laws; this is the area of concern expressed by AALCC in its recommendations. For example, some national laws restrict the power of the parties to determine the applicable law. Also, some national laws do not recognise the competence of the arbitral tribunal to decide about its own jurisdiction, or they provide for judicial control over the composition of the tribunal and sometimes even over the application of substantive law. Other laws establish certain nationality requirements for the arbitrators or require the award to be accompanied by a

[2] For detailed background on the UNCC see the United Nations Compensation Commission [13th Sokol Colloquium] (R. Lillich ed., 1995).

statement of reasons, irrespective of any agreement by the parties to the contrary (Binder 2002: 6).

It was suggested, therefore, that an UNCITRAL Model Law on arbitral procedure would, if implemented at the national level, solve many of the problems referred to. It would also establish universal standards of fairness and would thus meet the concern expressed in one of the proposals of AALCC. Moreover, such a model law would overcome some, if not all, of the difficulties detected in the survey on the application and interpretation of the 1958 New York Convention. Finally, by the elimination of certain local particularities in national laws, a model law would be relevant in the context of the proposal of the ICC to limit the reasons for setting aside awards to the grounds for refusing recognition and enforcement specified in Article V, paragraph 1(a)-(d) of the 1958 New York Convention, as already seen in Chapter 4.

In 1982, the Working Group on International Contract Practices took up the project. The work took four years to complete from the time UNCITRAL started working (Holtzmann and Neuhaus 1989:9-14). A Resolution of UNCITRAL adopted the final text at its full Commission session in Vienna in June 1985 (UN Doc. A/CN/9/207). Finally, a resolution of the General Assembly of the United Nations recommending the Model Law to Member States, was adopted on December 11, 1985 (No. 40/72).

(e) Types of Adoption

As its name suggests, the Model Law is only a model, or soft law, as mentioned in Chapter 3, which can be adopted verbatim, or only partially. Although UNCITRAL has never officially stated what exactly constitutes "full adoption" of the Model Law, it is apparent from the countries that adopted it that the fundamental provisions and principles (the so-called "pillars") of the Model Law (i.e. Articles 16, 18, 34 –36, to mention but a few), *must* in one way or another be included. Moreover, any changes or alterations should not go against the general philosophy of the law. The following – unofficial – definition of what could constitute "Model Law conformity" has been used.

> "1. When reading the national statute, the impression must be given that the legislator took the Model Law as basis and made certain amendments and additions, but did not simply take the Model Law as one amongst various models or follow only its 'principles'.
> 2. The bulk of the Model Law provisions must be included (70 or 80) percent):
> 3. The law must contain no provision incompatible with modern international commercial arbitration (e.g. foreigners may not be arbitrators, no-excludable appeal on errors of law)."
>
> (Redfern and Hunter 1999:642)

In this regard, we will mention two methods of adoption that exist in the international business community.

Incorporation by Reference

The first method of adoption involves using a Model Law general reference clause. The example that could be given in this regard is in a state like Singapore (Singapore International Arbitration Act 1994, Article 3 (1)). This means that the law is adopted verbatim and it is submitted that this type of adoption best serves UNCITRAL's goal of uniformity and harmonisation in international trade law.

In the Middle East, the Bahrain Decree Law on International Commercial Arbitration is the only method of adoption to offer a completely unconditional incorporation, by reference to the Model Law, into its legal system. Most of the other jurisdictions on the other hand choose the approach where additions and alterations are attached to the reference. These alterations range from the possibility of opting out of the Model Law in *toto,* to the use of an individual set of provisions for the enforcement and recognition of awards (Chapter VIII of the Model Law).

All these provisions have one thing in common. They include a provision which determines that UNCITRAL's *travaux preparatoires* shall apply for the interpretation of the law. This is important, since the adoption of all the provisions at once by any country will not necessarily include its own *travaux* that can be referred to in case of interpretational difficulties (Binder 2000:11).

Direct Adoption

This method of adoption directly adopts the 36 articles of the Model Law into the national law on arbitration. This involves additions and alterations and each state would have its own drafting style. The number and type of alterations differ from one jurisdiction to another, and it could be seen that the structure of Model Law is not always retained. In particular, the mixture of domestic and international arbitration laws with their manifold interconnected references can occasionally be difficult to follow.

Unlike the states, which incorporated the Model Law by reference, the "direct" adopting jurisdictions commonly fail to make reference to UNCITRAL's *travaux preparatoires.*[3] However, it is submitted that in cases of interpretational difficulties which cannot be resolved using the national legislative history, most courts would be well advised to refer to the Model Law's *travaux* (Binder 2000:11-12).

What Method of Adoption Should Saudi Arabia Adopt?

The question that should be asked at this point is what type of adoption a classic Islamic jurisdiction such as Saudi Arabia should consider. When discussing the matter with other colleagues in the field, one suggested the possibility of establishing a separate Islamic system or arbitration.[4] Also, some textbooks mention the existence of a separate Islamic system of arbitration. For example, in reading Redfern and Hunter, we could understand that they believe in the existence of a separate Islamic system of arbitration, in that they state the following.

> "The modern codes of law in Islamic states take account of the *Shari'a,* often as the principle source of law. However, as far as arbitrations are concerned, strict application of the *Shari'a* has diminished with the emergence of international arbitration rules, such as the UNCITRAL Rules and the Model Law. Indeed, many Muslim states have either adopted the Model Law or based their legislation on it. Additionally, as far as the recognition and enforcement of awards is concerned, the majority of Islamic states have adopted the New York Convention.
>
> (1999:110)

Based on the above, we believe that there is a major question to be asked of whosoever believes in the existence of a separate system of arbitration. The question is, what is so non-Islamic about the provisions of the UNCITRAL Model Law? At this point, it is relevant to move on to the UNCITRAL provisions to establish the understanding that these provisions are not far away from the principles of arbitration that exist in Islamic jurisprudence, and the Saudi Arbitration Regulations. What needs to be developed moreover is the theory of delocalisation that exists in Islamic jurisprudence, as we will see in Chapter 8. This will help to improve the Saudi Arbitration practice, since there will be a distinction between national and international arbitration and also between national and international public policy.

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[3] The reason for this probably lies in the partial availability of a national legislative history concerning these provisions, making other materials superfluous.

[4] A discussion on the matter took place between the author and a Saudi PhD student at Wales University, Mr. Mohammad Al Jarba when they met at the Oxford Seminar July 31st 1999.

2. PROVISIONS OF THE ARBITRATION MODEL LAW

(a) General Provisions

The Model Law was drafted to apply to international commercial arbitration. However, there is nothing to stop national legislators from giving it a wider application by including domestic commercial arbitration. In fact, many countries may prefer to have only one law governing commercial arbitration, whether international or domestic. It was not considered necessary to define the term commercial in the law itself, but a footnote makes it clear that it should be given a wider interpretation so as to cover matters arising from all relationships of a commercial nature, irrespective of whether the parties are commercial persons under any given national law, and irrespective of whether the relationships arise on the basis of a contract. Relationships of a commercial nature are intended to include those entered into by states or governmental agencies (UN Doc. A/40/17 paras. 19-26). It was considered necessary however to define the word international. The *travaux preparatoires* show that there was an extensive debate on this subject, and that various attempts were made to prepare a definition combining breadth with an acceptable degree of certainty.

The final solution is contained in Article 1 and is based on the concept that the primary test should be whether or not the parties are effectively of different nationalities, or have their places of business in different countries. As mentioned in Chapter 3, the Model Law had taken a step further in defining the word international. Moreover, in order to extend the scope of application of the said law, a number of specific extensions were incorporated. These are first, when the place of arbitration is in another country; second, when a substantial part of the performance of the transaction is in other country; and third, as a "sweep up" provision, where the parties "opt in" by agreeing expressly that the subject matter of the arbitration agreement relates to more than one country.

Can Parties in Saudi Arabia Agree on the Application of the Model Law?

Since Islamic general principles adopt the concept of freedom of contract, one may question whether the parties should have the right to agree on the application of the Model Law in Saudi Arabia, when it is not considered to be a Model Law country. It is important to mention that legal draftsman considered this question, and their final decision was that the place of arbitration should be the exclusive determining factor for the applicability of the Model Law

(Article 1(2)). In Saudi Arabia moreover, we believe that the parties are free to agree on whatever procedural law should apply, but in doing so, this would be considered an adventurous solution. The reason why we believe that it is an adventurous solution is because the Model Law is designed to prevail over provisions governing international commercial arbitration within the jurisdiction of a country adopting the Model Law. Moreover, it establishes a special regime (a *lex specialis)* for such arbitrations, and there is no way that we could be sure that the Saudi courts will not consider that the Saudi Arbitration Regulations have supremacy over any other arbitration rules, including the Model Law.

The first section of the Model Law also includes: Article 2, which sets out certain definitions; Article 4, which provides for a waiver of the right to object, where a provision of the law or requirement of the arbitration agreement has not been complied with; Article 5, which limits the scope of court intervention in matters governed by the law to those instances where the Model Law provides for such intervention; and Article 6, which encourages a state adopting the Model Law, to designate a specific court to perform the functions entrusted to courts by the Model Law. In Saudi Arabia on the other hand, it is the Board of Grievances, as mentioned in Chapter 1, who has jurisdiction over enforcing foreign judgments and foreign awards in the Kingdom of Saudi Arabia. If such an adoption of the Model Law were to take place in Saudi Arabia, we believe that the Government should consider establishing a competent commercial court dealing exclusively with commercial matters.[5]

(b) Agreement to Arbitration

Article 7 of the Model Law follows the New York Convention in requiring an Arbitration Agreement to be in writing and this is illustrated by confirming that exchanges made by telex or other forms of telecommunication are included so long as they provide a record of the agreement. The Model Law contains a broad definition of an arbitration agreement, and expressly states that the expression covers the reference of both existing and future disputes to arbitration. If we take this article, we could see that there is nothing that conflicts with Islamic general principles, not just because the Saudi Arbitration Regulations have adopted this concept, as seen in Chapter 2 (Article 1), but also because the Islamic principles that exist in Islamic jurisprudence allow it to do so. As seen in Chapter 1, Ibn Taimiyya (one of the students of the Hanbali School which is officially applied in Saudi Arabia) concludes that any contract (we assume arbitration as well) is binding, unless it is contrary to public policy or deals with a purpose forbidden by God. Moreover Ibn Taimiyya stated:

[5] A further discussion about the subject will be highlighted in Chapter 8.

> "The rule in contracts is tolerance and validity and one must only forbid or set aside those contracts which are forbidden by virtue of a text or of "Qiyas" (reasoning by analogy)"
>
> (Quoted in El-Ahdab 1999-24).

Common sense dictates that arbitration agreements should be in writing. This requirement comes in response to the business entities handling more complex transactions on a daily basis, which obviously has to be proved by some sort of record, as mentioned above.

Moreover, Article 7 (1) of the Model Law makes reference to disputes arising out of a "defined legal relationship". It reads as follows:

> " "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement"

It is not clear from reading the article itself what matters would be excluded in this context. However, it is understandable that the parties in local and international contracts may submit claims arising in tort, since the existence of a duty of care creates a legal relationship between the parties in any jurisdiction. From the Islamic point of view, there is no valid reason why this should not be adopted, since the parties in any Islamic country, including Saudi Arabia, can bring claims against each other in contracts as well as tort. It is understandable that any questions involving a criminal element remain excluded from the scope of the Model Law in many countries, presumably on public policy grounds. In any case, such matters are not normally considered commercial, and therefore do not concern us in this project.

(c) Composition of the Arbitral Tribunal

Article 10 provides the parties are free to determine the number of arbitrators, but if such agreement has not been reached, the arbitral tribunal is to be composed of three members. This requirement, in the absence of any agreement to the contrary, is the opposite position adopted in some international arbitration laws.[6] On the other hand, the number of arbitrators allowed in Islamic jurisprudence is mentioned in the *Medjella,* which states that:

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[6] The English Act of 1996 Article 15 (3) states "If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator". Also, Article 4 states, "An arbitrator is required to be of experience, good conduct and behaviour and full legal capacity. In cases of several arbitrators, their number should be uneven".

"There may be several arbitrators, i.e. it is admissible to appoint two or more arbitrators for a single case."

(Article 1843)

It should be noted however that the *Medjella* only expresses the point of view of the Hanifa School, and that the scholars of the other schools of the *Fiqh* have no opinion on this subject. This is the reason why the Saudi Arbitration Regulations followed the trend mentioned in Article 4. However, in general, an arbitrator was appointed by each of the parties.

Choice v. Nationality

Article 11 is primarily concerned with the appointment mechanism for arbitrators and it starts with an important preliminary provision:

"No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."

It should be noted that the Saudi Arabian Regulations do not contain any provision for a requirement for a nationality. The arbitrator could be of any nationality provided that he is male and Muslim. Of course we have mentioned the opinion of Dr. Mohammed Nader in Chapter 2, who suggested that this issue should be eliminated from Saudi Law. Nader justifies this by pointing out that the reasons for excluding a non-Muslim in Islamic legal history was because he was an enemy (*harbi*) or a protected person (*thimmi*), and that non-Muslims are now no longer classified in such terms (1995:12-13). He stated further that the justification for excluding a woman from being a judge was because of a lack of capacity and inexperience, but this no longer is the case (1995:13). The importance of this issue will be readdressed in Chapter 8 when we deal with developing Islamic law in general and arbitration issues in particular.

Moreover, Article 11(5) does specify that where a court or other appointing authority has to make such an appointment, it shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties. As regards the method of appointing the arbitral tribunal, Article 11(2) provides that the parties may agree upon the procedure to be followed. Such an agreement is likely to involve the intervention of an appointing authority, often an arbitral institution.

Arbitral institutions are likely to have the most up-to-date information, including the names and qualifications of people suitable for appointment as arbitrators in any particular type of dispute. If such parties do not choose an appointing authority and do not manage to agree

upon a third arbitrator, the appointment will be made by the Court as specified in Article 6 of the Model Law. It should be noted again that Saudi Arbitration Regulations are not suitable for institutional arbitration since all the procedures have to be done under the supervision of the judicial body having original jurisdiction over the subject matter. However, the Chamber of Commerce do have lists for arbitrators in Saudi Arabia.

Challenge of Arbitrators

Article 12 deals with the grounds for challenge of arbitrators. A party may challenge the appointment of an arbitrator only if reasons exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications as agreed by the parties (Model Law Article 12(2)). The Model Law also seeks to ensure that a challenge should only take place in the early stages of arbitration, by requiring a person approached as a prospective arbitrator to disclose any circumstances likely to give rise to "justifiable doubts" as to his impartiality or independence (Article 12(1)). The procedure for challenge is set out in Article 13. The parties may agree on the procedure for challenging an arbitrator although, whatever agreement they make, there will be the possibility of an appeal to the court specified in Article 6. In respect of an unsuccessful challenge, the parties will usually agree that the designated appointing authority (arbitral institution) should rule on challenges.

As regards the procedure itself, unless the parties have agreed otherwise, a party who wishes to challenge an arbitrator must do so within 15-days of the constitution of the arbitral tribunal or within 15 days of becoming aware of any circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. The method of challenge is to send a written statement for challenge to the arbitral tribunal (Model Law Article 13 (2)).

In Islamic jurisprudence on the other hand, a party may challenge an arbitrator if justifiable doubts as to his independence exist. As seen in Chapter 2, one of the main requirements for arbitrators is to be just and fair and therefore if anything affects this condition, a challenge could be made (Al Ahkam Al Sultania by Al-Mawardi 1973:65-66). Also, it should be noted that there is nothing in Islamic jurisprudence that would prevent the parties from being given any time limit, as indicated in the Model Law. By analogy in the Saudi Arbitration Regulations, the parties are given 15 days to submit their objections to the award issued by the arbitrators to the authority with which the award is filed (Article 18). This is not because it is mentioned in Islamic jurisprudence, but because it helps in achieving the efficiency required today and as it does not affect any Islamic principles. Interestingly, the Model Law did not

attempt to define the concepts of "impartiality" or "independence" mentioned above. We assume therefore that they are related either to the parties themselves, or to the subject matter of the dispute. This appears to give a wide range of discretion to the court or appointing authority entrusted with ruling upon any such challenge.

Appointment of a Substitute Arbitrator

When an arbitrator withdraws, either as the result of a successful challenge or as a result of failure to perform his functions, a substitute arbitrator is appointed in accordance with the procedure applicable or the parties' agreement. Articles 14 and 15 both indicate that, if an arbitrator fails to perform his functions, his authority may be revoked by the agreement of the parties. At first sight this seems a somewhat curious provision. On examination the logic is clear, since the parties may if they wish, terminate the arbitral proceedings altogether by agreement, thus revoking the mandate of the entire arbitral tribunal. It should be noted that in the Saudi practice the appointment of the substitute arbitrator is in the hands of the parties themselves unless one of the parties refuses to appoint an arbitrator. In this case, Article 10 of the Saudi Arbitration Regulations states the following as a remedy:

> "Where adversaries fail to appoint arbitrators, or one party abstains from appointing an arbitrator or arbitrators, which he has the sole right to chose, one or more arbitrators abstain from work, withdraw, or an eventuality arises which prevents him from functioning as an arbitrator, or if he is removed and there is no specifically agreed provision to cover such an occurrence, the authority originally competent to hear the dispute shall appoint the required arbitrators upon request of an adversary interested in expediting the arbitration, in the presence of the other adversary or in his absence after being summoned to a session to be held for this purpose. The appointed number of arbitrators shall be equal of supplementary to the number agreed upon among the adversaries. The decision in this respect shall be final."

(d) Jurisdiction of the Arbitrary Tribunal

The Model Law provides that the arbitral tribunal determines its own jurisdiction, *Competence/Competence* (Article 16). In this regard, we should mention that the practice of arbitration recognises the doctrine of autonomy or separability of the arbitration clause. The modern trend is to regard an arbitration clause as constituting a separate and autonomous contract. As such, it generally survives the termination of the main contract; and so it constitutes the necessary agreement of the parties that any disputes between them should be referred to arbitration. As already noted, however, there must be some limit to the power of an arbitral tribunal to rule on its own jurisdiction.

In adopting the concept of *Competence/Competence,* the Model Law has recognised the general trend of modern national legal systems and of international conventions which allow an arbitral tribunal to determine its own jurisdiction. However, the Model Law does not give an arbitral tribunal the final word; there is provision for concurrent control by the Court as specified in Article 6. Moreover, lack of jurisdiction remains a ground for setting aside an award or for refusing recognition and enforcement of it as already seen in Chapter 4 when we highlighted the New York Convention. The Model Law provides that a plea that an arbitral tribunal does not have jurisdiction must be raised not later than in the statement of defence, or promptly after the arbitral tribunal has indicated its intention to deal with the matter alleged to be beyond the scope of its authority (Article 16 (2)). The advantage of this system is that it enables the parties to know relatively quickly where they stand, so they will save time and money if the arbitration proceedings prove to be groundless. This is not to say that in the event of a delay, considered justifiable by the arbitral tribunal, later pleas in respect of jurisdiction cannot be admitted. In Saudi practice, Article 37 of the Saudi Arbitration Implementation Rules will govern any issue regarding the jurisdiction of the arbitral tribunal. This will ensure the concurrent control of Saudi courts over the arbitral tribunal. Article 37 reads as follows:

> "If in the course of the arbitration a preliminary issue outside the jurisdiction of the arbitral tribunal arises, a document is contested on the grounds of forgery or criminal proceedings are instigated with respect to the forgery thereof or another criminal case, the tribunal shall stay its action and suspend the date fixed for the award until a final judgement is rendered by the authority having jurisdiction to decide such issue."

Interim Measures of Protection

The title Jurisdiction of Arbitral Tribunal mentioned above also includes a provision that the arbitral tribunal may make orders for interim measures of protection related to the subject matter of the dispute (Article 17). As has already been clarified in Chapter 3, the jurisdiction of the arbitral tribunal is limited to making orders in relation to the subject matter of the dispute. Any other measures must be the subject of an application to the courts as provided in Article 9 of the Model Law. As mentioned above, the Saudi Arbitration Regulations have adopted the same concept in requiring the concurrent control method between the courts and the arbitral tribunal that could be taken from Article 37 of the Arbitration Implementation Rules.

(e) Conduct of Arbitral Proceedings

The fundamental principles on which arbitration procedures should be founded are set out in Article 18. The first principle is that there should be equality of treatment between the parties and secondly, that each party should be given a full opportunity to present his case. Party

autonomy is seen to be less important than the public policy requirements set out in Article 18. Moreover, Article 19 states that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, but where the parties have not agreed upon a procedure, the arbitral tribunal has the power to conduct the arbitration in such a manner as deemed appropriate. It should be noted that Article 36 of the Saudi Arbitration Implementation Rules generally requires the arbitrators to comply with the Islamic litigation principles, such as first, a party's right to confront the opposing party, second, to present its arguments, and third to examine the documents relating to the case. Islamic jurisprudence in general, does not prohibit any other litigation principles in other comparative jurisdictions in arbitration, but that has to be adopted by the parties' agreement. As mentioned in Chapter 2, common law principles were considered to be applied in the insurance case of *Sharq v The National Cooperative Insurance Company [NCCI].* This leads us to indicate that there is no religious or legal reason that prevents the Saudi legislator from adopting this Article as a whole and give greater party autonomy to adopt any discovery mechanisms such as the IBA Rules of Evidence.

Place of Arbitration

Party autonomy applies in relation to the place of arbitration under the Model Law. The parties may choose a place of arbitration but if they fail to do so, the place will be determined by the arbitral tribunal (Article 20 (1)). The Arbitrators on the other hand may meet at any other place for the purpose of hearing witnesses and inspecting the subject matter of the arbitration. But again, this is subject to party autonomy. The place of arbitration is very important and that will be highlighted in Chapter 8 under the heading 'Creating the Practical Legal Environment for International Arbitral Tribunals', but what we have to focus on at this stage is that the Model Law provides that the award must state the place of arbitration and that it shall be deemed to have been made at the place. However, the Model Law gives some flexibility by permitting the Arbitral Tribunal to not necessarily meet at the place of arbitration, and allowing the award not to be signed by all the arbitrators at the place of arbitration. It should be noted that Islamic jurisprudence is flexible on the place of arbitration and as mentioned in Rad Al-Muhtar quoted in El-Adhab:

> "Thus the place arbitration has no influence on the procedure to be followed, and the arbitrator may make his award in a place other than the place of arbitration. He may choose this place himself, unless the parties decide otherwise. However, he must respect certain fundamental principles, particularly that of a fair hearing."
>
> (1999:43)

In fact in the year 2000 the first ICC arbitration took place in Jeddah, Saudi Arabia even though it was deemed to be international arbitration and not national.

Commencement of Arbitral Proceedings

Party autonomy may play a role in this regard. The parties may agree upon the time at which the proceedings should be deemed to have commenced. The date will be considered on receipt of a request from the respondent, if they fail to reach an agreement (Model Law Article 21). This may have important consequences with regard to the time limit within which a claim must be brought, if it is not to be barred by a lapse of time. Moreover, time limits in litigation or arbitration must always be considered with great care. Failure to absorb them may be fatal. Time generally starts to run against a claim from the date on which the claim arises and it may do so under contractual provisions or under legislative provisions, or both. The generally accepted purpose of time limits is to ensure that claims are made whilst events are reasonably fresh in the minds of those concerned; and to put some limit to the uncertainties and expense of arbitration and litigation.

It should be noted that the Saudi Arbitration Implementation Rules require the arbitrators to start the proceedings within five days of notification of the approval of the arbitration document (Article 10). This requirement has nothing to do with any Islamic principles, and it is just for the purpose of speeding up the arbitration so the parties can receive an award. This leads us to believe that there is nothing under Saudi Law or Islamic jurisprudence that would prevent the parties from agreeing on the time at which the arbitration be deemed to have commenced. Moreover, there is nothing that prevents the Saudi legislator from adopting this same article in its present form.

Language

Party autonomy is also of great importance when it comes to choosing the language, or languages to be used during the proceedings. However, if there is no agreement between the parties, the arbitral tribunal itself will make the determination. Moreover, the arbitral tribunal may order that, where documentary evidence is in another language, that evidence should be accompanied by a translation into the language of the arbitration (Model Law Article 22). On the other hand, the requirement that the arbitration must be conducted in the Arabic language, under Article 25 of the Saudi Arbitration Implementation Rules, is not based on religious but on

political grounds. This requirement is obviously only suitable for domestic arbitration and not for international disputes, where evidence is printed either in English or any other language. In domestic insurance disputes much of the documentation is printed in English by Lloyds of London or other insurance entities, and therefore, we believe the choice of language should be left to party autonomy, as mentioned in the Model Law, either for domestic or international arbitration.[7]

Written and Oral Pleadings

The Model Law makes provision for each party to make submissions stating the facts supporting his claim and provides that the parties may annex to their statements all documents they consider to be relevant. They may also add references to their documents or other evidence that they propose to submit at a later stage in the proceedings (Article 23(1)). The parties may also amend their submissions unless the arbitral tribunal considers this inappropriate because of the delay involved or the prejudice likely to be caused to the other party (Article 23(2)).

It is not specified in Article 23 that the statements must be in writing, so it is still possible for the parties to agree to dispense with written statements of claim and defence, although this will no doubt be done only in rare cases such as "look and sniff " arbitrations. These examples can be seen in commodity arbitration, which is conducted in accordance with the rules of trade associations, often long established and with their own special procedures. For example, they may turn on the question of whether a consignment of coffee corresponds with the sample on the basis of which it was ordered. The arbitrators who deal with such quality arbitrations will then judge the quality by performing the "mystic operations" of smelling, tasting, touching and handling, sometimes described as "look-sniff".[8]

By contrast, it is expressly provided that the parties may agree to dispense with a hearing. But if one party requests a hearing however, the arbitral tribunal must hold one, unless it has been agreed that the arbitration is to be conducted, based on the documents submitted by the parties (Article 24 (1)).

This chapter of the Model Law also contains a provision empowering the arbitral tribunal to continue the proceedings, and to make an award where a party fails to comply with the requirements of the procedure agreed by the parties, or established by the arbitral tribunal

[7] This is due to the prohibitive cost of document translation in insurance disputes.
[8] This can be seen in the rules of the Refined Sugar Association.

(Article 25). The arbitral tribunal may continue the proceedings, but without treating any such failure as an admission of the claimants allegations. This is because the arbitral tribunal is not given equivalent powers to the court to issue a default judgment in favour of a claimant, and must, however, satisfy itself as to the claims presented in the arbitration and therefore, must make rulings upon them in its award.

Shari'a on the other hand, frees the arbitrator and the parties from the duty to comply with the procedure followed before the courts (El-Adhab 1999:43). Therefore, the Saudi Arbitration Implementation Rules mention what could be described as the equivalent of the Article mentioned above. Article 36 states the following:

> "The arbitration panel shall observe the general principles applicable to litigation. Such principles shall ensure the presence of all the parties in the course of the proceedings and shall permit each party to take cognisance of the proceedings, to have access to its relevant papers and documents at the appropriate time, and to give each party adequate opportunity to present his documentation, defences and arguments in the session, orally or in writing, and to have them recorded in the minutes."

This means that party autonomy is of great importance in this regard.

Experts

Article 26 (1) states that the arbitral tribunal may appoint one or more experts to report to it on specific issues. Article 26(1) moreover, empowers the tribunal to request either party to furnish certain information to the expert or allow him to examine certain documents, property or goods relating to the dispute. Naturally, if a party turns these requests down, the tribunal is empowered to rule on such a rejection, as it deems appropriate. Article 26 (2) states that after the expert had presented his report the tribunal may fix a hearing date for the parties to question the expert.

What is very important and special about this article is that is application depends on the agreement of the parties, and the idea that can be seen here is that the parties might not need experts in the first place, since the arbitrators themselves might already be experts on the subject matter of the dispute. This policy in the Model Law helps save money and time for the parties, and also encourages the selection of the right arbitrators. On the other hand Saudi Arbitration Implementation Rules Article 34 contain a different approach in that making a decision to appoint an expert could also depend on the arbitrators themselves. For example, in a case involving *Ali Hamdan v. Nagib Est.* the arbitrators were all from the legal profession, even

though the main issue was of a financial nature, which meant that the parties should have chosen two certified accountants from their side, and the parties' chosen arbitrators should have appointed an umpire from the legal profession. [9]

Court Assistance in Taking Evidence

Article 27 provides that the arbitral tribunal itself, or a party with its approval may make an application to the courts for assistance in bringing evidence before it. Arbitrators generally have no power to compel the attendance of witnesses or the production of documents; but if a party refuses to comply with any procedural directions given by the arbitral tribunal, it will usually lead to an adverse inference against the party's position. Although it is not specified in the text, it is clear from the *travaux preparatoires* that this provision applies to the oral evidence, or any person required to be examined as a witness, as well as to documents to be produced or property to be inspected. Again, this type of assistance may go under Article 37 of the Implementation Rules as mentioned above.

(f) Making An Award and Termination of Proceedings

Article 28 regulates the way in which the law applicable to the substance of the dispute is chosen. The parties in this process are free to choose for themselves the law applicable to their dispute. However, where the parties fail to make such a choice, the arbitral tribunal will do so. This involves a two-stage enquiry. Firstly, the selection of the conflict rules to be applied, and secondly, based on those rules, the selection of the applicable law. This provision has been seen by many commentators to be a restrictive, or even reactionary provision (Herrmann 1985:No. 1 Arb. Intl.:23). However, it was decided that whilst the parties themselves should have a free choice of the law applicable to the substance of the dispute, the freedom of the arbitral tribunal should be limited as provided in Article 28 (2). [10]

As mentioned in Chapter 2, the Saudi Arbitration Implementation Rules states in Article 39 that the arbitrator's award has to be based on the principles of *Shari'a,* and the applicable Saudi regulations. Many practitioners believe that neither the parties nor the arbitrators are free to apply foreign laws. It is very important to note that this might be the situation in theory, but in practice this is not be the case, and what proves this is that the judges at the end of the

[9] In this regard, see the author's Article (June 1996) on how to choose an Arbitral Tribunal in Saudi Arabia in the Chamber of Commerce 'Tejart.Al Riyadh' magazine.

[10] In Chapter 6, we will see that some other commentators such as Professor Pierre Mayer who have considered that the UNCITRAL Model Law implicitly validated the so-called direct approach.

arbitration are concerned that the award is not contrary to Islamic principles, rather than what customary law the parties have applied. Another point is that there is a great demand to apply English law in big insurance cases and this has never been considered as affecting any Islamic principles as long as there is a filtering process to avoid whatever is contrary to Islamic principles.[11]

Moreover, many foreign lawyers think that there is a fixed set of codes called 'Islamic Law', not knowing that they will be dealing with doctrines that exist in Islamic jurisprudence, and the duty of an arbitrator is to check that the contract or foreign law that they are applying does not violate those doctrines and general principles. This characteristic of Islamic law has clearly caused confusion among practitioners, just as happened in the Abu Dhabi case highlighted in Chapter 2, which dealt with a crisis of arbitration in the Arab Middle East. We believe that when the time comes to modernise and delocalise Saudi Arbitration law, the parties have to be able to nominate their applicable law; and, in the case of absence of choice, the arbitrators should be able to choose the applicable law in accordance with the applicable conflict of law rules, or even go for the so-called direct approach as will be seen in Chapter 6.

Amiable Compositeurs

It should be noted that the Model Law also provides that the arbitral tribunal may act as *amiable compositeurs* only if the parties have expressly authorised it to do so (Article 28(3)). In such a case, the arbitral tribunal will still, in all instances, take into account trade usages relating to the transaction in question (Article 28 (4)). This provision of the Model Law is equivalent to Article 16 of the Saudi Arbitration Regulations where it states that the parties may authorise the arbitrators to make a settlement award, but that it has to be unanimous. The arbitrators will still have to take trade usages into consideration, but as mentioned above, there will be some concurrent control by the general principles of *Shari'a.* However, if such delocalisation of arbitration should take place in the Kingdom of Saudi Arabia, such a requirement may be waived on the agreement of the parties.[12]

[11] For example, in the insurance case of *Al-Sharq Petrochemical Co. v NCCI Insurance Co.*, the parties considered English Law as the best law to be applied in the dispute.

[12] In Chapter 8, we will discuss how some Islamic general principles could be altered and adopted to allow such delocalisation.

Majority Decisions

Article 29 provides that, where there is more than one arbitrator, all decisions of the arbitral tribunal are to be made by a majority, unless the parties agree otherwise. If it should prove impossible to reach a majority decision, the presiding arbitrator should issue an award as if he were sole arbitrator, providing that the parties have authorised him so to do. A presiding arbitrator could deal with any questions relating to procedure, if the parties or the arbitral tribunal give such authorisation. On the other hand, this topic does not seem to have been studied by academic writers of Islamic jurisprudence. However, the *Medjella* states:

> " If there is more than one arbitrator... they must agree upon the award and none of them can make a separate award"
>
> (Article 1844)

Moreover, Saudi Arbitration Regulations Article 16 mentioned above requires that the award shall be issued by a majority of the arbitrators. In practice, moreover, the disagreeing arbitrator would submit his award with the original awards of the arbitrators. This means that there is nothing in Islamic jurisprudence in general to prevent direct adoption of this article word for word.

Form and Contents of the Award

Article 30 deals with whatever settlement is reached during the course of the arbitration. The parties may request a consent award, but the arbitral tribunal may object to issuing such an award, in exceptional circumstances.[13] Article 31 on the other hand, states the main requirements are, that the award must be in writing and signed by the arbitrators who made it. Also, if an arbitrator refuses to sign the award in disagreement with the majority, Article 31 requires the arbitrators to mention the reasons for the disagreement in the original award. It should be noted that unlike Islamic Jurisprudence, and the Saudi Arbitration practice, the Model Law gives the parties the liberty of agreeing not to include any reasons in the award. Islamic jurisprudence states that a general statement of the reasons is sufficient. This general statement is necessary in order to control the award and to know whether or not it contains any flagrant injustices. The judge in charge of enforcement may obtain information from the arbitrator regarding his reasons (Mu'in Al-Hukkam 1973:119). On reflection, Article 41 of the Saudi Arbitration Implementation Rules states:

[13] For example, if the agreed settlement contained an unlawful element.

"The award shall be adopted by the opinion of the majority of the arbitrators. The award shall contain the names of the members of the panel issuing it, the date and place of issue, the subject matter of the award, names, surnames, capacities, domiciles, appearance and absence of the parties, a summary of the facts of the case, requests of the parties, summary of the pleas, substantive defences, and the reasons for and text of the award. The arbitrators and clerk shall sign the original copy of the award which incorporates the above-mentioned information and which shall be placed in the file of the case within seven days from the date on which the draft is deposited"

This problem could be dealt with easily if the theory of delocalisation is established in the Saudi jurisdiction.

Finally, Article 32 makes certain provisions with regard to the termination of the proceedings, other than pursuant to a final award. The arbitral tribunal is given power to make an order for termination of the proceedings, if the claimant withdraws his claim or when "the continuation of the proceedings has for any other reason become unnecessary or impossible.[14] Islamic jurisprudence on the other hand deals with the issue. The majority of academic writers believe that each party has the right to withdraw from the arbitration before the award is made. However, according to one opinion mentioned by Al-Mawardi in Adab Al Kadi and quoted in El-Ahdab, the parties may no longer withdraw after the arbitrator has started the arbitration. This opinion is for the purpose of protecting the efficacy of the arbitration process (1999:46).

Correction and Interpretation of Awards and Additional Awards

The arbitral tribunal may correct any clerical or typographical errors in the award, or errors of a similar nature. This could take place either on its own or at the request of one of the parties (Article 33). However, the arbitral tribunal may not give interpretations of the award on its own initiative, or at the request of only one party, but it may do so where all the parties agree that interpretation should be given (Article 33 (1)(b)). In Islamic jurisprudence, the arbitrators are empowered to interpret their award, with or without the parties' request, and to correct any material errors therein up to the time when an application is made to the courts to enforce or set aside the award (Mu'in Al-Hukkam 1973:29-30). On the other hand, the Saudi Arbitration practice mentions the same method but includes that the interpretation will be considered complimentary in all respects to the original award and shall be subject to the same rules relating to methods of objection (The Saudi Arbitration Implementation Rules, Article 43). We

[14] This could happen, for example, if the parties failed to make any deposits in respect of costs required by the arbitral tribunal, or if the claimant failed to deliver a statement of claim or to take some other step ordered by the arbitral tribunal. It is possible to imagine other factors making the continuation of the arbitral proceedings impossible. For example, if one of the parties has ceased to exist.

assume that since the award has to be reasoned, either party has the right to ask for such interpretation.

Furthermore, in the Model Law, a party may request the arbitral tribunal to make an additional award with regard to claims presented in the proceedings, but not dealt with in the award, and this will be subject to certain time limits (Article 33 (3)). The same thing takes place in Saudi Arbitration practice, even though there is nothing that could be considered the equivalent to the above-mentioned article. Moreover, in some cases it would be the competent authority that had original jurisdiction over the subject matter that would ask the arbitral tribunal to deal with any additional awards. But on the other hand the competent authority in some situations could take the liberty of approving the award and deal with additional awards itself as seen in the case mentioned in Chapter 2 of *Tohama Construction Co. Ltd v. Hondi Construction Co. Ltd.*

(g) Recourse Against the Award

As with the New York Convention, the Model Law makes it clear that an application for setting aside is intended to be the sole opportunity for recourse against the award in the state where the arbitration took place (Article 34(1)). The intention is to exclude any other form of recourse that might be available under the laws of the state relating to matters other than arbitration. The purpose of this limitation is to ensure that foreigners contemplating arbitration in a state which has adopted the Model Law are fully aware of the means by which an award may be set aside. Again, the grounds for setting aside an award are set out in detail and in essence are taken from Article V of the New York Convention, as mentioned in Chapter 4 and they are worth mentioning again at this stage:

- Lack of capacity of the parties to conclude an arbitration agreement, or lack of a valid arbitration agreement;
- Where the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to present his case;
- Where the award deals with matters not covered by the arbitration clause or submission agreement, thereby rendering the arbitral tribunal incompetent for lack of jurisdiction;
- Where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself:
- Non- arbitrability of the subject-matter of the dispute;
- Where the award (or any decision in it) is in conflict with the public policy of the state

(Model Law, Article 34 (2)(3))

Doubts were raised as to whether the requirements of equality of treatment and of giving the parties a full opportunity to present their respective cases, adequately covered all the circumstances in which awards might be set aside. But the *travaux preparatoires* make it clear that public policy provision is intended to cover other reasons, such as the possibility of setting aside an award if an arbitral tribunal has been corrupted in some way, or if it has been misled by corrupt evidence.

Procedure for Setting Aside an Award

As for the procedure for setting aside an award, an application must be made within three months of the date on which the aggrieved party receives the award.[15]

The procedure that has to be followed in this process will be the procedure laid down by the Court specified in Article 6 of the Model Law. Article 34 is *the* provision of the Model Law which careful arbitrators will constantly monitor, because it determines whether or not the award becomes final and binding. Furthermore, it is uncertain whether an arbitrator who issues an award which clearly violates Article 34, is entitled to his full payment or even whether he could face claims himself. The violations mentioned above prima facie relate to procedural defects of the arbitral proceedings, as are illustrated by Articles 34(2)(a)(i)-(iv) which are easy to determine. The public-policy ground of Article 34(2)(b)(ii) is less easy to determine, and remains a fairly vulnerable point which can easily be attacked by the courts (Binder 2000:214). As mentioned in the historical background of the Model Law at the beginning of this Chapter, uniformity on the issue of setting aside arbitral awards was one of its prime goals. The almost uniform adoption of the major parts of Article 34 is confirmation of the success of the Model Law in this respect. It is worthless to compare Article 34 of the Model Law to Article 18 of the Saudi Arbitration Regulations since the latter is not designed to govern international arbitration.[16]

(h) Recognition and Enforcement of Awards

A losing party has the choice of either taking the initiative of attacking the award, by applying to have it set aside under Article 34, or waiting for the winning party to take the initiative by applying for a court order for recognition or enforcement of the award and then

[15] Subject to any extended time limit that may be appropriate where corrections, interpretations or additional awards have been issued under Article 33).

[16] The forms of supervision in Saudi Arbitration practice were described in detail in Chapter 2 and some Islamic solutions will be given to delocalise arbitration in general in Chapter 8.

defend that action. Unlike Article 34 which deals only with the setting aside of awards made in the relevant country, Article 35 provides that an award shall be recognised irrespective of the country in which it is made and that enforcement may be granted following the deposit of the original award as well as the arbitration agreement or certified copies of it. Of course, the documents must also be translated where they are in a language other than the language of the state in which enforcement is sought and these are the same requirements mentioned in the New York Convention.

Grounds for Refusing Recognition and Enforcement

Article 36 states the grounds for refusal of recognition or enforcement of an award. These grounds are the same as those mentioned in Article 34 above.[17] However, in Chapter 4 we addressed the differences between recognition and enforcement.

The first is that a challenge on the initiative of the losing party under Article 34 will, if successful, nullify the award altogether and render it incapable of enforcement both in the state in which the arbitration took place, and in any other state. [18]

This is in contrast with the position where the losing party successfully defends an action for recognition or enforcement of the award in the country in which he has assets, but which is not the country in which the arbitration took place. The effect will then be to prevent the winning party from enforcing the award in that particular country. It neither destroys the award itself, nor renders it impossible for the winning party to take action in other countries (Redfern and Hunter 1991:450-451).

3. SOME MODEL LAW ARAB COUNTRIES

(a) Generally

In the Middle East there are some countries that went through the so-called crisis of arbitration as mentioned in Chapter 2. This involved many countries abandoning arbitration as a

[17] Except Article 36 includes the provision in Art. V(1)(c) of the New York Convention that recognition or enforcement may be refused where "the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

[18] Exceptionally, some states as we have seen in Chapter 4 may be willing to enforce an award even where it has been set aside in its country of origin.

way of settling disputes since it was always associated with the colonial countries escaping the jurisdiction of their national courts. In this regard, we will mention some of the developments that have taken took place in some of these jurisdictions where the mistrust of arbitration was overcome.

(b) Bahrain

On August 16, 1994, the Emir of the State of Bahrain issued a new law on arbitration.[19] He ordered that the provisions of UNCITRAL Model Law on International Commercial Arbitration be applied in any international commercial arbitration, taking place in Bahrain. According to Binder and Van den Berg, the Model Law was enacted without incorporating any changes (2000:11 and HBCA 1998 Vol.1:i). However, Article 1 of the implementing law allows parties the option of "opting out" of the Model Law.

Under this law, the Supreme Appeals Court (Civil Chamber) is the Court in charge of assisting and controlling the framework of the arbitration, as mentioned in Article 6 of the Model Law. It should be mentioned that the State of Bahrain became a party to the New York Convention.

(c) Egypt

The Egyptian Act on Arbitration 1994 is considered to be a new stage in the history of Egyptian legislation. In 1986, Egypt formed a commission to study a new international arbitration act inspired by the UNCITRAL Model Law on arbitration. This step beset by political obstacles since there was a faction that was opposed to it, and to the prospect of a new act (El Ahdab 1999:157).

In the view of many legal thinkers, it was considered that submitting international arbitration to a new law, rather than the normal law, meant returning to the system of the *mixed courts*[20], which was applied when Egypt was under the occupation of the English army. The old law of arbitration caused many problems, and that could be seen in some of its articles. For example, Article 502 stated that:

> "Without prejudice to the provisions of special laws, the arbitrators must be appointed by name in the agreement to arbitrate or in a separate agreement."

[19] Decree law No. 9/1994 published in the official Gazette No. 2125 dated 17/8/1994.
[20] The mixed courts are composed of English and foreign members to hear disputes where at least one of the parties is foreign.

This means also that institutional arbitration was not possible because some arbitration centres appoint a third arbitrator, if agreement is not reached between the parties. Moreover, arbitration clauses that did not contain the names of the arbitrators were considered void, even if they did not refer to an arbitration centre (El Ahdab 1999:156). This old law of arbitration raised a problem not only for arbitration but also for investment. At one point, Egypt issued modern legislation on foreign investments. However, it did not succeed in attracting foreign investors, because they were waiting for an arbitration act that would enable them to settle any disputes by way of arbitration (El Ahdab 1999:157).

Finally, the Egyptian Act of 1994 was issued to solve the problems contained in the old law.[21] Indeed, the new law replaces Articles 501-503 of the Court of Civil Procedure.

At the present time, after the new Arbitration Act, Egypt has become the leading seat of arbitration in the Arab Middle East and Africa, especially after establishing The Cairo Regional Centre for International Commercial Arbitration, mentioned below.

(d) Oman

Until 1984, there was no special code governing arbitration in Oman. Arbitration was therefore governed by the basic principles mentioned in Islamic jurisprudence, based on the *Ibadite* School (Article 14 of Sultanate Decree No. 32/1984). The *Ibadite* School moreover, recognises that arbitration agreements are valid but not binding. But it should be noted, however, that if the parties proceed to arbitration, the award issued will be binding on them. However, in 1994 the state incorporated precise provisions that organised and governed arbitration. This laid down the statute governing the Board for Settlement of Commercial Disputes, and contained a full chapter on arbitration (El Ahdab 1999:478).

In the process of encouraging foreign investment, the government of Oman had realised that the arbitration system had to be modernised, so it would meet the minimum international standards of arbitration. Due to this, the Egyptian Arbitration Law of 1994 influenced Omani legislators. Accordingly on 28 July 1997 a new Act on Arbitration in Civil and Commercial matters was issued based on the Egyptian law mentioned above (El Ahdab 1999:479).

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[21] Law No. 27/1994, issuing the Act relating to arbitration in civil and commercial matters, issued on 18th April,1994, published in the Official Gazette No. 16 (Supplement of 21.04.1994). It came into force on 15 May 1994.

4. SOME ARAB ARBITRATION CENTRES INFLUENCED BY UNCITRAL ARBITRATION RULES

(a) Generally

There are some arbitration centres in Arab Middle Eastern countries that have been influenced by the UNCITRAL Arbitration Rules, believing that they constitute the minimum standards needed for arbitration. The following are only some of those arbitration centres that we believe have succeeded in attracting business people in the last five years.

(b) The Abu Dhabi Commercial Arbitration Centre

On 2 February 1993 the Abu Dhabi Chamber of Commerce and Industry announced the establishment of the Abu Dhabi Commercial, Conciliation and Arbitration Centre to be the first specialised centre of its kind in the whole of the Gulf region. The Centre's articles defined the relation between the Chamber and the Centre. If confined this relation to the limits of providing protection, patronage and supervision of the Centre's management without any actual interference by the Chamber in the proceedings, or in the performance of any stage of arbitration or conciliation. This Centre is considered to be one of the commonly used centres in the United Arab Emirates (UAE). In fact it has been used very frequently in national as well as international commercial disputes.[22]

(c) The Dubai Commercial Arbitration Centre

The DCCI Arbitration Centre was established pursuant to the resolution of the board of directors of the Dubai Chamber of Commerce and Industry, issued on the 12/12/1994 in accordance with its powers under Law No. 2 of 1975 of the Dubai Chamber of Commerce and Industry and its subsequent amendments. The establishment of the Centre, however, was announced on the 6 March 1996. The aim of the Centre is to provide supervisory services for domestic and international arbitration under the DCCI Rules of Commercial Conciliation and Arbitration of 1994.

Dubai's geographical position has made it one of the leading commercial centres in the Middle East. In general, the Chamber of Commerce and Industry have practised arbitration and mediation there since its establishment in 1964. The Chamber has played a substantial role in

[22] http://www.adcci.gov.ae

the settlement of commercial disputes through the Committee of Arbitration and Trade Customs[23]

(d) The Cairo Regional Centre for Commercial Arbitration

This Centre is an independent, non-profit making international organisation. Its principal aim is to cope with progress and developments in both Asian and African countries. The establishment of this Centre was by the Asian African Legal Consultative Committee (AALCC). The history of the Centre could be said to go back to January 1979, when the committee signed an agreement with the Egyptian government for the establishment of the Cairo Centre for an experimental period of three years. The agreements between the committee and the Egyptian government developed until it became independent in the early 1990s. The Centre has developed alternative dispute resolution techniques (ADR) such as conciliation, mediation and others. Furthermore, this Centre has established a centre in Alexandria to handle Maritime Arbitration (ACIMA). At the present time, the Centre has a cooperation agreement with the American Arbitration Association. This Centre is generally considered to be the most successful arbitration institution in the Arab Middle East. It applies the UNCITRAL Arbitration Rules, and it has been used by many foreign companies, and also by Arabian Gulf companies investing in Egypt. The Centre has published a book on the arbitral awards it has issued (Alam Eldin 2000).[24]

5. PROPOSED FUTURE UNCITRAL DEVELOPMENTS

(a) Generally

While this brings us up to date with the current law, the discussion would seem incomplete without looking forward to see the future work of UNCITRAL. On the occasion of the New York Convention's 40th anniversary, UNCITRAL organised a colloquium on the topic of "Enforcing Arbitral Awards under the New York Convention – Experience and Prospects," where a number of leading arbitration experts gave their opinion on topics surrounding the Convention. The reports presented made various suggestions to the Commission on problems encountered in recent arbitration practice. The result of the report was that the commission requested the secretariat to prepare a note on possible future work in the area of international commercial arbitration (April 1999 A/CN. 9/460). It was decided later to entrust a Working Group with the discussion of a number of issues and in March 2000 the Working Group held its

[23] http://www.dcci.gov.ae
[24] http://www.crcica.org.eg

first 2-week meeting. Below, we are going to discuss some of the matters that are being highlighted by the above-mentioned Working Group and some leading practitioners in the field of arbitration. This will probably give us an idea of future developments of UNCITRAL in the field of international commercial arbitration.

(b) Conciliation

Some aspects of conciliation are among the issues that have been discussed by the Working Group. The worldwide increase in the use of conciliation or mediation makes a harmonised legal solution of certain problematic issues seem inevitable. And they were among the first to be discussed by the Working Group on Arbitration.[25] One of the issues that they have discussed is the admissibility of certain evidence in subsequent judicial or arbitral proceedings (A/CN.9/WG.II/WP.108, paras 18-28). The difficulty in this area is because the parties in conciliation proceedings express suggestions and views regarding possible settlement. These disclosures could be used to their disadvantage in subsequent arbitral proceedings, if the conciliation fails. It was generally agreed in the Working Group that Article 20 of the UNCITRAL Conciliation Rules was a good basis on which to build a model legislative provision (A/CN.9/468,para.23).[26] The provision should aim at preventing a spill over of information into subsequent proceedings, and it should state that in cases where such evidence was illegally submitted to the tribunal, it should be disregarded.

Also, the enforceability of settlement agreements reached in conciliation proceedings were discussed by the Working Group (A/CN.9/WWG.II/WP.108). One view expressed by them was that the enforceability of settlement agreements would increase the attractiveness of conciliation, and that would encourage the preparation of a Model legislation provision to this effect. The other opinion was that it is inappropriate to equate conciliation settlements and arbitral awards, due to the fundamental differences between them (A/CN.9/468, para.39). In the end, the Working Group decided that since there were simpler ways of making a settlement enforceable, there was no real need for such regulation.

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[25] See the Report of the Working Group on Arbitration on the work of its 32nd session (Vienna. March 20-31, 2000), A/CN.9/468.

[26] Article 20 – Admissibility of Evidence in Other Proceedings: "The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings. (a) Views expressed or suggestions made by the other party in the course of the settlement of the dispute; (b) Admissions made by the other party in the course of the conciliation proceedings; (c) Proposals made by the conciliator; (d) The fact that the other party had indicated the willingness to accept a proposal for settlement made by the conciliator."

(c) The Requirement of Written Form for the Arbitration Agreement

The requirement that the arbitration agreement should be in written form, was also discussed by the working group and some leading writers, such as Kaplan (Arb.Intl. 1996:27). As we have seen in Chapters 4 and 5, both the New York Convention and the UNCITRAL Model Law require the arbitration agreement to be in written form. However, there was a discussion as to whether the provisions were any longer in accord with international trade practice, especially with electronic means of communication. Finding a solution to this problem was seen as a high priority and was therefore taken up for discussion by the working group at its first meeting. It was decided that this could be achieved by an amendment to the Model Law, including a list in Article 7 together with the wording "for the avoidance of doubt". Further, some delegates recommended a protocol to the New York Convention as a solution. Others thought this problem could be solved either by a protocol or an amendment to the Model Law, as both these measures would take too long to become effective and create too much diversity (A/CN.9/468, para. 93).

(d) Liability of Arbitrators

The liability of arbitrators is a subject that has been discussed by many academic writers such as Dr. Julian Lew in his interesting book The Immunity of Arbitrators (1990). In discussing the Model Law moreover, it seems that the *travaux preparatories* held that the issue of arbitrators' liability could not be included in the text and should be left to national jurisdictions to deal with (A/CN.9/216, paras 51-52). However, it was then seen that the approaches taken by different national laws were very diverse and a uniform solution was desirable. Even though the delegates of the Working Group recognized the difficulty of the matter, they decided not to take up the issue at the present time and the problem was described as an academic one without great practical importance.

(e) Consolidation of Cases Before Arbitral Tribunals

This issue has been discussed in Chapter 3 when we highlighted the advantages and disadvantages of arbitration and it has been discussed by some practitioners such as B. Hanotiau (1998 114 (4) Arb. Intl.369). In certain circumstances, it might desirable to consolidate two or more arbitral proceedings into one arbitration. In such an arbitration moreover, where no provision is made for consolidation, it is not possible to apply the current provisions for consolidating the proceedings, unless agreed by both parties. The main advantage of such consolidation is to avoid the inconsistency of decisions and also to increase the efficiency of

arbitration. In this regard, model provisions were suggested by the Secretariat as a possible solution to the issue. Other delegates suggested that a guide on the subject be drafted by UNCITRAL. At the end of the discussion, the delegates' attitudes seemed to be that the issue was of a low priority, and that other matters should take precedence over it.

Of course, there are other issues that have been discussed by the working group and they include sovereign immunity in arbitration, raising claims for the purpose of set off, information confidentiality, arbitral proceedings and others. The above-mentioned issues, however, are the most interesting commentaries on the development of UNCITRAL Arbitration Model Law.

6. CONCLUSION

Harmonisation of national laws governing proceedings for the resolution of disputes in international trade is in a general sense desirable. It limits judicial supervision to the minimum necessary to protect the parties from unfairness, whilst permitting party autonomy and defining the powers of the arbitral tribunal to decide upon its own jurisdiction. By developing the project in the form of the Model Law, as opposed to a uniform law or convention, UNCITRAL recognised the need for states to be able to adapt the Model Law to their own individual requirements. Nonetheless, the Model Law is suitable for adoption by many nations, which either have antiquated laws or no laws at all, relating to the conduct of international commercial arbitrations within their territories. Furthermore, it is virtually inconceivable that any state will in future introduce legislation relating to arbitration without first looking at the text of the Model Law and its legislative history. From the comparison mentioned above, it could be seen that there is nothing in the Model Law or its future developments that would conflict with any major principles of Islamic jurisprudence. It is only the theory of delocalisation that should be developed and that will be dealt with in Chapter 8. At this point, we will move on to see the key players in the field who played a very big role in the internationalisation of international commercial arbitration, so that we can understand, in the final chapter, what has to be done in the Saudi Arabian jurisdiction without affecting major Islamic principles.

Chapter 6

THE INTERNALISATION OF INTERNATIONAL COMMERCIAL ARBITRATION

1. INTRODUCTION

(a) Generally

Today, important economic battles are being fought and a true arbitration industry is emerging. Arbitration has become a universally accepted solution for the resolution of international commercial conflicts. Arbitration clauses, moreover, have increasingly attracted law firms from very different backgrounds, and as a result international arbitration is presently undergoing a process of harmonisation. The considerable participation of jurists from very different origins, with very different approaches has caused arbitral procedure to evolve in an extraordinary manner. For example, Anglo-Saxon lawyers educated in the common law system want to conduct arbitration in the same manner as it is done before their domestic courts. In continental Europe, on the other hand, the approach to the resolution of conflicts differs between areas with Germanic cultural roots and areas that are called the Latin zone. Finally, East Asian, Arabian and Islamic societies are known for their emphasis on conciliation, and because of this it is appropriate to speak of arbitration as a true clash of legal cultures (Cremades *in* Frommel and Rider 1999:147-151).

In reading about this area, we can understand that overcoming the clash of legal cultures was not achieved through academic discussion but rather through everyday practical reality that emerged at the beginning of the 20th century or even before (Cremades *in* Frommel and Rider 1999:151). Support for harmonisation has emerged from distinguished practitioners and academics worldwide, as we will see below.

In general, the harmonisation of national laws on arbitration for international trade, is desirable. As we have seen, the text of the Model Law is considered to be a kind of benchmark showing the balance between the autonomy of the parties and the control of the arbitral process by the law. It also limits the judicial supervision to a minimum, for the purpose of protecting the parties from unfairness, whilst permitting party autonomy and defining the powers of the arbitral tribunal to decide upon its own jurisdiction.

The major consequence for practitioners is that they will know that they are working within a system familiar to their colleagues overseas. It will also mean that the enforcement of awards will be treated with greater uniformity, and also arbitration can be held in less-developed countries in which projects are carried out, without fear of frustration by intervention from the local courts. Finally, applications of the award will be dealt with on a more uniform basis, acceptable by international standards (Redfern and Hunter 1991:526).

As mentioned above, if we look back to the genesis of modern international commercial arbitration, we find that modernisation of arbitration is not a new development that has come into force just recently, but rather an ongoing process of major developments that have taken place in many national and international systems of law. In this chapter we will look into these developments.

(b) Development Within the English Legal System

The first English arbitration code was developed and finalised in the form of a digest by Lord Bramwell and his colleagues in 1883. They were strongly supported by the Corporation of the City of London, the Association of Chambers of Commerce, and also by many merchants from the City of London, who did not like the delay and expense associated with litigation proceedings in the English High Court (V.V. Veeder QC *in* Hunter, Marriott, and Veeder 1995:13-14).[1]

With the passing of the English Arbitration Act 1889, the Bramwell Code was almost forgotten until Lord Mustill and Stewart Boyde QC mentioned its existence in their written work on Commercial Arbitration in 1982. At the present time, many academics see that the 1889 Act, which was re-enacted in 1950, constitutes the basis of English statutory law on arbitration and that it was inspired by Bramwell's Code. From our readings, we cannot see a relationship between the Bramwell Code and the 1889 Act. However, we may think that the official people who drafted this law had a copy of the Bramwell Code and they adopted some of its provisions.

Moreover, many practitioners in the UK such as Veeder believe that the features of the Bramwell Code, adopted by the Arbitration Act of 1889, constituted an important stepping-stone on the long path leading to the 1923 Geneva Convention on Arbitration Clauses, and the 1927 Geneva Convention on Arbitration Awards mentioned earlier (Veeder *in* Hunter, Marriott,

[1] This was before the establishment of the English Commercial Court in 1895.

Veeder 1995:15). V.V. Veeder QC argues that without the Bramwell Code for the `internationalisation' of arbitration, the UK would have throttled both these treaties at birth, or at least, like the US, would never have signed them. While this may be the case, it could equally be argued that the UK's long experience in international business was extensive enough for the UK to have considered the Geneva treaties.

(c) Development in The Hague

The Permanent Court of Arbitration was founded in 1899 by one of three Conventions adopted at the Peace Conference in The Hague. It was revised, however, at the second Peace Conference in 1907. Its purpose was to further the peaceful settlement of international disputes. Prior to that, however, The Hague Conference of Private International Law was held in 1893 for the purpose of harmonising the rules of conflict between laws, which had become increasingly important at that time. One of the most notable changes is the Comité Maritime International, founded in 1897 to standardise maritime law. This was the start of the development of internationalisation by The Hague, which over a long period of time and after the two World Wars, has led to extensive international and regional co-operation in this matter (Dr. Jur. Allan Philip *in* Hunter, Marriott, Veeder 1995:26).

(d) Developments by the International Chamber of Commerce (ICC)

Before the First World War, many Chambers of Commerce in different states showed a great deal of interest in promoting international commercial arbitration as a necessary consequence of world trade. The International Congress of Chambers of Commerce and Industrial Associations adopted a resolution proposing the unification of national legislation relating to commercial arbitration (Veeder *in* Hunter, Marriott, Veeder 1995:17).

The outbreak of the First World War delayed the development of matters but in July 1921 the first post-war ICC Congress called for `uniform rules of procedure for commercial arbitration'. Moreover, at their second Congress in March 1923, the ICC established its own Court of Arbitration and promulgated its rules for conciliation and arbitration. Crucially, the ICC did not merely support the draft of the Geneva Protocol on Arbitration Clauses, or propose a better means for enforcing arbitration awards, which led to the 1927 Geneva Convention, but they also passed a resolution proposing the unification of laws relating to arbitration (Veeder *in* Hunter, Marriott, Veeder 1995:17). At that time, the Sub-Committee of legal experts on the 1923 Geneva Protocol warned of difficulties caused by the major differences between the laws of different countries. In some countries, like France for example, arbitration clauses were not

valid, but even if the arbitration clause were valid, the French Court had entire discretion as to whether or not to enforce an award (Veeder *in* Hunter, Marriott, Veeder 1995:17-18). However, it is important to acknowledge the role that the ICC played in developing the theory of internationalisation.

(e) Developments by the UNIDROIT

In 1928, UNIDROIT, the International Institute for the Unification of Private Law was founded in Rome. In December 1929, just a year later, it took arbitration into consideration. Moreover, UNIDROIT requested its secretariat to report on whether it was possible to promote a uniform law on arbitration and, if so, how best to achieve that goal (Veeder *in* Hunter, Marriott, Veeder 1995:18). This question was given to Professor Rene David, a professor of law at Grenoble. He completed his report three years later. It was a document of some 290 printed pages that analysed and briefly described the different arbitration laws and practices of many countries, including the USA, and major European countries like Germany, England, Spain, France, Italy, Poland and Sweden (Veeder *in* Hunter, Marriott, Veeder 1995:18). UNIDROIT published the report in December 1932 but academics, at the present time, find it extremely elusive, and Veeder believes that its existence is not well known outside France. It is worth noting that Professor David refers to the UNIDROIT project in his work on international trade.

In April 1933 UNIDROIT established a Special Committee to prepare a draft of the uniform law envisaged by Professor David. It was chaired by UNIDROIT's President, His Excellency Mariano d'Amelio, and other distinguished European figures. The most important feature in the composition of this Special Committee was that it did not include a representative from the United States of America. This was due to the fact that the US was not a member of the League of Nations, and also had not ratified the 1932 Geneva Protocol and the 1927 Geneva Convention. Yet, the US Nationals Committee was highly active within the ICC. Also, the Committee's composition was totally European and, therefore, the common law tradition was under-represented (Veeder *in* Hunter, Marriott, Veeder 1995:18-19).

The Committee met five times between 1934 and 1936. It published its final draft with a final report in September 1936. Its proposed Uniform Law included forty articles drafted in both French and English. The French draft, moreover, included a detailed commentary on each Article (Veeder *in* Hunter, Marriott, Veeder 1995:19). During June-July 1937 the Rome draft was considered and approved at the ICC Congress in Berlin. However, four national committees withheld their approval. These countries were the United States of America, Australia, Japan and the United Kingdom. At the time, uniformity in the procedure of commercial arbitration

was seen as wholly undesirable, if not impossible. Moreover, in England the Oil Seed Association declared itself unwilling to change or modify the Anglo-Saxon system of arbitration for the purpose of obtaining uniformity with continental European countries. Other individual trades also had their own separate requirements (Veeder *in* Hunter, Marriott, Veeder 1995:20). This concern was best expressed in a letter written to the Lord Chancellor by a young barrister called Mr. Quintin Hogg.[2] The relevant paragraphs read as follows:

> "As you are aware, the vital distinction between these two systems is as follows. An English Arbitrator, although chosen by the parties, is still a judge in the sense that he must administer the law. In disputes arising out of a contract, his function is to give effect to the rights of the parties under the contract. He has no right to carve out a new contract for the parties, or to suggest reasonable or equitable courses. He is there to determine the dispute by deciding which party is right.
>
> The Latin system of conciliation is based on a totally different conception. The referee thereunder undertakes the good offices of a friend, but his decision, being under the reference, has the binding force of law. He is not limited to decide the dispute according to the rights of the parties, or even to decide who is right at all. His object may be equally to effect a compulsory compromise, and he may therefore, by his award, direct the parties to do that to which they have never agreed, and which, apart from the award, they would never have been bound to do.
>
> English merchants in the past have had unpleasant experiences of foreign conciliators and have to an increasing degree inserted in their contracts clauses specifying that disputes are to be settled according to English Arbitration law. In spite of the fact that the foreign lawyers who have to administer such clauses abroad have found some difficulty in mastering the unfamiliar system, the practice has, I understand, grown to such a degree that if the present proposed convention can be defeated it is anticipated that in a few years English Arbitration methods will be accepted abroad at least as an equally reputable method of settling disputes, and in the end will supersede conciliation in commercial differences."
>
> (Veeder *in* Hunter, Marriott, Veeder 1995:21)[3]

After the Second World War, it was felt that some serious steps had to be taken towards the internationalisation of international commercial arbitration. Neither the existing regional conventions nor the 1958 New York Convention on the enforcement of foreign arbitral awards, truly satisfied harmonisation. It was, however, satisfied by the UNCITRAL Model Law 1985, as seen earlier, and by the minimum standards set in it for all national systems of arbitration (Jan Paulsson *in* Van Den Berg 1999:575).

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[2] Quintin Hogg became a leading Conservative politician holding a number of senior ministerial offices in government, culminating as Lord Chancellor, with the title of Lord Hailsham.

[3] It is important to note that we have chosen the most relevant paragraphs in this letter.

2. THE DEVELOPMENT OF THE THEORY OF DELOCALISATION OVER THE LAST 100 YEARS

(a) Generally

Delocalisation is one of the various aspects of internationalism, seen when parties from different countries wish, as much as possible, to avoid the intervention of their respective courts. It is possible, however, to fix the seat of the tribunal in a third state, although practitioners suggest that it is not always easy to find a venue considered neutral by both parties. Also, parties obviously want to make sure that there is no connection between the dispute and the state in which the proceedings are held, otherwise they potentially weaken the justification of the court exercising control in that state. In addition, parties often only want minimum state control over the award (Professor Pierre Mayer *in* Hunter, Marriott, Veeder 1995:37. In this chapter we will see the development of the theory in different areas.

(b) Local Law as Curial Law

Until the late 19th century international arbitrators were expected to behave in the same way as national arbitrators, which one might tentatively interpret as meaning that the so-called 'jurisdictional' approach to arbitration then prevailed (Bucher, N *in* Brower and Lillich 1994:30). However, the comparative view of researchers and practitioners shows a different approach. A comparative study made in the 19th century by the French author Foelix reveals that the jurisdictional approach was not the method adopted in most countries at the time (Mayer *in* Hunter, Marriott, Veeder 1995:39). In general, courts assisted, on the basis of the contract between the parties. The contractual approach, moreover, gives the application of the local law weaker support than the jurisdictional one. This is how the principle of 'party autonomy' was used and recognised. After that, and in the famous *American Surety Co of New York.* case in 1910 (16.Com.Cas 37, 103 LT 663,27 TLR 91), the principle of party autonomy was given the largest conceivable force, and thereafter, many cases followed the same principle.

The development in this regard was apparent in the 1923 Geneva Protocol on Arbitration Clauses. Article 2 of the Protocol provides that:

> "The arbitral procedure shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."

Also, the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards stated the same principle in Article 5 as seen in Chapter 4. Clearly the role of the local law is only subsidiary, and no law has to be complied with except the law chosen by the parties. Islamic jurisprudence can be seen to validate the contractual approach in the Hanafi School while making some requirements for it, as seen in Chapter 1.

The first requirement is that the dispute must already have arisen, the arbitrator has to be named and the agreement of the arbitration has to be in the form of an offer of acceptance (Medjella al-Ahkam Art. 1848 *by* Ali Haidar). In modern practice, the Saudi Arbitration Regulations have adopted the contractual approach, even in the extreme. This was seen in the case between *Al -Hoshan Ltd v. Al Farhan Ltd* (mentioned in Chapter 2) when the judges, (Appeal Division), at the Board of Grievances referred the parties to arbitration even though none of them had stopped the proceedings on the grounds that they had an arbitration clause in their contract.

(c) Conflict of Law Rules

The Conflict of Law Rules is applied when dealing with the determination of the law applicable to the contract. Over the last century, arbitrators have usually felt it necessary to apply the Conflict of Law Rules of the seat of the tribunal. However, in the late 1960s, arbitral tribunals began paying attention to the choice of law rules of the countries where each party was domiciled, and gradually less attention was paid to the law of the seat. But this was not the end of the revolution, because since the mid-1970s many `advanced' arbitrators have adopted the so-called `direct approach' where arbitrators choose to select the applicable law without applying any conflict of law rules of any specific state. In this situation, they would, however, use the general principles of private international law, and then, only as guidance. Some of the advanced arbitration laws, such as French law, have validated this method, and, in the opinion of Professor Pierre Mayer, the UNCITRAL Model Law has validated it implicitly (Hunter, Marriott, Veeder 1995:42).[4] Because of developments in the conflict of law rules and also the political, legal and cultural differences in the world of arbitration, the practice has developed many types of laws applicable to the substance of a dispute.

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[4] Article 28 (2) states the following "Failing any designation by the parties, the arbitrator's tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."
Another example, Article 1496 of the French Law states the following "the arbitrator shall resolve the dispute in accordance with the rules of law chosen by the parties; in the absence of such a choice, in accordance with the rules of law he or she considers appropriate. In all cases, he or she shall take trade usages into account."

(d) The Different Types of Applicable Law

Arbitration is a process where legal cultures come together. As a result its practice has developed different types of applicable laws. The following options are a detailed explanation of the major choices that the parties usually have.

National Law

In most of the arbitration cases, the parties will choose an anonymous legal system to govern their contract. This may be the law of a federal state like New York, or French law. An anonymous system is always referred to as a national system of law. While in practice there is never any certainty, a national system of law should provide a legal standard against which the rights and responsibilities of the parties can be measured. Moreover, in the event of a dispute, the parties can be advised with reasonable confidence as to their legal position, or, at the very least, they can be given a broad indication of their chances of success or failure. In practice, legal advisors would be able to evaluate the legal position of their clients (Redfern and Hunter 1991:101-102).

The choice of a national system of law is the one made in most international contracts. The reason for choosing a specific national law may be because of its connection with the parties, or because that particular system is suited to governing modern commercial relations. In practice, we see that construction, commodity, shipping and insurance contracts are often governed by English law, because the commercial law of England is seen to best reflect the needs of international commerce (Redfern and Hunter 1991:102). Also, in a country like Saudi Arabia, we see that many contracts related to international finance mention English law as the law applicable between the parties. In some domestic insurance disputes the parties have in a number of cases suggested that English law should be applicable to the disputes.[5]

In some cases, however, the parties may have difficulty in choosing a national system of law. There may be arguments against the choice of a national system. In the majority of situations, the most common objection to the choice of a national system of law is inadequacy.

[5] This is based on the author's experience. For example, the case between *Al-Sharq Petrochemical v NCCI 1997* where the parties and the arbitrators were seriously considering English law as the law applicable to the substance of the dispute.

This is when a national system of law is not sufficiently developed to allow it to deal with modern commercial transactions (Redfern and Hunter 1991:102).[6]

Another reason for rejecting a national system is the unsuitability of that system for ruling on international trade (Redfern and Hunter 1991:103-104). As mentioned above it can be seen that in Saudi Arabia the doctrines in Islamic sales contracts are seen by Western legal advisors as insufficient to govern international syndicated loans and, therefore, English law is always chosen in large financial contracts.[7]

If There Is No Substantive Law Chosen

As we have seen in the article by Professor Pierre Mayer, mentioned above, arbitrators would traditionally apply the conflict of law rules of the place of the seat of arbitration, in order to determine the applicable law. However, modern laws and arbitration rules now give the tribunal the freedom to apply the rules of law that it deems to be appropriate, as seen in section 46-3 of the English Arbitration Act of 1996. If no such choice is made, the contract is treated as being governed by the law of the country with which it is most closely connected (Paulsson, Rawding, Reed and Schwartz 1999:15).

General Principles of Law

In some situations the parties would want to avoid reference to a national law and opt for general principles of law. This approach, as seen by practitioners, should be adopted with caution because the lawyers would be dealing with common general principles. The example that could be given here would include concepts such as the importance of good faith in business relationships; that a breach of contractual commitments involves an obligation to make reparation; that a person should not enrich himself unjustly at the expense of another, etc. Therefore, practitioners see that the application of those principles would be effective only within a specific system of national law (Paulsson, Rawding, Reed and Schwartz 1999:16). Furthermore, it should be noted that practitioners in international arbitration view that the application of Islamic law as applying general principles, described above. This causes them to

[6] This has been mentioned previously in The Crisis of Arbitration (Chapter 2).

[7] In Chapter 8 we will suggest what has to be done to develop Islamic law principles and Saudi Regulations in order to cope with all the economic changes taking place in Saudi Arabia at the present time. Those suggestions should have effect on developing arbitration law and the international arbitration practice in general.

avoid its application in practice. For example, Islamic practice calls for such general principles and this can be seen in one of the famous sayings of the Prophet Mohammed:

> "A Moslem is the brother of a Moslem and would not perjure or harm him."
> (Zad al Moslem by Al Shenkeety [Died 1363H] Vol 3 :388)

The judges in Saudi Arabia consider this principle when they remind one of the parties about the difficult financial position that the other party is going through. They would use such a principle when a party asks for a longer period of time to pay his debt by agreed instalments.

Common Principles of National Laws (Competing Laws)

Major contracts between parties operating in the international arena, and specifically highly political projects, result in complex applicable law clauses which prove difficult to apply in practice. Modern examples include the applicable law clauses in the Channel Tunnel project, where the contract was governed by principles common to both English and French law and, in the case of the absence of such common principles, by the general principles of international trade law as have been applied by national and international tribunals (Paulsson, Rawding, Reed and Schwartz 1999:6-17). In these cases, the result has been that the parties and their advisors will have to search for common principles between two different legal systems, each of which is perfectly capable on its own of solving any legal problems which might arise. Moreover, as we can see in the Channel Tunnel contract, each country developed its own separate rules to regulate contractual relations, and it will not always be easy to extract common principles from these different legal rules.

Moreover, while such clauses may be expedient and raise interesting questions for comparative lawyers, they are likely to lead to increased costs and reduced certainty for the parties, and should therefore be avoided, where possible (Paulsson, Rawding, Reed and Schwartz 1999:16-17). As understood by most practitioners in Saudi Arabia, the clauses that contain common principles of national laws were never used among the Gulf States, or even other Arab countries because of the supremacy of Islamic law in most of the Arab world. Islamic law will have some concurrent control over the application of any national laws chosen between the parties.

Concurrent Laws

When one party to a contract is a state or state agency, the principles of international laws are often coupled with a national law, so as to create a separate system of the so-called concurrent laws. Public international law then acts or operates as a regulator of the national law, ensuring that it does not fall below the minimum international standards (Paulsson, Rawding, Reed and Schwartz 1999:17). The 1965 Washington Convention provides a striking example in relation to disputes between states and foreign nationals, in connection with disputes submitted to ICSID arbitration (Hirsch 1993:135-138). Another example is the Energy Charter Treaty, in which Article 26 sets out the dispute resolution procedures available under the Treaty (Paulsson, Rawding, Reed and Schwartz 1999:17).

The Libyan oil nationalisation arbitrations are a good real life example in this regard. Moreover, the coupling of national law with international law is seen in the *Texaco, BP* and the *Liamco* arbitration cases. These arose out of the Libyan oil nationalisation and it should be noted that it worked effectively in only one of the cases. The clause of those arbitrations reads as follows:

> "This concession shall be governed by and interpreted in accordance with the principles of law of Libya, common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law including such of those principles as may have been applied by international tribunals."
>
> (Texaco arbitration (1978) 17 I.L.M. 3.)[8]

`Freezing' the Law Clauses

This is often seen in contracts between a state, or state agency on the one hand, and a private entity on the other. In these contracts the private entity is likely to be under commercial pressure to agree that the governing law under the contract should be that of the state concerned. In that situation there will be some fear that the state party may use its legislative powers to alter the law and, therefore, change the contractual obligations without the consent and approval of the private party (Paulsson, Rawding, Reed and Schwartz 1999:18). The technique that is sometimes used as a measure of protection is to couple the law of the state party with the principles of international law that we have mentioned, or by using the `freezing' of the law clause, so that the relevant law would always be the law expressed in the contract at the date the contract was signed, and so the private party could protect himself from any changes in the future (Paulsson, Rawding, Reed and Schwartz 1999:18-19). This is called a `stabilisation'

[8] The references for the other BP and Liamco arbitrations can be found in the Table of Cases

clause, under which the state party would undertake that the benefits granted under the contract would not be diminished by any legislative or regulatory changes.

This type of clause might be appropriate in some cases, but there are doubts as to whether a state can restrict its future legislative powers by a private contract (Fouchard, Gaillard and Goldman 1999:796). Using the `freezing the law' clause was successful in one of the Libyan oil cases (Texaco arbitration), but not in the *Aminoil* arbitration, a case involving the American Independent Oil Company Inc and The Government of the State of Kuwait. In this case the arbitral tribunal held by a majority to use or adopt the concurrent law approach discussed above (*Aminoil* arbitration (1982) 21 I. L. M.:976). However, the use of international law solely in many contracts is increasingly considered, and perhaps one of the points of concern for internationalisation, is the lack of awareness of this trend, as we shall see later. In Saudi Arabia it has been assumed that freezing the law clauses will be used in large investment contracts with the Saudi government, especially in BOT projects.[9]

Lex Mercatoria

The increasing complexity and internationalisation of modern trade and commerce have led many lawyers to conclude that what is needed for international contractual relationships is not an international system of law, but a modern law that would meet the requirements of international commerce (Dely 1992:249). Currently, this modern law goes under various descriptions, including transnational law, the international law of contracts, the *Lex Mercatoria*, and international trade law. Whatever its description, the purpose is clear: to regulate international commercial transactions through an international system of law. However, a clear problem is the lack of clarity, as previously described in the General Principles of Law (Paulsson, Rawding, Reed and Schwartz 1999:20).

Moreover, arbitral tribunals never mention the phrase *`Lex Mercatoria'*, even on international contracts and therefore, until an acceptable body of law has been brought into use by the international business community, there will be little confidence in mentioning *`Lex Mercatoria'* in arbitration agreements. One of various efforts to establish a universal law was made by UNIDROIT, which promotes the international harmonisation of law and seeks to establish guiding principles. Many people believe this to be a body that may well form the kernel of a new merchant law, since it is concerned with the principles of international commercial contracts.

[9] BOT stands for Build, Operate and Transfer.

That is not to say that *Lex Mercatoria* was never applied. There have been some cases where the arbitral tribunal has chosen *Lex Mercatoria* as law to be applied between the parties.[10] The development of the *Lex Mercatoria* is of particular importance and relevance to international arbitration, which transcends national boundaries and seeks to establish an international procedural order for the resolution of disputes in international trade and commerce (Paulsson, Rawding, Reed and Schwartz 1999:20-21). It should be noted that there is recognition of the phrase *Lex Mercatoria* in Saudi Arabia under the heading Commercial Law Customary Rules (*Al Araff Al Tijaria*). However, this is subject to its not being in conflict with Islamic general principles. For example, when the Chamber of Commerce gets involved in a mediation relating to international sales of goods contracts, the legal advisors in the legal department at the Chambers of Commerce have the liberty of applying the Vienna Convention on the international sale of goods, on the grounds that it represents the customary rules prevailing in international trade.[11]

(e) Delocalisation of the Arbitral Award

At the end of the arbitration, one of the parties will have to enforce an award. The dream of arbitration practitioners is to see the recourse to state courts become totally unnecessary in international commercial arbitration. However, at the present time this is not a matter for concern, since it is clear that enforcement against a party unwilling to pay can be secured only through obtaining a court order (Mayer *in* Hunter, Marriott, Veeder 1995:43). This is generally the best way to ensure that the debtor will comply with the award. Therefore, complete delocalisation from state courts is not to be achieved in the near future (Mayer *in* Hunter, Marriott, Veeder 1995:44). That is not to say that there are no suggestions for developing the enforcement practice. We shall see below the summary of the writings of some distinguished academics and practitioners on the subject.

However, the main issue that practitioners are concerned with at the present time is to have the right to bring an appeal before a court against an award. Moreover, this appeal would be for the purpose of having the award vacated on some grounds to prevent the winning party from enforcing it anywhere (Mayer *in* Hunter, Marriott, Veeder 1995:44). As we have already

[10] See, for example, the ICC case between *Pabalk Ticaret Sirketi v. Norsolor SA*, 11 Yearbook of Commercial Arbitration 484 (1986) in which the arbitrators have settled the case applying Lex Mercatoria. See also *Compania Valenciana de Cementos Portland SA v. Primary Coal Inc*, 16 Yearbook of Commercial Arbitration 142 (1992) in which the applicability of Lex Mercatoria was considered.

[11] This is based on the author's involvement in the mediation of two international sales of goods contracts one relating to the sales of marble from Greece and the other to machinery for manufacturing of packing cases

seen, the traditional position is that such an appeal is legally possible against domestic awards, but when it comes to international awards the grounds for appeal may not always be exactly the same. Therefore the concept of geographical delocalisation has emerged since 1899, when the French Cour de Cessation decided that an award rendered in France by application of English law was to be regarded as English, and for that reason was not subject to an appeal in France. Since 1956 German law has, at least, shared this position (Mayer *in* Hunter, Marriott, Veeder 1995:44). As we have seen before, according to a minority of Islamic opinion, the contracts between non-Muslims concluded in an Islamic state were considered as non-Islamic (Al Ahdab 1999:51). By analogy, we can see that Islamic jurisprudence was aware of this concept of delocalisation. In carrying out any developments in the field of arbitration, this opinion should be considered.

The concept of legal delocalisation emerged once more in the 1970s. It developed to limit the intervention of the national courts to prevent their acting as a Court of Appeal in arbitral awards. Such developments can be seen in the English Arbitration Act 1979, which offers the parties to non-domestic contracts, the right to adopt an `exclusion agreement'.[12] The Swiss Federal Act on private international law, enacted in 1987, on the other hand, adopted a similar position. That can be seen in Article 192 of the Act.

3. EXPECTED MAJOR FIELDS OF INTERNATIONAL ARBITRATION

(a) Generally

Since we have an idea about the key players who made the first step towards the harmonisation of arbitration, it will be relevant to see what are the expected major fields in the future of international arbitration. Moreover, it is important to highlight the future new common arbitrable matters.

[12] Article 3 of the Act provides the following: Exclusion agreement affecting rights under sections 1 and 2. (1) Subject to the following provisions of this section and section 4 below – (a) the High Court shall not, under section 1 (3) (b) above, grant leave to appeal with respect to a question of law arising out of an award, and (b) the High Court shall not, under section 1 (5) (b) above, grant leave to make an application with respect to an award, and (c) no application may be made under section 2 (1) (a) above with respect to a question of law.

(b) State Arbitration

It is seen that this type of arbitration has been practised in the Medieval period when two disputing states went to the Pope or a foreign head of state (Merrills 1998:89). At the present time, military disputes cannot normally be resolved by interstate arbitration. However, exceptions have arisen such as the Iran-United States Claims Tribunals, mentioned in Chapter 5, when the interests of the states involved made them consider arbitration (Presidential Order 12294 Feb. 24th 1981). Also in the *Taba* arbitration, when Israel and Egypt considered it useful to depoliticise the border disputes so they could normalise their relationship (1989 80 ILR, p. 224). However, this does not mean that states cannot be expected to be heavily involved in international commercial arbitration. In most parts of the world, state enterprises are involved in international arbitration at the ICC and other arbitration centres.

As we will see in this project, the disappearance of the state monopoly on foreign trade in former Communist countries has caused and will continue to cause an increase in arbitration involving state enterprises. Moreover, arbitration in these parts of the world will be essential, since experience in commercial matters will not be available to them for a number of years (Bockstiegel *in* Hunter, Marriott, Veeder 1995:74).[13]

(c) Resolving E-Commerce Disputes

This concerns the consequences of doing business on the Internet where parties are from different countries. This type of business will bring arbitration into a totally new area. Moreover, the absence of certainty regarding the place where the contract is concluded, due to parties to internet-based transactions being under more than one jurisdiction, will require development in the method or methods of resolving e-commerce disputes (De Zylva and Burr *in* Zylva and 1999:141-142). In response to the speed of development in this field, various national and supranational organisations are devoting significant time to the resolution of the problem areas. The European Union has proposed a regime for digital signatures and distance contracts, and the United Nations Trade Commission has proposed a law on electronic commerce.[14] These issues are commanding attention from different national departments of trade, one of which is the Saudi Ministry of Commerce. In this regard it will be very interesting to see how the rules of offer and acceptance in Islamic jurisprudence would apply in e-commerce contracts.

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[13]It should be noted that some developments have taken place following the collapse of the Communist system. The situation in some of these countries will be described in Chapter 7.

[14] See for example (a) Proposal for a Directive on a Common Framework for Electronic Signatures, Directive 98/0191 of 13 May 1998. (b) Directive on the Protection of Consumers in Respect of Distance Contracts. June 1997, 97/7/EC OJ R144/19 and (c) UNCITRAL Model Law on Electronic Law 1996.

(d) Arbitration in International Telecommunications

The contribution which international arbitration can make to the telecommunications industry is significant. Up to the present time, arbitration appears to have been of little or no use to telecommunications operators as a method of dispute resolution in what is still a highly regulated industry. Operators have instead preferred to turn to national courts to resolve differences between them. However, with the expansion of privatisation and governments beginning to withdraw from this increasingly competitive sector, relying instead on the benefits of competition between qualified private companies to ensure that consumers get the choice of services they expect at a reasonable price, the need for alternative dispute resolution methods to resolve disputes amongst themselves, without the intervention of a regulator, will increase. Arbitration, particularly at an international level, would appear to be well suited to resolving such disputes (Vincent Smith *in* Zylva and Harrison 1999:175). The use of arbitration in this field has started, even in Saudi Arabia, when following the privatisation of the Saudi Telecommunications Company, it recently went for a major international arbitration under the rules of the LCIA with the US-based telecommunications company AT&T.[15] The award was made in favour of the Saudi party, and the general reaction in the Saudi private sector was that, if the arbitration had taken place in Saudi Arabia, it would have been difficult to conduct the arbitration under the Saudi regulations that we have described above.

4. COMMENTS AND SUGGESTIONS FOR THE IDEA OF INTERNATIONALISATION

(a) Generally

Clearly, as mentioned above, technology and inter state relationships will increase the types of arbitration. However, there are issues that should be dealt with in order for true harmonisation to take place in the international business community. At this point, we will discuss the concerns that affect that new trend.

(b) Arbitrators

As mentioned at the beginning of this chapter, the process of international arbitration includes elements of the so-called `conflict of cultures' between the parties as well as between

[15] AT&T Corp v. Saudi Cable Co. cited in 2000 1 Lloyd's Rep. 22. It should be noted that this arbitration was conducted by the LCIA Rules and the seat of arbitration was London.

their respective counsel. These reflect the fact that arbitrators and lawyers in international arbitration come from different legal backgrounds, generally from civil law and common law jurisdictions. Therefore, the process of international arbitration must observe the legal and cultural differences between them (Wilkey *in* Frommel and Rider 1999:79). The arbitrator should adopt a comparative approach, considering all the legal cultures involved in the case and not consider only what he or she is familiar with and the law applicable to the dispute. The arbitrator needs to be familiar with and understand the context of the parties' backgrounds in order to be able to overcome their cultural differences. As Professor Pierre Lalive has mentioned:

> "Arbitrators have to reach a degree of international mindedness, the opposite of legal parochialism or intellectual imperialism in international commercial relations."
>
> (Hunter, Marriott, Veeder 1995:51)

The Steps Needed to Reach That Level

What must be done in order to reach that level is for international arbitrators to receive extensive training in comparative law. However, the focus in this regard is not only on the arbitrators but also on the lawyers representing the parties. Also, they need to have an understanding of other jurisdictions and not be as Lalive says, less `comparatively minded' – that is to say, exclusively imbued with the spirit and traditions of their own national legal education (Hunter, Marriott, Veeder 1995:51). This, of course, applies to Saudi practice where lawyers and arbitrators should prove Islam to be a flexible religion and not rigid or dogmatic, as has been shown by practice in some political-Islamic countries.[16] There is no doubt that some progress has taken place in this respect. At the present time, it can be seen that many lawyers and legal advisors in many countries have travelled to obtain foreign educations and legal experience in different international jurisdictions. However, the international business community still needs more practitioners. The number seems to be far too small for the need, especially when one considers the current expansion of international commerce and litigation (Lalive *in* Hunter, Marriott, Veeder 1995:52). It would seem advisable for practitioners of international arbitration to sponsor the establishment of specialised programs at some of the international universities that have an existing interest in comparative law and legal studies. As Professor Lalive says in his article:

[16] The example that could be given in this regard is the state of Sudan, where Islamic law was applied only in criminal matters. They have not revised or abolished most or even some of their Western-adopted institutions, although they have changed the LLB program (Bachelor of Law) at Khartoum University, where English and Islamic Law used to be taught at the same time.

"It is important to increase the efforts, both in basic legal education and in permanent training of practitioners, to remedy the existing lack of international and comparative outlook."
(Hunter, Marriott, Veeder 1995:52)

(c) Increasing Importance of Procedure

The lack of comparative legal studies among international lawyers and practitioners results in an increase in the importance of procedure. This means the heavy adoption of national judicial processes, like the methods of American lawyers in their litigation. International arbitration is known for its flexibility and traditionally peaceful nature. This may be one of the reasons why it was called `alternative dispute resolution' (ADR) in the United States of America (Lalive *in* Hunter, Marriott, Veeder 1995:54). In some situations though, procedure has become an obstacle to arbitration working in a flexible way. In some international commercial arbitrations there seems to have been an increase in objections to the jurisdiction of the arbitral tribunals, challenges to arbitrators, and other procedural obstacles in national courts (Borris *in* Fronnel and Rider 1999:1). While some of these procedural incidents may be justified, others are purely dilatory or even dictated by sheer bad faith.

In some situations, moreover, practitioners see that appeals against arbitral awards and delays in complying with them seem to be increasing. This has made many arbitrators become wary of dealing with state-controlled entities, and more interested in becoming specialists in comparative procedure (Lalive *in* Hunter, Marriott, Veeder 1995:55). It is important to mention that according to the information given by Abdulah Al-Dabagh, former Secretary General of the Council of Chambers of Commerce in Saudi Arabia, international companies refuse to do business in Saudi Arabia, either because of the perceived lack of clarity of Islamic law and Rules of Procedure that would apply in arbitration cases, or because they fear the risk of having the award go to appeal through the Saudi courts, as mentioned in Chapter 2, when addressing the forms of supervision over arbitral awards in Saudi Arabia.

There is a definite evolution in the `internationalisation' of general principles of procedure. It is no longer possible to oppose, according to the old cliché, common law and civil law types of arbitration procedure, that is to say, a new harmonised procedure, where all the general principles of justice exist, has to be found (Lazareff *in* Fronnel and Rider 1999: 31). However, currently the fact remains that many practitioners return to their national procedural attitudes, and for that reason raise quite unnecessary issues.

(d) The Unnecessary Expansion of International Arbitration Centres

Among the areas of concern in the field of arbitration is the rapid proliferation, or overnight springing up of arbitration centres throughout the world. As we have seen, new types of arbitration are taking place and will continue to take place in the business community, and therefore some specialised arbitration centres should exist for business people. However, at the present time, as seen by practitioners like Lalive, many are nothing more than an improvised attempt at local or personal self-promotion, often accompanied by a kind of marketing or commercial propaganda of a rather unpleasant or even ridiculous kind. Some arbitration centres in the Middle East are of this kind. If we take Egypt as an example, we see the only successful arbitration centre is the Cairo Regional International Centre mentioned in Chapter 5, but the others, in my opinion, are the efforts of propaganda-seeking lawyers. Lalive says:

> "It is comparatively easy to create an international centre, print beautiful regulations and propaganda booklets and call yourself `international'. It is much more difficult to be really international and to offer users and business operators the quality of services and the neutrality they are entitled to expect."

After this he concludes:

> "If any parties to some dispute are considering such an option, they are better off using *ad hoc* arbitration or resorting to state courts, because that might in some cases be a cheaper and more suitable means of settlement than recourse to an international institutional arbitration of this kind."
>
> (Hunter, Marriott, Veeder 1995:53)

We feel that at some point it will be necessary to establish universally recognised and regulated international standards for arbitration centres. The requirements for establishing them should be with an international body such as the UNCITRAL, so that the quality of their services would not differ from one country to another. Some other practitioners call for the creation of a single global institution that would make uniform processes and facilitates available anywhere in the world. This would make all the existing international arbitration institutions unite to become branches of a single institution in the countries in which they are located (Frick 2001:284).

(e) The Unawareness of the Changes in Applicable Law

As business relationships become more complex, it is increasingly unlikely that any particular dispute will be strictly bilateral in character. International commercial relationships are becoming more complex, in particular because of the economic role played by groups of companies on the one hand, and state organisations or enterprises on the other. Because of this,

there will be the growing importance of public international law, at least in the form of incidental or preliminary questions. This has, of course, occurred in many international arbitration cases such as *Aramco, Texaco* and *Aminoil* mentioned previously, and in the recent case of *Dalmia* that illustrates the importance of questions relating to international law (1978 Lloyds Report Rep. P223). Moreover, as we have seen when we described earlier in this chapter the types of applicable law in international arbitration, we came across the so-called 'concurrent laws'. This method was applied in all the Libyan oil cases in which public international law worked as a regulator to national law so that it would exclude whatever was in conflict with international law (Paulsson, Rawding, Reed and Schwarz 1999:17 and Redfern and Hunter 1991:115).

As Sir Robert Jennings, President of the International Court of Justice (ICJ) said:

> "... domestic courts are often unaware of the extent to which they are applying international law, and the same thing would be true for international arbitrators and other practitioners."
> (Hunter, Marriott, Veeder 1995:57)

The second consequence is the choice of law problem. As seen in Chapter 5 when we described the Model Law, it seems that this issue has recently lost much of its importance, not because of the autonomy of the parties in deciding the applicable law, but because of the increasing importance of what is more and more being called `transnational law' which is even reflected in international institutional rules (Derains *in* Berger 2001:43-44).[17] As we saw earlier when we highlighted the *Lex Mercatoria*, the question of whether a body of transnational law exists or whether it constitutes a `legal system' has divided doctrinal writers.[18] Even though different legal opinions have been produced in that regard, what we have to know is that in practice an arbitral award based on the *Lex Mercatoria* or transnational law is, in fact, accepted by the arbitrators or, as the case may be, by the national courts. This has been seen in the case mentioned above, and also in the French case of *Deutsche Schachtbau*, when the validity of a Geneva award based on such general principles was recognised (Reisman, Craig, Park, Paulsson 1997:215-217).

In theory, public international law could be easily applied in Saudi Arabia in private international relationships, but in this case it will still be subject to public policy. Therefore, there has to be a distinction between national and international public policy when reforming the law of arbitration, in the near future, in order to cope with the developments made in the regulations for foreign direct investment in Saudi Arabia, as we will see later in this project.

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[17] See for example the development of the ICC Rules 1955, 1975,and Article 17 (1) 1998.

[18] In the international business community it is well known that common law lawyers are not always in favour of applying this so-called *Lex Mercatoria*, while on the other hand civil law lawyers would give it recognition.

5. THE DREAM FOR THE FUTURE

(a) Generally

After mentioning the obstacles and concerns of harmonisation of arbitration practice, it is be relevant to move on to examine the views of eminent practitioners and academics on the future of international arbitration. It would seem unlikely that anyone will have gone to the same lengths in projecting the future of arbitration as H.E. Judge Howard M. Holtzmann, who suggests that legal activists in the 21st century should work to create a new international court to take the place of municipal courts in resolving disputes concerning the enforceability of international commercial arbitration awards. This does not necessarily require a huge leap of imagination – after all, the New York Convention was once considered an impossible dream. However, today the New York Convention is recognised as an indispensable element in the structure of international commercial arbitration (Holtzmann *in* Hunter, Marriott, Veeder 1995:109).

(b) The Idea of Developing Harmonisation

H.E. Judge Holtzmann argues in his article in (Hunter, Marriott, Veeder 1995:110) that the system of international commercial arbitration has to have five important elements in its framework:

a) effective arbitration clauses
b) efficient procedural rules
c) experienced arbitral institutions
d) national laws that facilitate arbitration
e) international treaties that assure the recognition of arbitration agreements and the enforcement of foreign arbitral awards.

He further states:

> "As we approach the 21st century, the situation with respect to the first four elements is already highly developed. Although we can expect that the state of the art as to arbitration clauses, procedural rules and institutional practice will continue to be refined, fundamental innovations do not appear to be needed; similarly, one can be reasonably confident that the movement to modernise national laws will become even more widespread, with the UNCITRAL Model Arbitration Law providing valuable guidance for States that choose to enact it, and serving as a yardstick by which to measure the desirability of laws in States that decide to depart from the UNCITRAL pattern. In contrast, the situation with respect to the fifth vital element, international treaties, challenges the arbitration community to search for additional solutions that will internationalise the process still further and thus achieve a truly universal system of international commercial justice."
>
> (Hunter, Marriott, Veeder 1995:110)

In mentioning treaties, he further explains that the most widespread and effective treaty for the recognition and enforcement of foreign arbitral awards is the New York Convention. As we will see in Chapter 7, this convention has already been adopted in different parts of the world. It is considered the most successful convention in the field of arbitration, since it has been so widely adopted both by developed and developing countries that have different economic, legal and social systems.

Is the New York Convention Enough?

Judge Holtzmann's article suggests that the system should go further in that there is still a great deal to be done in terms of harmonisation, and that the current practice of the New York Convention is not enough to guarantee a target. He states:

> "The New York Convention falls short of achieving complete internationalisation of the system. That is because, while the Convention specifies properly limited grounds for refusing recognition and enforcement of awards, it leaves the function of determining whether those grounds exist to the municipal courts of the State where recognition and enforcement is sought. Moreover, enforcement may be refused if the municipal court in the country where the enforcement is sought finds either that (a) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country."
>
> (Hunter, Marriott, Veeder 1995:111)

Furthermore, Judge Holtzmann explains the effect of this practice on international trade and economies in general and on business people in particular. Addressing the issue that in some cases national courts would favour their own citizens over a foreign national when it came to enforcement procedures, he argues:

> "This involvement of municipal courts in the enforcement of foreign arbitration awards has a practical effect on the free flow of international commerce. When business people enter into foreign trade and investment transactions they hope that there will be no future disagreements, but they fear disputes may arise. The possibility of future disputes is seen as one of the risks of the transaction. Wise business people recognise that this risk may be exacerbated by the fact that in most cases in which a losing party refuses to honour an award it will be necessary for the winning party to seek enforcement by a municipal court in the country where the loser makes its home and has its assets. In such circumstances, businesses often perceive that there is a risk that a municipal court might favour a national of its own country."
>
> (Hunter, Marriott, Veeder 1995:111)

He further argues that the consequences of this practice will produce one of two results:

> "Either they will refuse to enter into the transaction because the risk is too great, or they raise the price to compensate for the additional hazard. Alternatively, businesses may seek to devise mechanisms for letters of credit, performance bonds or other forms of contractual guarantees, all of which add to the cost and complexity of the transaction."

The Establishment of a Court for Enforcing Foreign Arbitration Awards

As a result of what Judge Holtzmann mentions above, he went even further in suggesting the establishment of a court. This court, moreover, should have jurisdiction over all the issues related to the recognition and enforcement of international arbitral awards. He specifically mentions:

> "That the court will examine the award for any of the reasons set forth in Article 5 of the New York Convention. Each State that adheres to the new Convention would thereby undertake an international treaty obligation to execute judgements of the new international court with respect to persons and property within its territory. The new court should have the power to impose damages on States that do not fulfil that obligation. The new international court would not only take over the functions now performed by municipal courts under the New York Convention, but would also be substituted for municipal courts at the place of arbitration with respect to applications for setting aside or enforcing awards. This would be valuable because it would facilitate international contract negotiations by removing a difficulty the parties often face in reaching agreement on the choice of the place of arbitration of any future disputes."
>
> (Hunter, Marriott, Veeder 1995:112)

Judge Holtzmann goes further on the subject of executing the awards, saying that it should not be left to the local courts to delay the procedures, and also asking for the state executive concerned to deal with such an award as if it had come from their local courts. What he mentions specifically is:

> "One of the most difficult challenges in drafting the new convention will be to devise a mechanism so that execution of judgements of the new international court will not be subject to interference or delay by municipal courts. I envisage that States would undertake in the new convention to have their appropriate ministerial officials promptly execute judgements, or orders, of the new international court, just as those officials now execute decisions of the State's municipal courts."

Full cooperation with the courts would clearly be necessary if interim measures of protection were needed. Regarding this he states:

> "Another problem that would need to be solved in drafting the new convention is to find a way to ensure that interim measures of relief, such as attachment of assets, would be quickly available before the new court has finally decided on the validity and enforcement of an award. Interim measures provide important safeguards, and the possibility of obtaining them quickly and effectively in appropriate circumstances should be preserved."

Dealing with Public Policy Issues

The issue of public policy is of some concern to Judge Holtzmann. He suggests that what has to be considered in international arbitration is international public policy, not the national public policy of the place where enforcement is sought. In that he takes a different path

than that mentioned in the New York Convention that gives consideration to national public policy (Samy 1997:46, Pietro and Platte 2001:134). Holtzmann argues:

> "The new convention should modify the provision of the New York Convention that permits a court to refuse recognition and enforcement of an award if that would be contrary to the public policy of the country in which enforcement is sought. It seems more appropriate that the new international court should apply provisions of international public policy, rather than attempt to discover and effectuate the public policy of any particular State. This proposal is not a radical one, because enlightened municipal courts already follow the practice of applying international public policy in cases involving international commercial arbitration."
>
> (Hunter, Marriott, Veeder 1995:113)

Dealing with Practical Problems

Judge Holtzmann suggests practical solutions to some of the problems that can be seen in practice. Concerning the issue of delays he argues:

> "A new court would be better positioned to avoid the delays that are often experienced in crowded municipal courts, where it can take years to reach a final judgement. And, most significantly, such a court would, for the reasons explained above, facilitate international trade and investment by reducing the risks and uncertainties that business people fear when they must submit their affairs to the court of a foreign country."
>
> (Hunter, Marriott, Veeder 1995:114)

Judge Holtzmann also mentions the appropriate location where this court should be established. He explains the reasons why he thinks that The Hague should be the first choice.

> "It would be appropriate to locate the new court in The Hague where it could benefit from the administrative and physical facilities of the Permanent court of Arbitration and the great library resources of the Peace Palace"
>
> (Hunter, Marriott, Veeder 1995:114)

Judge Holtzmann mentions that his review of decisions of the International Court of Justice, in cases that support the arbitral process, encourages confidence that the new court now proposed would similarly respect and uphold the principles of international commercial arbitration.

6. SUPPORTERS OF THE HARMONISATION MOVEMENT

(a) Generally

H.E. Judge Stephen M. Schwebel is one of the supporters of the idea that Judge Holtzmann proposes. He started by asking the question as to whether there is a need for establishing a new court. The answer that he gave was that there is, since there is no reason why

the International Court of Justice cannot resolve disputes about the validity of international arbitral awards if they are at a state level (Hunter, Marriott, Veeder 1995:115).

He goes further, suggesting the new court be composed of fifteen judges. Given the fact that so much international commercial arbitration involves states who are leaders in international trade, judges should be drawn from some of these states, as well as from the principal legal systems. One of the most interesting ideas suggested in this regard is that the world must be represented as a whole. He argues:

> "Once the convention is ratified by a prescribed number of States – say 45 – it shall come into force and .... the parties to the Convention shall then meet to elect the Judges of the Court. The electors should all be parties to the Convention, and the Judges of the Court would be responsible only to the international community."
>
> (Hunter, Marriott, Veeder 1995:117)

As Judge Holtzmann has suggested, the court should decide upon the validity, recognition and enforcement of international commercial arbitral awards. Moreover, it would have exclusive jurisdiction over issues related to the application of the New York Convention. It would not be entitled to consider the merits of disputes that have been referred to arbitration. He concludes that the parties and the national courts have to respect the awards, and in this event he sees a way of ensuring the efficiency of this new international practice:

> "The parties and their courts are required to give effect to and enforce the judgements of the international court of arbitral awards. The new convention should also provide that national, state and local courts of whatever level or character shall be bound to give full faith and credit to those judgements."
>
> (Hunter, Marriott, Veeder 1995:118)

As a result, a party seeking enforcement would be armed with the binding decision of the new international court. This proposal is made for the purpose of avoiding another judicial layer. The court would act instead of national courts in deciding challenges to the validity of arbitral awards, and yet it would not act as a court of appeal.

(b) Comparing the Ideas and The Experience of The International Court of Justice

The experience of the International Court of Justice in dealing with problems of the validity of international arbitral awards may be seen as suggestive of the establishment of the above-mentioned international court. Moreover, Judge Schwebel takes the experience of the International Court of Justice as an example for dealing with arbitral awards in the International Business Community.

As mentioned by Judge Schwebel in his article, it is possible to point to the experience of the International Court of Justice in two major cases where it proved itself not to be a court of appeal. In the opinion of Judge Schwebel, those cases show that if a similar court is established in order to deal with private international business transactions, it will help the smooth running of international arbitration. At this point we will mention some details about these two cases:

Nicaragua v. Honduras

In this case concerning the arbitral award made by the King of Spain on 23 December 1906 (an award which purported to settle a large territorial dispute between Nicaragua and Honduras), the court emphasised that it was not a court of appeal and could not pronounce on whether the arbitrator's decision was right or wrong, but only on whether the award was a nullity. In this case, both Honduras and Nicaragua had officially accepted the appointment of the King of Spain. No question was raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction. In these circumstances, the court was unable to hold that the designation of the King of Spain as arbitrator was invalid. Furthermore, the court rejected Nicaraguan contentions that the King of Spain had exceeded his powers. It found no error that would render the award a nullity. Nicaragua argued that the award made by the King had no reasonable grounds. The court however, found that the award dealt in logical order and in some detail with all relevant considerations and contained ample reasoning and explanations in support of the arbitrator's conclusions. Therefore, the court held that the award was valid and binding and that Nicaragua was under an obligation to carry it out – which in fact it did (ICJ Report 1988, p.150).

Guinea-Bissau v. Senegal

The question of the validity of an arbitral award was considered in the case of the arbitral award made on 31 July 1989. Guinea-Bissau and Senegal had an arbitral agreement to answer two questions. The first related to the legal force of an agreement from 1960 delimiting maritime boundaries made between the former colonial powers. The arbitration agreement also required the tribunal to annex a map to its award. At the end of the arbitration, the tribunal concluded that the 1960 agreement was valid and could be imposed on both parties, and that it had to be interpreted in the light of the law in force in 1960. However, the tribunal did not find it appropriate to answer the second question or to annex a map. In this case the tribunal's president, who voted with the majority, made a declaration stating that he would have preferred that the award had been otherwise, so as to permit an answer to the second question as well. Guinea-Bissau therefore, challenged the validity and indeed the very existence of the award on

the grounds that the president's declaration demonstrated that, in substance, he did not support the award for which he had voted, and that accordingly, the award lacked majority support Again the court emphasised that its proceedings concerned only the alleged non-existence and nullity of the award and were not an appeal to it. Accordingly, the court rejected the contentions that the award was null and void and found that it was valid and binding for both parties, who had the obligation to apply it (ICJ Report 1990, pp.64-68).

These two cases summarise how future practice might be conducted in the field of international commercial arbitration. H.E. Judge Schwebel ends his proposal by saying that:

> "If a new Court were to be established of the character which Judge Holtzmann has proposed, there will be a more effective system of international commercial arbitration throughout the world."
>
> (Hunter, Marriott, Veeder 1995:123)

7. CONCLUSION

The aforementioned, for a number of reasons, is not far from becoming reality. First, international commercial arbitration has undergone numerous fundamental changes. Second, the globalisation of the economy has opened up new directions for business activities and, therefore, to disputes which may arise in their contractual relationships.

Nowadays, businessmen and law firms accept arbitration as the usual manner in which to resolve disputes. Countries that used to reject arbitration based on the grounds of sovereignty are now the first to resort to it. People of many different geographic, social and cultural origins participate actively in arbitration. This proves that what seemed impossible only a few years ago, has now become a reality. The simultaneous globalisation of the economy, and participation of people from different origins in arbitration, has caused some to speak of a true conflict of cultures, as we have seen in this chapter.

At this point, we will highlight the major changes that have taken place in parts of the world such as Asia, Russia and South America in order to show the speed at which international commercial arbitration is changing towards harmonisation, and what needs to be done about our arbitration practice in Saudi Arabia.

Chapter 7

THE PRACTICAL MOVEMENT TOWARDS THE HARMONISATION OF ARBITRATION IN THE INTERNATIONAL BUSINESS COMMUNITY

1. THE GENERAL DIRECTION OF THE MOVEMENT

(a) Generally

The movement towards harmonisation of international commercial arbitration has become visible even in respect of countries that have historically been seen as `unfriendly' to arbitration (see Chapter 3 above). In this context Latin America, Russia and some parts of Asia have developed their laws because they cannot be isolated from international commerce. China, for example, has experienced rapid growth since it started its `open door' policy in the 1980s. Coca-Cola, IBM and Nike were no longer powerful and exotic foreign names, but those companies connected with the outside world (Yi Li *in* Bradlow and Escher 1999:281). International investment enterprises, on the other hand, cannot afford not to ignore India because it is simply too large, since economic liberalisation began in 1991 (Desai *in* Bradlow and Escher 1999:303). Colombia, as a third example, is the only country in South America with coasts on both the Atlantic and Pacific Oceans, and it has been developing commercial ties with the Far East (Acevedo *in* Bradlow and Escher 1999:439). Based on the above, these countries have many things in common that made them develop their arbitration laws. In this chapter we will go to different parts of the world to see what steps have been taken to harmonise their arbitration laws with international minimum standards of arbitration. It seems that Foreign Direct Investment moreover is seen as one of the reasons why countries with different economic backgrounds have developed their arbitration systems. Therefore it is relevant to highlight FDI as a reason for developing arbitration.

(b) Foreign Direct Investment (FDI)

As mentioned above, Foreign Direct Investment is one of the main reasons for the development of arbitration laws. As we know, FDI is primarily a domestic law, since states are

sovereign according to traditional public international law.[1] These states have the right to regulate the entry of foreigners into their economies. Facing the need to develop their economies for private capital, many countries have fundamentally changed their attitude towards the entry and treatment of foreign investors and the way of settling disputes. One can even notice regulatory competition between countries and regions to attract foreign investments. Approximately 44,000 multinational corporations are active as foreign private investors and account for approximately 276,000 foreign affiliates.[2]

Types of Foreign Investment Contracts

The types of Foreign Direct Investment would include Joint Ventures, Licensing and Transferring of Technology Agreements, Turnkey Contracts, Management Agreements, Concession Agreements, Production Sharing Agreements, and Build, Operate and Transfer Agreements (BOTs).

These contracts share similar features but obviously industries have tailored new contracts specific ally to these industries. Generally, the host state would want to control foreign investment and reap as much benefit from it as possible. The multinational corporation, on the other hand, would want to escape from the control of the host state as much as possible and increase the international element in contracts in the event of a dispute (Sornarajah 2000:31).

Common Reasons for Developing Arbitration in Major Parts of the World

Since FDI includes major contracts as mentioned above, this would require the involvement of banks to finance the projects, and therefore an international loan agreement will involve the laws of more than one jurisdiction. This can be seen in the case of a syndicated loan made by banks located in different parts of the world (Wright *in* Berkeley and Mimms 2001:204).

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[1] Most countries pass an Act that regulates foreigners conducting business in their country. Take for example Saudi Arabia who passed its new Foreign Direct Investment Act on April 10th 2000 to cope with global changes.

[2] World Investment Report 1997 (Transnational Corporations, Market Structure and Competition Policy, UNCTAD, 1997: 6-7); The World Investment Report 1996 (Investment, Trade and International Policy Arrangements, UNCTAD, 1996:1) counted 39,000 parent companies with more than 270,000 foreign affiliates.

For this reason, it is normal for the parties to choose a law to govern the agreement instead of leaving the issues to be resolved by the courts according to different local Conflict of Law rules. In practice there are basically three options open to the parties: the law of the lender's country, the law of the particular market or the law of the borrower's country (Wright *in* Berkeley and Mimms 2001:204). Of course, the parties will have the liberty of choosing public international law, and any choice will not exclude the relevance of other laws for specific matters, as we will see in Chapter 8 when we suggest the codification of the basic Islamic principles of contract.

At this point we will now review the development of arbitration in different parts of the world where party autonomy has been given great consideration. It is necessary not only to highlight the countries that have adopted the UNCITRAL Model Law but also to see all the effort that has been made to modernise arbitration laws. Saudi Arabia shares with some of the countries, mentioned below, some common features. For example, Hong Kong transferred the functions of the High Court relating to the appointment of arbitrators to the Hong Kong International Arbitration Centre (HKIAC). Saudi Arabia still performs this function under the supervision of the judicial body having original jurisdiction over the subject matter, instead of referring the matter to any arbitral institution in the Kingdom (Article 10 of the Arbitration Regulations). Also the arbitration procedure in China involves conciliation at any time during the course of the proceedings, and this is a common feature with some Saudi arbitration where the arbitrators encourage the parties to conciliate at any time during the course of the proceedings.[3] What is interesting is that as countries modernise their arbitration laws their legal culture still prevails. We believe that this is a good feature but should not be applied when one of the parties comes from a different legal culture that does not ascribe to this type of ADR in the arbitration process. We will mention the similarities in detail below, and also see how many countries overcome the difficulties with their bad arbitration practices.

2. ASIAN ARBITRATION

(a) Generally

Since Asia is a major centre for international business, it has been greatly affected by the changes in the world's economic structure. Asia became a target for many international

[3] This is based on the author's experience as a former Secretary of the Arbitration Board at the Chamber of Commerce and Industry in Riyadh in the case between *British Aerospace v. Abdulaziz Al Rajhi 1995* concerning the tenancy agreement on a building rented by British Aerospace.

investors, especially from the West; but that is not to say that the Asians themselves are not major investors in other parts of the world.[4] The increase in investment has resulted in many different types of commercial disputes which only arbitration can resolve. As in other parts of the world, going to national courts takes time, and business entities do not have much time to spare.

International arbitration where one party is Asian takes place at the major arbitration centres throughout the world such as the ICC, the LCIA and the AAA. However there has been great pressure from the business community in Asia that these arbitrations could and should take place in Asia. For that purpose, many of the countries in Asia have modernised arbitration laws and legislation based on the UNCITRAL Model Law, which has already been enacted in Hong Kong, India, Singapore and Sri Lanka.[5]

On the other hand, Hong Kong, Singapore, Malaysia, Thailand, Indonesia, Japan and India are all parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Awards can be easily enforced, and they are subject to the limited grounds set out in Article 5 of the Convention that we have explained in Chapter 4.

At the present time, arbitration may be conducted in several arbitration centres in Asia. They include, in particular, Beijing, Hong Kong and Singapore. Moreover, because of the good arbitration facilities many ICC arbitrations have had their seat in Asia. In theory there is no longer any justification for requiring Asian parties and their lawyers to travel from Asia to Europe. Western parties are prepared to accept an Asian place of arbitration since many countries in Asia are already considered a good seat for international commercial arbitration. While we are summarising the position in each of the major Asian countries set out below, we will mention some of the common features between arbitration in Saudi Arabia and these Asian countries.

(b) Hong Kong

Arbitration in Hong Kong is governed by an Arbitration Ordinance, which was amended in 1996. The law is designed for domestic and international arbitration. The rules governing international arbitration reflect the UNCITRAL Model Law. One of the changes

[4] For example, FDI has positively influenced China's national economy and complemented its economic reform. In 1997 alone the actual FDI inflow reached $45.3 billion. This information has been taken from the Ministry of Foreign Trade and Economic Cooperation, Zhongguo Duiwai Jingi Maoyi Nianjuian 1996/97.

[5] These and other countries will be further discussed later in this chapter.

made by the amendment is the transfer of the functions of the High Court relating to the appointment of arbitrators to the Hong Kong International Arbitration Centre (HKIAC). It has issued rules under which it will perform this function.[6] This situation is similar to the Saudi practice where the appointment of arbitrators has to be under the supervision of the judicial body having original jurisdiction over the subject matter. It will also have to choose an arbitrator if one of the parties fails to appoint an umpire or choose his party arbitrator (Article 10 of Saudi Arbitration Regulations).[7]

At the present time, Asia has the Hong Kong International Arbitration Centre (HKIAC), established in 1985 as an independent, non-profit-making organisation supported by the private sector but mainly by the Hong Kong Government.[8] The Foundation of this Centre established Hong Kong as a leading centre for international commercial arbitration, and from its establishment in 1985 up to 1999, it has handled a total of 1,602 disputes.

The Handover 1997

As we know, Hong Kong has been a party to the 1958 New York Convention since 1977 by virtue of the UK's ratification of the Convention on Hong Kong's behalf. However, following the handover on 30 June 1997 the Convention continues to apply to awards made in other contracting states, because of the PRC's ratification of the Convention on behalf of Hong Kong. Enforcement of Convention awards may be refused on the limited grounds of Article 5 of the Convention.

Under the present situation, the major change that has to be noted is that the Convention no longer applies to the enforcement in Hong Kong of awards made in the PRC. This issue was considered by the Hong Kong High Court in *Ng Fung Hong Kong Limited v. ABC1* in 1998. The winning party wanted to enforce the award in Hong Kong under the Convention. The application to the Hong Kong court was made after the handover and the court remarked that:

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[6] Appointing Arbitrators and Umpires Rules made by the Hong Kong International Arbitration Centre under sections 12 and 34C of the Arbitration Ordinance (Cap.341) with the approval of the Chief Justice. Noted in Gazette 16 May 1997.

[7] As we mentioned before, many people in the legal community have called for establishing arbitration institutions in the Chambers of Commerce in order to overcome the delays in the procedure (choice of arbitrators). In some cases this process has lasted for over five months.

[8] For further information see the website of the centre: www.hkiac.org

"Since the PRC resumed sovereignty over Hong Kong on 1 July 1997, Hong Kong and Mainland China have ceased to be separate parties to the New York Convention vis-à-vis each other."

(13 High Court of the Hong Kong Special Administrative Region, Court of First Instance, 19 January 1998; 1997, No. Con 95)

This application for enforcement, moreover, was dismissed as an international award made in the PRC.

This practice has caused some concern in the legal community in Hong Kong, and therefore it has been addressed by a recent agreement, which provides for reciprocal recognition and enforcement of arbitration awards between Hong Kong and the PRC, as if those awards were made in separate states, parties to the New York Convention. Accordingly, parties can now make a fresh application for enforcement, notwithstanding a previous failure to obtain enforcement.

(c) The People's Republic of China

One of the unique characteristics of arbitration in China is that proceedings frequently involve conciliation, which naturally has to be with the approval of the parties. This is a common feature of the Saudi arbitration practice, as mentioned above in the case between *British Aerospace v. Abdulaziz Al Rajhi 1995.* It should be mentioned that the arbitrators are not regarded as having compromised their position by their involvement in the settlement process.[9]

Arbitration in the PRC is governed by the Arbitration Law, applicable to both foreign and domestic arbitrations, which was passed in September 1995.[10] Even though China has many arbitral bodies, most international commercial arbitrations are conducted before the China International Economic and Trade Arbitration Commission (CIETAC) and parties are not permitted to apply different rules.[11] However, Chinese parties are not precluded from agreeing to arbitrate outside the PRC.

The PRC ratified the New York Convention on 22 January 1987. Enforcement is available under the Convention for awards made in other contracting states arising from `commercial relations' which are defined as `relations concerning economic rights'.

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[9] For example, in 1997 some 20-30% of CIETAC cases were resolved through conciliation.

[10] Arbitration Law of the People's Republic of China. Adopted at the 9th Session of the Standing Committee of the 8th National People's Congress of the People's Republic of China and promulgated by the President on 31 August 1994. Effective from 1 September 1995.

[11] For further information see website: www.cietac.org.cn

(d) Singapore

In the opinion of many practitioners, Singapore has become an important centre for international arbitration, not only as an acceptable neutral venue for both Asian and Western parties, but also, perhaps because of the uncertainty over the ease of enforceability in the PRC of arbitration awards obtained in Hong Kong, even though this issue now appears to have been resolved, as mentioned above.

The International Arbitration Act 1994 (IAA) that adopted the UNCITRAL Model Law, helped to promote Singapore's role as a growing centre for international arbitration (Boo *in* IHCA 1998 Vol. III:2).[12] In 1991, on the other hand, the Trade Development Board and the Economic Development Board established the Singapore International Arbitration Centre (SIAC)[13]. It was established for offering services and facilities for international and domestic arbitration and conciliations, mostly based on the UNCITRAL Arbitration Rules (Boo *in* IHCA 1998 Vol. III:3).

However, parties to international arbitrations conducted in Singapore are free to choose their own rules in preference to those published by SIAC and to agree on the law to govern the substantive issues in question (Article 28 (1) Model Law, IAA). Parties may be represented by whomever they choose, including foreign lawyers, but if the procedural law or the substantive law applicable to the dispute is a Singapore law, the local Singaporean lawyer must appear jointly with the foreign lawyers. We believe that this policy should be followed in Saudi Arabia once it adopts the UNCITRAL Model Law for international arbitration. It will be effective in cases where Saudi Law or Islamic Law is applicable.

Finally, there are two regimes for the enforcement of international arbitral awards under the IAA: one for awards made in an international arbitration conducted in Singapore; the other for foreign arbitral awards made outside Singapore in a New York Convention country, under the New York Convention to which Singapore acceded on 21 August 1986.[14]

[12] International Arbitration Act Republic of Singapore No. 23 of 1994.
[13] For further information visit the website www.siac.org.sg
[14] New York Convention is now given the force of law by Part III of the IAA.

(e) Malaysia

Despite the fact that Malaysia has an important position as a financial and commercial centre in Asia, it has never become an important seat of international arbitration. Indeed, it has had very small number of cases (Lim *in* IHCA 1998 Vol. III:2).

Arbitration in Malaysia is governed by the Arbitration Act 1952, which is applicable to both domestic and international arbitration.[15] However, arbitrations held under the Rules of the International Centre for the Settlement of Investment Disputes (ICSID) or the Rules of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) are specifically excluded from the ambit of the Arbitration Act by Section 34, which was added by the Arbitration Amendment Act 1980.[16]

Moreover, the KLRCA is the principal body that handles international commercial arbitrations in Malaysia, and its rules are based on the UNCITRAL Arbitration Rules. We believe the main reason for the establishment of this centre was to provide a regional system for the settlement of domestic and international disputes instead of going to the ICC and other Western arbitration institutions. We believe that the common feature between the Saudi Arbitration Regulations M/46 and the Malaysian Law is that it does not distinguish between national and international arbitration. While *Shari'a* law has to be considered when making any award in the Saudi jurisdiction, in Malaysian law if the parties have not agreed on the choice of the proper law, the arbitrator shall have to determine that law according to English Common Law principles (Section 3 Civil Law Act 1956) with the exception of Section 34, mentioned above. It should be noted that, as with other jurisdictions in Asia, there is no prohibition on foreign lawyers appearing in arbitration proceedings held in Malaysia.

Malaysia ratified the New York Convention on 5 November 1985, and enforcement may be refused only on grounds similar to those set out in Article 5 of the New York Convention.[17]

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[15] Enacted in 1952 as Sarawak Ordinance No. 5 of 1952. Revised up to 1 September 1972 as Laws of Malaysia Act No. 93 and coming into force on 1 November 1972.

[16] See Article 34 (1) that says: "The provisions of this Act shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur." For more information about the centre see their website www.klrca.org

[17] Malaysia passed the Recognition and Enforcement of Foreign Arbitral Awards Act in 1985. In practice it is referred to as (Act 320).

(f) Thailand

Just like the Kingdom of Saudi Arabia before the issuance of Arbitration Regulations Royal Decree M/46, business disputes have been resolved informally in Thailand. In the past decade there has been an increase in foreign investment, so arbitration has become important. Arbitration prior to that was rarely practised at both domestic and international levels because of the lack of sufficient legal regulations. In addition, the business community, lawyers and judges in Thailand were not acquainted with this way of settling commercial disputes. At the present time, arbitration is governed by the Arbitration Act 1987, which does not differentiate between domestic and international arbitration (Asawaroj *in* IHCA 1998 Vol. IV:1).[18]

Practitioners and investors have no objection to using Thai arbitration centres. The principal arbitration institution in Thailand is the Council of Arbitration of the Thai Chamber of Commerce established in 1967.[19]

Unlike other states in Asia, foreign lawyers are not permitted to practise arbitration directly.[20] It is therefore better to instruct law firms entitled to carry on business in Thailand and then use foreign lawyers who are consultants within that firm. This situation is similar to the practice of foreign lawyers in the Kingdom of Saudi Arabia, where they are allowed to practise as long as they are in association with Saudi lawyers. It seems that this policy will be carried out in the practice of international arbitration in Saudi Arabia.

Furthermore Section 29 of the Arbitration Act 1987 states the following:

> "A foreign arbitration award shall be recognised and enforced in Thailand only when it is governed by a treaty, convention or international agreement, to which Thailand is a party and only to the extent to which Thailand is bound to do so under the treaty, convention or international agreement."

Some practitioners that we have met in London in some arbitration seminars and symposiums consider the absence of a clearer distinction between domestic and international arbitration to have given rise to difficulties in respect of the enforcement of arbitration awards in Thailand. Even though Saudi Arabia has not experienced the enforcement of foreign arbitral

[18] Arbitration Act BE 2530 (1987). Published in the Government Gazette, Part 156 of 12 August 1987.
[19] For further information see http//:www.tcc.or.th
[20] This might be a violation of the Alien Occupation Act, although it is doubtful whether this Act will be applied in this context.

awards under the New York Convention, we assume that the situation will be the same as it is in Thailand. Thailand moreover became a party to the New York Convention 1958 in 1959.[21]

(g) Sri Lanka

Before the issuance of the new arbitration law mentioned below, arbitration was possible in Sri Lanka for all civil matters including commercial disputes, property disputes etc. Anyone who can be a party in the Civil Court (District Court) can go to arbitration. Legislation provides for voluntary arbitration. Legislation also provides for compulsory arbitration in complicated accounting matters where a party who has agreed to arbitration tries to avoid it. Legislation provides for the enforcement of arbitral awards, and for setting aside of arbitral awards when there are serious defects (Simmonds, Hill and Jarvin 1987:207).

At the same time a new Arbitration Act came into force in Sri Lanka on 30 June 1995.[22] This Act is modelled on the UNCITRAL Model Law and applies to both domestic and international arbitration. It also gives effect to the principles of the 1958 New York Convention. The Act has added provisions *inter alia* for the use of conciliation (Section 14 of the Act).

(h) Indonesia

Mediation and conciliation are the first steps in dispute resolution in this country. We believe that Indonesia appears to be like other Islamic countries that are pro compromise. Arbitration will take place only when there is a failure in negotiations. However, Indonesia recently introduced a new law on Arbitration and Alternative Dispute Resolution, which revokes certain parts of the Code of Civil Procedure in the Old Dutch law.

Indonesia does have an arbitral institution, BANI (Badan Arbitrasi Nasional Indonesia) which was established in 1977 under the auspices of the Indonesian Chamber of Commerce (KADIN).[23] An interesting feature of BANI arbitrations is that, at the first hearing, it is mandatory for the Tribunal to seek a settlement between the parties (Article 13 (1) of the Arbitration Rules). This requirement is also to be found in Article 45 of the new Law but arbitrators do not involve themselves in the process.

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[21] Government Gazette, Vol. 77 Part 25, 29 March 1960:330 U.N.T.S. 3.
[22] Arbitration Act No. 11 of 1995. Certified on 30 June and printed in the Gazette of the Democratic Socialist Republic of Sri Lanka of that date.
[23] For more information about the centre visit their website: www.arbitration.co.nz/apec/indonesia/institutions.html.

The BANI rules do not distinguish between domestic and international arbitrations. In the view of practitioners, it might be the reason why most BANI arbitrations have been purely domestic. On the other hand, *ad hoc* arbitration may be held anywhere in Indonesia using such rules and language as may be agreed upon by the parties.[24]

On the other hand, as far as foreign awards are concerned, Indonesia ratified the New York Convention on 7 October 1981. The special law that regulates enforcement of foreign arbitral awards under this Convention requires that registration be made at the District Court of Central Jakarta.[25] In this process the foreign award will be brought before the court proceedings and it is then principally at the discretion of the court to determine what legal significance may be attributed to the foreign award. The court may, if it is deemed necessary, enter into re-examination of the merits. The similarity between the Saudi and Indonesian practices is that the competent court will have discretion over re-hearing the merits of the case, if necessary. This appears to be the practice, even though the Indonesian Law respects the doctrine of party autonomy between the parties in their choosing the law applicable to the dispute (Simmonds, Hill and Jarvin 1987:76).[26]

(i) Japan

Like any country in the world, Japanese businessmen prefer arbitration because of its private and confidential nature. The arbitration law is found in Part 8 of the Code of Civil Procedure, which was based on the old German Code of 1890.[27] This law is silent about the scope of its application. It is interpreted as being applicable not only to domestic arbitration but also to international arbitration (CCP, Part VIII (Arts. 786-805). Although party autonomy is not the rule in the law of procedure, it consists of a small number of basic provisions, only a few of which are mandatory (CCP, Part VIII). As a consequence it leaves parties and arbitrators too much room for framing their own rules of arbitral procedure or, instead, of adopting some ready-made rules such as ICC, UNCITRAL etc.

Arbitration services are available in Japan through two main international commercial arbitration institutions: the Japan Commercial Arbitration Association (JCAA), which handles

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[24] *Ad hoc* arbitration is used in Indonesia because Indonesia does not have specialised arbitration institutions in certain sectors of business (commodity trading etc.). Specialised arbitration is not practised in institutionalised forms.

[25] See decision dated 29 November 1984 of the Supreme Court, No. 2944 K/Pdt/1983.

[26] For some examples of the Saudi practice see Chapter 2 under the heading 'The Types of Supervision in the Saudi Arbitration Practice'.

[27] It was drafted by Hermann Techow, the German advisor to the Japanese Government, who almost literally copied Part X of the German Code of Civil Procedure of 1877.

all types of disputes, and the Japan Shipping Exchange Inc. (JSE), which specialises in maritime matters.[28]

The most significant recent development so far as Japanese arbitration is concerned is the 1996 removal of the previous restriction on foreign lawyers conducting arbitration in Japan (Attorney's Law Article 72). In our opinion, however, caution should still be exercised only when issues involve Japanese law, because it is arguably illegal for foreign lawyers not qualified in Japan to be engaged in the unauthorised practice of Japanese domestic law. Moreover, we consider this will be a common feature with the Saudi arbitration practice, should it ever be internationalised. Any issues related to Islamic and Saudi regulations will have to be handled by Saudi local lawyers.

Japan ratified the New York Convention on 20 June 1961 and enforcement of foreign awards is obtained by an application in accordance with Article 4 of the Convention, subject to the grounds for refusal set out in Article 5, as seen in Chapter 4.

(j) India

As in Saudi Arabia, the settlement of disputes by arbitration was known and practised even in ancient times. The Panchayati System was very much akin to arbitration and widely prevalent (Simmonds, Hill and Jarvin 1987:39). The founding fathers of the Indian constitution also enshrined in the constitution a provision encouraging settlement of international disputes by arbitration (Simmonds, Hill and Jarvin 1987:39). In our opinion, because of the large population of India their national courts are packed with many cases, which make arbitration a good alternative to the long, complicated proceedings in the Indian courts. It has been mentioned by some Indian practitioners in London that it is normal for a case to take up from 10-15 years.

The new Arbitration and Conciliation Act was introduced in 1996, based very much on the UNCITRAL Model Law, and contains provisions that apply automatically when there is no agreement between the parties (Ordinance No. 8 1996). Among the main objectives of the Act are the minimising of the involvement of the courts in the arbitration proceedings, having a

[28] More information about these two centres can be obtained from their websites. JCAA: www.jcaa.or.jp and JSE: www.gsid.nagova-u.ac.jp

flexible procedure for the tribunal to apply, and not being subject to the strict rules of civil procedures or evidence.[29]

The main arbitration institution in India is the Indian Council of Arbitration (ICA), established in 1965 as an administration centre for a wide range of commercial arbitrations.[30] Even though India was one of the first countries to become a signatory to the New York Convention on 10 June 1958, foreign parties have had great difficulty in enforcing foreign awards made in relation to contracts governed by Indian law.[31]

In 1992, for example, the Indian Supreme Court in the case of *National Thermal Power Corporation Limited v. The Singer Company* decided that the Indian courts were competent in all matters relating to arbitration agreements governed by Indian law, whether or not the arbitration awards were rendered in India or abroad (3 Supreme Court of India 1992:551-573). Consequently, awards were subject to all the challenges that could be brought against Indian domestic awards under the old legislation.

Under the new Act, however, an award made in a convention jurisdiction is enforceable in India. Moreover, grounds for refusing recognition of foreign awards are limited to those for refusing enforcement under Article 5 of the New York Convention.

3. ARBITRATION INVOLVING RUSSIAN, CIS AND EASTERN EUROPEAN PARTIES

(a) Generally

As anyone would assume, the consequences of the establishment of the Russian Federation and the Commonwealth of Independent States have been to develop and establish new national laws for dispute settlements. There has been an enormous injection of foreign capital into all these countries, supported by organisations such as the European Union and the European Bank for Reconstruction and Development (EBRD). As a result of the cultural and legal differences, as well as the economic predicament of these countries, many disputes have arisen (Salpius and Pavlovic *in* Berkeley and Mimms 2001:323).

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[29] For example, Article 19 (1): "The arbitral tribunal shall not be bound by the Court of Civil Procedure, 1908 or the Indian Evidence Act, 1872".

[30] More information about the rules can be obtained from the ICA website: www.ficci.com

[31] This bears out the author's opinion that once a country becomes party to the said Convention it cannot afford to ignore the UNCITRAL Model Law.

The national courts in these countries had no experience in international business practices, and therefore international arbitration had to be developed for this purpose.[32] Local courts in Saudi Arabia are seen from an international perspective not to have experience in international business practices, and this will lead us to suggest in Chapter 8 how the *Shari'a* could be developed to meet all the new challenges that exist in the business community either locally or internationally.

What should be mentioned is that arbitration has long been recognised in all of the Central and Eastern European countries. It existed in centralised economies but was used either as a mandatory dispute resolution method for transactions between COMECON (former USSR, Bulgaria, Czechoslovakia, Hungary, Romania and Poland) or for the settlement of disputes arising from international business transactions. Even though arbitration was practised by the National Chambers of Commerce which are controlled by the Government, there was little confidence in the West that these institutions would ensure a fair and impartial determination of the issues in dispute (Salpius and Pavlovic *in* Berkeley and Mimms 2001:323-324).

The above mentioned countries represent some of the developments that have taken place in this part of the world and it should be relevant for us to move on to highlight the Russian Federation and other CIS countries.

(b) The Russian Federation

As we have seen above, with the collapse of the Soviet Union and the emergence of free enterprise in the Russian Federation there was a growth in foreign investment and a consequent increase in disputes between foreign investors and Russian entities. Since 1991 the Russian Federation has issued new laws on private and international arbitration and the Model Law was adopted in 1993.[33] New arbitral institutions have been set up to deal with local and international disputes.

Since they adopted the UNCITRAL Model Law, we assume that the relationship between the courts and the international arbitral tribunals is a good one. Parties to an international arbitration under the 1993 law can apply to the Russian courts for procedural assistance.

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[32] The reports from the European Commission on progress towards accession by candidate countries repeatedly mention inadequate experience and qualification of local judges, inefficient and understaffed courts, increased caseload and substantial delays in resolving disputes as a major impediment for countries' integration into the European Union.

[33] International Commercial Arbitration Act of the Russian Federation, 7 July 1993, No. 5338-1.

The Russian Federal Law `On Arbitrazh Courts' was adopted on 4 July 1991 and established the new federal system of Arbitrazh Courts.[34] However, this was replaced in 1995 by The Federal Constitutional Law on Arbitrazh Courts in the Russian Federation. On the other hand, for historical reasons Russian parties often prefer arbitration under the auspices of the Stockholm Chamber of Commerce, mainly due to their neutrality during World War II. However, Russian parties have started to have confidence in other international arbitration centres such as the ICC and LCIA.

In Russia, however, there is the International Commercial Arbitration Court (ICAC) of the Chamber of Commerce and Industry, considered one of the world's largest arbitration centres.[35] Many practitioners believe the reason for the success of the centre to be that there is no restriction on the use of foreign counsels before the ICAC, and the rules of this centre specifically allow it.

The USSR ratified the New York Convention with effect from 20 November 1960, and it is still binding today. The 1993 law provides a number of grounds upon which a party may request the Russian court to refuse recognition of an arbitral award, and they are based on Article 36 of the International Arbitration Act.[36] Moreover, the court may pass a motion refusing to recognise or enforce an award if it is contrary to national public policy, or if it finds that the subject matter of the dispute cannot go to arbitration under Russian law.[37]

(c) Other CIS States[38]

Even though some of these countries have not reached an advanced level in international commercial arbitration, we can say that they are currently in the process of development. The creation of a strong private arbitration system is one of the main elements of the judicial reform currently under way in Armenia. The `Law on Mediation Courts and Meditation Procedure' entered into in January 1999 applies to private arbitration proceedings.[39]

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[34] These courts were established to create a new federal system for the settlement of domestic economic differences. Article 7 of the Russian Federal Law on Arbitrazh Courts provides the right to apply to private arbitration and mediation.

[35] For more information about the centre visit website www.russus.com

[36] These grounds are the same as those in the Model Law Article 36.

[37] In 1999 the Supreme Court of the Russian Federation published a decision on the violation of public policy. This is the case of *State Enterprise `Izmeritel' v. Omegateks Electronics GmbH*, 25 September 1998, Supreme Court, Bulletin of the Supreme Court of the RF, 1999 No. 3 pp. 12-14.

[38] The remaining CIS countries are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Ukraine and Uzbekistan.

[39] This law was adopted by the National Assembly on 5 May 1998.

It regulated many arbitral issues such as the formation and composition of the arbitral tribunals, the rules of procedure, and the arbitral award and its enforcement.

Even though the law on foreign investment in Armenia stipulates that investment-related disputes where the Government is a party should only be heard in Armenian courts, investment treaties ratified by Armenia consider arbitration as a resolution of commercial disputes. It is well known that Armenia acceded to the New York Convention 1958 on 29 December 1997.

Also, Azerbaijan has signed the 1996 Interim Agreement on Trade and trade-related matters with the EU. This means that both parties shall encourage the adoption of arbitration as the preferred means of resolving disputes arising out of commercial transactions between the EU and Azeri parties. UNCITRAL Rules and the ICC Rules are the most commonly used. The new civil procedure code will be the final step necessary to implement Azerbaijan's obligations under the New York Convention, which was signed in December 1999. It has been mentioned that the legal framework for investment will improve with the issuance of the new Civil Procedure Code.

Even though state courts in Kazakhstan examine most commercial cases, arbitration is becoming an increasingly popular means of dispute resolution. Kazakh commercial entities are now using international arbitration rules such as those of the ICC or UNCITRAL. On the other hand, arbitration in Kazakhstan is subject to legal reforms that should be completed in the near future and it also ratified the New York Convention 1958.[40]

(d) Central and Eastern Europe

Bulgaria

This is the first country in this part of the world to make changes to its arbitration legislation as early as 1998 (Salpius and Pavlovic *in* Berkeley and Mimms 2001:326), perhaps to encourage foreign direct investment in the local market. The Bulgarian Law on International Commercial Arbitration was amended in November 1993, and is based on the UNCITRAL Model Law.[41]

[40] This information on the CIS states, seen from the international practitioner's perspective, is elicited from the arbitration briefings of the international law firm Herbert Smith of April 2000.
[41] State Gazette No. 60, 5 August 1988, amended in No. 93, 2 November 1993.

The 1993 amendments extended the scope of the law to cover other civil (non-commercial) disputes, with the exception of property, family and labour law matters. However, as practitioners see it, there are some differences between this law and the UNCITRAL Model Law. One of the most interesting differences can be seen where the Bulgarian Arbitration Law does not allow the parties to empower the tribunal to decide *ex aequo et bono* or as *amiables compositeurs* (LIAC Article38 (1)). The parties would always have to decide on the basis of an agreed substantive law, and if there is an absence of choice there will be determination on the applicable conflict of law rules (LIAC Article38 (2)).

The arbitration court at the Bulgarian Chamber of Commerce and Industry (BCCI) had mandatory jurisdiction in all disputes arising from transactions between Bulgarian entities and other COMECON countries.[42] Bulgaria ratified the New York Convention 1958 on 10 October 1961. The court may refuse to recognise or enforce an award if it finds that the subject matter is not capable of settlement by arbitration under Bulgarian law, or recognition or enforcement would be contrary to Bulgarian public policy as stated in the above-mentioned convention.

The Czech Republic

As foreign investment increased as a result of the collapse of the Communist regime, arbitration proved essential and has become an important clause in foreign investors' contracts. The current arbitration law in the Czech Republic is the 1994 Act on Arbitral Proceedings and the Enforcement of Arbitral Awards, which replaced the former Czechoslovak Act of 1963.

Many lawyers believe that the new law is still based on the old Czechoslovak law rather than on the Model Law. It was supposed to have two purposes: to reflect the new market economy, and to facilitate international arbitral disputes (Salpius and Pavlovic *in* Berkeley and Mimms 2001:323). The primary arbitration institution is the Arbitration Court, which is attached to the Economic Chamber and the Arbitral Chamber of the Czech Republic in Prague. Originally founded in 1949 and attached to the Czechoslovakian Chamber of Commerce and Industry, it acquired its present name and affiliation in 1994 after the formation of the separate states of the Czech Republic and Slovakia and has a number of regional branches throughout the Czech Republic.[43]

[42] For further information about the centre see www.arbitrationlaw.com/books/au2.htm
[43] For further information on this arbitral institution see www.jurisint.org/pub/03/en/doc/13.htm

With respect to foreign awards, the former Czechoslovakia ratified the 1958 New York Convention in 1959 and an instrument of succession for the Czech Republic was executed on 30 September 1993.[44]

It is important to mention that Czech judges have frequently tended to allow a party contesting the enforcement of an award the opportunity to argue the case on its merits in court rather than simply enquiring about the formalities of a tribunal's decision. We believe that this is a common feature with Saudi arbitration practice, as seen in Chapter 2. Moreover, the Czech law provides that an award may be set aside if there are reasons for a new trial in civil proceedings.[45]

Hungary

Arbitration is becoming an increasingly popular means of dispute resolution in this country. We believe that it is due to the slow court system in dealing with commercial disputes. Also arbitration has to gradually change in order to cope with the country's changing political scenario. The use of arbitration has increased since the introduction of new legislation in 1994 and is based on the UNCITRAL Model Law, which is used for domestic and international arbitration.[46]

Even though parties in international arbitration regularly stipulate the ICC Court of Arbitration in Paris or the LCIA in London, or elsewhere in Europe, parties frequently stipulate the jurisdiction of the Hungarian Permanent Court of Arbitration (the `Permanent Court'), which is based on the UNCITRAL Rules.[47]

Since the UNCITRAL Model Law was adopted, we assume that the relationship between the courts and the arbitral tribunals is generally good. The court will not interfere in the arbitral process except where the Act provides that they may. A court may order interim measures of protection whenever it is necessary according to the Act. One of the reasons why Hungary is considered to be a good seat for arbitration is that the tribunal could directly determine the applicable substantive law rather than through conflict of law provisions as provided in the Model Law (Hungarian Act Section 49), as opposed to the Model Law Article

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[44] AP Act, Article 38 provides for the enforcement of foreign arbitral awards based on reciprocity. However, Article 47 provides: 'The provision hereof shall apply, unless an International Treaty binding on the Czech Republic and which is published in the Collection of Laws provides otherwise.'

[45] Reasons for a new trial are set out in Articles 228 (1)(a) and (b) of the Czech Code of Civil Procedure.

[46] Act LXXI of 1994 on Arbitration.

[47] For further information on Hungarian Permanent Court of Arbitration see website: www.fornax.hu.

28. This means that the Hungarian Law has adopted the so-called direct approach, which was recognised by some international arbitration laws, as seen in Chapters 5 and 6.

An arbitral award has the effect of a non-appealable court judgement (Hungarian Act Section 58). The execution of an arbitral award is governed by the procedure of the execution of the court judgement; the New York Convention signed by Hungary in 1962 governs the recognition and enforcement of an arbitral award.

Poland

Poland's national arbitration law is contained in the Polish Code of Civil Procedure.[48] Even though the Civil Code dates from 1964, it was not affected by the trends of the emerging economy (Salpius and Pavlovic *in* Berkeley and Mimms 2001:342). This is a common feature with the Saudi arbitration practice since it has not yet been internationalised since Saudi Arabia signed the New York Convention and the issuance of the FDI new law, as will be seen in the next chapter.

However, Polish companies in international trade use arbitration clauses in their contracts, largely we believe, helped by Poland ratifying the New York Convention with effect from 1 January 1962, and the European Convention in 1964, as well as being a party to the Moscow Convention of 1972, mentioned in Chapter 4. The Code of Civil Procedure provides that an award may be set aside if there are reasons for a new trial (Polish Code of Civil Procedure, Article 712). As mentioned above, the New York Convention 1958 and the Code of Civil Procedure govern the recognition and enforcement of foreign arbitral awards (Polish Code of Civil Procedure, Articles 1147-1153).

There have been several proposals for the revised Polish national arbitration law. A new law based on the UNCITRAL Model Law has been proposed but the legislative process is at an early stage. We believe that it proved helpful to this country in coping with the standards of international arbitration practice by giving great importance to the doctrine of party autonomy. This can be seen, for example, in the choice of law process where, if there is no agreement between the parties on the applicable procedural law, the arbitral tribunal will determine this particular law and is not bound by the national procedural rules (Polish Code of Civil Procedure, Article 705).

[48] Polish Code of Civil Procedure Act, 17 November 1964. The arbitration-related articles are to be found in Nos. 695-715.

The principal arbitration institution in Poland is the Arbitration Court of the National Chamber of Commerce in Warsaw, which handles many international cases.[49] The Arbitration Court previously had two sets of arbitration rules, one for domestic and one for international, disputes but with effect from 1 January 2000 a new uniform set of rules has been developed which applies equally to domestic and international arbitration.

Meanwhile, three other major arbitration institutions deal with arbitrations in specific trades. The Court of Arbitration of the Cotton Association is the oldest arbitration court in Poland and administers many cases each year. There are also other permanent arbitration courts attached to various exchanges, banks and bar councils. Like the other jurisdictions cited previously, there is no restriction on the nationality of arbitrators or counsel representing the parties in an international arbitration in Poland. Finally, as aforementioned, Poland is a party to the New York Convention, and foreign awards are thus enforceable on the basis of the Convention (Polish Code of Civil Procedure, Articles 1147-1153).

Romania

The Romanian arbitration legislation is included in the Romanian Code of Civil Procedure (Articles 340-370) and the Conflict of Laws Act (Articles 165-177).[50] Under the former Communist regime arbitration was available only in international disputes, and therefore it was not frequently used. Under the present law, however, domestic disputes may now be referred to arbitration. International arbitration is currently on the increase in Romania with the introduction and development of the free market and foreign investment. Foreign investors prefer it because Romanian judges generally have little experience in international commercial matters, and the court system is slow. Again, this is a common feature with the Saudi commercial practice, where international practitioners view judges of the Board of Grievances as having no thorough experience in commercial matters, as will be seen in the next chapter.

The courts in this country are supportive of arbitral processes and assist in enforcing interim measures ordered by the tribunal (Romanian Code of Civil Procedure, Articles 3587-3588). The court also grants orders for interim measures following a direct application by either

[49] For further information on the Chamber of Commerce see website www.kig.pl.
[50] An important point to mention is that practitioners refer to this as the Conflict of Law Act, but officially speaking it is Law No. 105 on the Settlement of Private International Law Relations, dated 22 September 1992, Articles 165-177.

party. The main arbitration institution in Romania is the Court of International Arbitration attached to the Romanian Chamber of Commerce and Industry.[51]

This Court of International Arbitration was established in 1953 to settle foreign trade disputes and its procedural rules are based on the UNCITRAL rules, which do not place any restrictions on foreign arbitrators. The arbitral award is final and binding on the parties and immediately executable (Romanian Code of Civil Procedure, Article 376). The reasons for setting aside an award correspond to the requirements of the Model Law. Moreover the New York Convention applies to the recognition and enforcement of foreign arbitral awards. If the Convention is not applicable, the Conflict of Laws Act provisions on the recognition and enforcement of foreign decisions are applicable to arbitral awards (Conflict of Laws Act, Articles 165-177 and 180-181).

4. ARBITRATION IN LATIN AMERICA

(a) Generally

As we noted in Chapter 3, the countries of Latin America have generally been seen as unfriendly towards international arbitration (Born 1994:35). At the present time, in the view of practitioners, participation in international arbitration proceedings is no longer unusual in Latin America. The globalisation of the economy has opened up new directions for business activities and therefore to the disputes which may arise in contractual relationships. As noted by commentators, the Latin American countries have shifted towards participating as plaintiffs in the field of arbitration – seemingly impossible a few years ago but now common practice. Bernando M. Cremades reported:

> "Latin American countries, for example, overwhelmingly rejected arbitration based on grounds of sovereignty. Today, Latin American countries participate, often as plaintiffs, in large-scale international commercial arbitration proceedings. The prior reluctance of large United States law firms to participate in arbitration proceedings, on the basis that they were a closed solution limited to a select group of law professors in continental Europe, has disappeared, to the extent that these same law firms now play a leading role in the world of arbitration."
>
> (1999:1)

It is therefore important to see how far Latin American countries have gone in their participation in the internationalisation of arbitration, especially as they share many common

[51] For further information on the Court of Arbitration see website www.ccir.ro

features with Saudi Arabia, one being the banning of the Saudi government agencies' participation in arbitration, on the grounds of sovereignty (Council of Ministers, Resolution No. 58, June 1963).

(b) Argentina

Arbitration in Argentina is governed by the National Code of Civil Procedure[52], which was enacted on 19 September 1967 (Law No. 17:454). This is applicable in the Federal capital, Buenos Aires, national territories, and by Federal judges all over the country; the respective provincial courts locally apply provincial codes. To a large extent (although not in every case) provincial procedural codes reproduce the provisions of the National Code (Naón *in* IHCA Vol. 1 1998:1). It was then modified in March 1981 by the respective provisions of the diverse provisional procedural courts (Law No. 22:434).

Argentine law recognises two types of arbitration. The first is *de iure*, where arbitrators have to strictly abide by the written legal rules as to substance and procedure (Code of Civil and Commercial Procedure, Articles 736-765). The second is *amiable compositeurs* or *ex aequo et bono* (Code of Civil and Commercial Procedure, Articles 766-772). All these institutions are commonly grouped under the general term of arbitration.

There are no statistics revealing the use of arbitration in Argentina, but as Professor Naón mentions, arbitration has been very scarce. Just like in Saudi Arabia, domestic arbitration in Argentina is on the increase, especially in the area of construction and civil engineering contracts (Naón *in* IHCA Vol. 1 1998:2) There are many important arbitral institutions in Argentina, one of which is the Tribunal de Arbitraje General de la Bolsa de Comercio de Buenos Aires.[53]

On 28 September 1988 Argentina ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Argentina also declared that it would apply the Convention in accordance with the Argentine constitution. The purpose of this declaration responds to a principle known as *Formula Argentina*, which is to safeguard inalienable sovereign rights and vital national interests.[54] We assume this means that the Argentine law does not distinguish between national and international public policy, just like the Saudi arbitration system.

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[52] The arbitration related provisions may be found in Articles 735-773.
[53] For more information about this centre see website: www.bcba.sba.com.ar
[54] The Argentine Congress passed Law No. 23619, which was promulgated by the Executive Branch of the National Government through Decree 1524/88 dated 21 October 1988.

(c) Brazil

The advantage of international arbitration has prompted a legislative change in the legal scenario in Brazil, which has recently enacted a particularly modern bill regarding arbitration and is based on the UNCITRAL Model Law.

Until the enactment of Law No. 9307/96, the arbitration clause was not binding. Practitioners show that when parties sign a contract that includes an arbitration clause, neither party would accept to be subjected to arbitration proceedings (Netto *in* IHCA Vol. 1, 1998:3).

In the opinion of some practitioners such as Alberto de Orleans e Braganca, this problem arose due to a principle in their constitution that the judiciary may not be bypassed. Moreover, the Brazilian Constitution expressly provides that the law shall not exclude the judiciary from anything (Cremades 1999:21).

Since the publication of the above-mentioned law, arbitration agreements have become enforceable, turning them into an effective alternative for the settlement of disputes. This law is the result of research in to modern legislation on arbitration, taking into account the directives of the international community, in particular those established by the UNCITRAL Model Law, as well as the New York Convention 1958 and the Panama Convention 1975, mentioned in Chapter 4. One of the most important arbitration centres in Brazil is the Instituto de Mediacao e Arbitragem do Brasil (MAB).[55]

(d) Mexico

Mexico is a federal republic and so its commercial law is of a federal nature. A Federal Statute, the Commercial Code, governs commercial matters including commercial litigation and arbitration.[56]

International trade increased in Mexico after it joined GATT, which made Mexican companies more involved in commercial arbitration. This trend is also true among government agencies when dealing with foreign suppliers, contractors and international financiers (Siqueiros and Hoagland *in* IHCA Vol. 1, 1998:3).

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[55] For further information on this centre see website www.imab.org.br/index.shtm

[56] This original statute covered numerous topics which have been gradually removed from its text i.e. business corporations, bankruptcy law, insurance law, banking law and maritime law, etc.

This prompted the Government to issue the new 1993 Arbitration Law, which is largely based on the UNCITRAL Model Law.[57] This law applies to domestic and international arbitration as well (Mexican Arbitration Law, Article 1415). The Mexican Congress exhibits this approach, wishing to avoid a dichotomy in arbitration law. We believe Saudi legislators, either when adopting the Model Law wholesale or in view of new Saudi Arbitration Regulations, should also consider this approach.

Enforcement of awards will be governed by the New York Convention (Mexican Arbitration Law, Article 1461). The grounds for refusing recognition and enforcement of an award are similar to those mentioned in Article 5 of the New York Convention (Mexican Arbitration Law, Article 1462). The most famous arbitration institution is the Camara Nacional de Comercio de la Ciudad de Mexico (CANACO).

(e) Peru

On 11 December 1992 the General Arbitration Law came into effect to replace Articles 1906-1922 of the Civil Code.[58] This law governs both domestic and international arbitration. Section 1 (Articles 1-80) governs domestic arbitration, and Section 2 (Articles 81-109) governs international arbitration. The other section is closely based on many aspects of the UNCITRAL Model Law, and applies to international arbitration. Even though this is considered to be a good development in the field of international arbitration in this country, some practitioners, such as Professor Alberti, consider domestic and international arbitration to have had limited use up to the present time (IHCA Vol. III, 1998:1). The most important arbitral institution is the Centre of National and International Conciliation and Arbitration of the Lima Chamber of Commerce.[59]

In relation to the recognition and enforcement of foreign arbitral awards, the New York Convention 1958, to which Peru became a party in 1988, will apply.[60] Peru also signed the Inter-American Convention on International Commercial Arbitration in 1988, highlighted in Chapter 4.[61]

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[57] Title IV on Commercial Arbitration, Articles 1415-1463 (Official Gazette, 22 July 1993).
[58] General Arbitration Law (GAL) Decree Law No. 25935 published in the official Gazette – El Peruano.
[59] For further information on this centre refer to website: http://www.jurisint.org/pub/03/en/doc//7.htm
[60] The New York Convention was applied without any reservation by Legislative Resolution No. 24810.
[61] The Panama Convention was approved on 7 November 1988 by Legislative Resolution No. 2.

(f) Uruguay

Arbitration agreements are rarely used in Uruguay. The reasons for this are not totally clear, but commentators believe it is due to two different factors: cost and distrust of arbitration (Ferrere *in* Cremades 1999:81). The courts, unlike other jurisdictions, impose very low costs. In general terms, moreover, court fees and taxes do not exceed 1% of the amount of the claim. Finally, local courts, in the opinion of practitioners like Daniel Ferrere, are not corrupt and the quality of their service in commercial cases is reasonably good and fair (Cremades 1999:81). It should also be mentioned that Uruguayan courts and scholars have always distrusted arbitration, but the establishment of a Centre for Arbitration and Mediation by the National Chamber of Commerce in the early 1990s showed that promoting arbitration for domestic disputes had become socially acceptable (Ferrere *in* Cremades 1999:82).

The opposition to arbitration changed when complaints by businessmen against what was then a deficient functioning of the courts gave legitimacy to the arguments for a swift and more efficient system of settling disputes. Although both Saudi Arabia and Uruguay have developed domestic arbitration, neither have changed their stance towards international arbitration despite the fact that they are all party to a number of regional and international conventions. Uruguay ratified both the 1975 Panama Inter-American Convention on Arbitration and the 1958 New York Convention.[62]

(g) Venezuela

As we have seen in the second chapter when highlighting the practice of arbitration before the issue of the recent Saudi Arbitration Regulations, the situation in Venezuela was similar in that the settlement of disputes was traditionally reserved for the state courts. Any signatory to an arbitration clause could always dismiss it and have the claim decided in a court of law (Castillo *in* Cremades 1999:87).

After the Code of Civil Procedure was issued, the Caracas Chamber of Commerce created the Conciliation and Arbitration Centre. This was for the purpose of promoting arbitration and other alternative dispute resolution mechanisms in Venezuela, but as Castillo said:

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[62] Article 502 of the Code on General Procedure provides that "The arbitral award issued by foreign arbitral tribunals may be enforced in Uruguay, according to what is provided for by the treaties or laws referred to in the enforcement of foreign (judicial) rulings, as applicable."

> "This was ahead of time because the Courts were not comfortable with the idea of citizens being capable of bypassing the Courts' jurisdiction."
>
> (Cremades 1999:88)

In June 1998 the Venezuelan Congress passed the Commercial Arbitration Law that supports arbitration as a valid and effective dispute resolution mechanism. As commentators say, the law tries to reflect the current trends in arbitration and, to a large extent, has succeeded. This law respects arbitration agreements and their validity, and defines the arbitration agreement as:

> "an agreement by which the parties agree to submit to arbitration all or certain disputes which have arisen or which may arise between them with respect to a legal relationship, whether contractual or not.
>
> (Venezuelan Arbitration Law, Article 5)

With regard to the methods whereby governmental entities enter into arbitration agreements, those corporations where the state owns a 50% or more stake require approval by the corresponding body pursuant to the bylaws of the corporation, and prior authorisation of the governmental controlling entities (Venezuelan Arbitration Law, Article 4). The law simplifies the recognition of foreign arbitral awards and only requires the requesting party to present a duly certified copy of the award translated into Spanish, if necessary (Venezuelan Arbitration Law, Article 48).

With the passing of the Commercial Arbitration Law, the Caracas Chamber of Commerce reactivated the Centre and reformed the rules to be in line with the freedom granted by the new law.[63] Also, the Venezuelan-American Chamber of Commerce and Industry (VENAMCHAM)[64] is working on the development of its own arbitration centre, and of course other institutions are also working on the preparation of their own rules as the law permits.

5. CONCLUSION

This survey reveals significant development and modernisation of arbitration laws even in those parts of the world historically unfriendly to them. Progress towards harmonisation is revealed by the fact that the UNCITRAL Model Law has strongly influenced these developments. Arbitration has come to be considered the most appropriate and neutral method of settling international disputes, especially with foreign investors.

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[63] For further information about the centre see website: www.ccc.com.ve

[64] For further information about VENAMCHAM see website: www.venamcham.org

Against this unfolding panorama, the harmonisation of arbitration law is not far from becoming a reality and we now return to consider the general development of the Saudi Arabian arrangement for new arbitration laws.

At this point, we will try to highlight all the legal aspects that need to be considered when developing a new arbitration law detached from the control of the state courts. The law will have to be delocalised in order to distinguish between national and international arbitration, as well as between national and international public policy. Such considerations will include Islamic and non-Islamic issues, and these will be mentioned in the final chapter. Such issues will include the role of the legislator to codify Islamic law in order for it to be applicable in the field of international commercial transactions. In Foreign Direct Investment, for example, domestic law governs many issues, and therefore reforms in national Saudi regulations have to take place in order to satisfy the needs of foreign investors.

Also, the issue of public policy should be settled by distinguishing national from international arbitration, as it was known in some of the old Islamic jurisprudence schools, as seen in Chapter 1. At the same time, the rigidity of the old Islamic jurisprudence schools will have to diminish since they were applied differently from one nation to another in the old Islamic eras. Chapter 8 will include our opinions in this regard in order for Saudi Arabia to cope with all the international standards practised throughout the world, as already seen in this chapter.

Chapter 8

A PARTICIPATION IN THE DEVELOPMENT OF SAUDI ARABIAN LAWS AND THE ARBITRATION PRACTICE

1. THE CURRENT ENVIRONMENT FOR DEVELOPING SAUDI LAWS AND ARBITRATION

(a) Generally

As we saw in Chapter 2 when we described developments in Saudi Arabia, oil was discovered in the 1930's and that created a great opportunity for the strength of the economy, and oil progressively became the principle source of national income. However, it was borne in mind that oil would not last forever and therefore most of the GCC countries have been working hard to build a solid infrastructure and to diversify the sources of national income. For example, Saudi Arabia, at the beginning of the 1970's, took the precaution of adopting a series of five-year plans, the aim of which was national development toward minimal dependence on oil.[1]

(b) Recent Economic Development

The Saudi Arabian national economy grew by 8% in 1996, and 7% in 1997, but it was less in the year 2000. In the view of many economists, this was considered a remarkable achievement in the light of the critical conditions that followed the second Gulf War. This positive outcome was not because of oil, but was due to the growth of the non-oil sectors in the national economy. That was related to the government's commitment to achieving the restructuring of the economy, enhancing the role and efficiency of the private sector, and attracting direct foreign investment. Reform programs are being implemented, especially in the area of trade and investment regimes.[2] But the reductions in the economy in 2000 made the government think more seriously about development and non-oil dependency.

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[1] The same method was adopted by Prince Abdullah bin Abdulaziz (The Crown Prince) In the year 2000 when the price of oil went down for some time.

[2] In 2000, Saudi Arabia implemented the Foreign Investment Act, which liberalizes the foreign investment laws in the Kingdom. The Saudi Arabian General Investment Authority was created under the Act, which has responsibility for licensing all new foreign investment in Saudi Arabia. Under the new Act, foreign persons and entities are permitted to invest in all industries and services except those specifically excluded from foreign investment. The excluded industries include those related to the manufacture of military material, equipment and explosives; oil exploration and production; services related to security, insurance and real estate brokerage; whole distribution and retail services; telecommunications services; and land, air and space transport, among others.

(c) The General Understanding of Foreign Investment as a Means of Development

When it comes to foreign investment, what will be looked at first from a foreign investor's point of view is the foreign institutions in charge of fostering political stability and encouraging economic growth. Moreover, they will look at the human resources and physical facilities i.e. infrastructure, that are available in a particular country. Finally, they will also look at the regulatory framework and the administration, which deals with foreign investors and the settlement of investment disputes (Escher *in* Bradlow and Escher 1999:27).

Host countries always have to decide for themselves two basic questions. First, what role should FDI (Foreign Direct Investment) play in order to achieve the national development agenda, and second, how should the domestic investment laws be tailored in order to accomplish the best result. The answer to these questions depends on the political and cultural conditions in each country, but in any case, governments of host countries want to provide better infrastructure such as education, health care, transportation, telecommunications, and, on the other hand, multinational corporations are interested in increasing profits, conserving capital, and expanding their markets. (Escher *in* Bradlow and Escher 1999: 28)

The Legal Issues Concerning the Foreign Investor

As we know, a foreign investor always has to deal with his lawyer to get a general legal opinion and analysis concerning a particular environment for investment. Moreover, a legal opinion has to explore the national investment law and the relevant administrative procedures, which are necessary for implementing and operating the foreign investment. The legal opinion has to investigate national laws on export financing, risk insurance, taxation and Arbitration. Similarly, the lawyer must investigate anti-corruption laws that apply to the bribery of foreign officials by nationals (Escher *in* Bradlow and Escher 1999:37-39). At this stage, we will explain how far Saudi Arabia has come in developing its legal environment for foreign investment, which has definitely resulted in the need to develop its national laws in general, and its arbitration laws in particular.

(d) The New Saudi Arabian Foreign Investment Law

On April 10, 2000, the government of Saudi Arabia passed a new foreign investment law for the purpose of attracting foreign capital. Over the past 25 years, Saudi Arabia has

attracted about $5 billion in private foreign investment. The United States is the largest partner with 267 projects, and Japan ranks as the second.[3]

The law provides developments enabling foreign investors to own up to 100% of the joint venture. This motivation eliminates any conflicts that may occur between the foreign investor and Saudi Arabian partners. In addition, the new law abolishes the sponsorship rule that dominated the legal system for decades, when conducting business in Saudi Arabia. Under the new law, moreover, a foreign investor does not require a Saudi sponsor. Licensed companies are now entitled to sponsor expatriate employees working in the Kingdom. Such companies shall also have the right to own the project land, buildings and housing complexes for its employees.[4]

The foreign investor, under Saudi Investment law, also has the right to transfer capital outside the country and enjoy tax reductions. The purpose of stating the above is to highlight the new areas of arbitritable matters, which are considered international in the New York Convention, and the UNCITRAL Model Law that were mentioned in Chapter 5. Furthermore, we will also suggest that there are other laws of major concern to foreign investors that need to be updated and developed.

2. THE AREAS THAT NEED TO BE DEVELOPED

(a) Generally

It is important to realise that in FDI transactions, many contracts are judged by the law of the host state, and in some areas international standards have limited application. This can be seen, for example, in labour contracts, local supply and distribution agreements, insurance and financing arrangements with domestic institutions, either public or private (Escher *in* Bradlow and Escher 1999:39). For this reason, national laws have to be developed, even though in arbitration, as we have seen before, parties are free to choose their applicable law

[3] It has to be noted that up to the time of writing this thesis there is not much material on the subject in Saudi Arabia.

[4] Article 9 of the New Foreign Investment Law reads as follows: The Foreign Investor and his non-Saudi staff shall be sponsored by the licensed facility". Also Article 8 states "The foreign facility licensed under this Act shall be entitled to possess the required real estate as might be reasonable for operating the licensed activity or for the housing of all or some for the staff as per the provisions governing real estate acquisition by non-Saudis".

Events that Show the Importance of National Laws

In the field of arbitration national law can be important, as seen in Chapter 6. Also it would be a misconception to believe that all disputes related to FDI could be referred to arbitration. A foreign investor will face many instances in which he will have to rely on domestic courts. For example, the foreign investor will need to resort to the host state's courts to enforce contractual rights against local suppliers or customers (Escher *in* Bradlow and Escher 1999 42-43). Because of this, national laws have to be developed either for arbitration or for FDI, and become accessible to foreigners. At this stage, we are going to describe some major issues in Islamic law and its application in the Saudi courts and arbitration, so we can see how it should be developed.[5]

(b) Issues Related to Islamic Law as the Applicable Law

It was mentioned earlier in this project, that Islamic law has supremacy over all the regulations that exist in the Saudi jurisdiction. When it comes to explaining how the basic Islamic law of contract works, it is very important to understand that in Islamic Law there are no fixed codes or legal digests that a person can rely on, in order to get general principles related to a specific matter. It is also very important to understand that there are no specific theories of contractual liability in Islamic jurisprudence. The situation in Islam is dealt with on a case-by-case basis (Rayner 1991:86). It must also be mentioned that the few contractual principles are very difficult to explain in any language other than Arabic. For example, this was the cause of confusion in the *Aramco* case involving the Government of Saudi Arabia and the Arabian American Oil Company. As we have seen in Chapters 2 and 3, the arbitrators in that case stated the following:

> 'In view of the inefficiency of Muslim Law as interpreted by the school of Imam Ahmad ben Hanbal, and as the law enforced in Saudi Arabia contains no rules concerning oil exploitation, it is necessary therefore in this case to resort to general principles of law.'
>
> (Sir Alfred Bucknill (1963) 27L.L.R.177)

Having mentioned the above several times in this project, whenever it was applicable, we may feel that now is the right time to ask all the 'what' and 'why' questions concerning Islamic Law in the first place. Moreover, it is very important to ask what Islamic Law and Islamic Jurisprudence are, so we can understand how they are applied in modern commercial transactions.

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[5] Because of the lack of clarity in Islamic law from the viewpoint of the foreign investor, up to the year 2000 foreign direct investment was mainly based on oil investment.

(c) The Basic Understanding

The understanding of the definition of Islamic Law requires the highlighting of the sources of this law. As seen by Islamic scholars, the main principles of Islamic Law are taken first from the Holy *Qur'an,* which is the Islamic holy book, and constitutes the direct word of God to the prophet Mohammed. Secondly comes the *Sunnah*, which includes what was expressed and practised by the prophet over a period of 23 years. The *Qur'an* and the *Sunnah* together constitute one complete whole source of Islamic Law, which is known as *Shari'a* (Shalabe 1983;27-30).

After the death of the Prophet there followed the rise of the schools of jurisprudence *fiqh*, which were founded by the eminent scholars, who had to deal with many issues faced by Islamic societies. Muslims consider Islamic jurisprudence as one of the greatest achievements of Islamic civilisation, and many believe that Muslims can retain it and still find their own way in modern commercial transactions (Vogel and Hayes 1998:20).

Through Islamic jurisprudence, moreover, other subsidiary sources of *Shari'a* have evolved to include *Ijma*, which means consensus (Shalabe: 1983:247-249). Also, *Qiyas* which means analogy. Both of these sources still have to be based on the fundamental principles laid down in the *Qur'an* and the *Sunnah* (Shalabe 1983:251-253). The development of Islamic jurisprudence resulted in four major Sunnah schools as seen in the first chapter, and they would include the Hanfi, Maliki, Shafi, and Hanbali schools (Shalabe1983: 171). As mentioned in Chapter I, the Hanbali School is the school officially adopted by the Saudi jurisdiction.

As we have already seen in Chapter 1, it is important to note again that Islamic jurisprudence, for many reasons, stopped developing at some point. Among the most important of these was the rise of the Ottoman Empire, which ruled Islamic societies for 500 years, until the outbreak of the First World War. Moreover, many modern Islamic scholars believe that this period constitutes the end of the development of Islamic jurisprudence as the Ottomans adopted many foreign laws, particularly French laws (Abu Taleb 1982:38-39).

The Temporary Revolutionary Solution

This situation called for codification in the Arab Middle East. As we saw in Chapter 1, one of the very successful efforts was in Egypt, where the Hanafi school teachings were

codified in a book called the *Medjella*, which became a very useful source in some situations to assess and understand Islamic opinions in contracts and other legal matters.

At the present time, the return to Islamic Law in some Arab Middle Eastern nations is associated with the so-called Islamic Awakening, when some Islamic scholars started to think about codifying the different opinions mentioned in those Islamic schools. Many Islamic countries in the 70's started developing their legal systems based on Islamic Law, which became, in most Arab Middle Eastern countries, the main source of legislation (Vogel and Hayes 1998:20).

However, as many scholars see it at the present time, progress has been slow, particularly in the fields of contracts and commercial law. It is relevant in this regard to mention that no country that went through the so-called Islamic Revolution, neither Iran nor Sudan have abolished or revised all or even most of their Western adopted laws and legal institutions (Vogel and Hayes 1998:21).

The Effect on the Foreign Investor

Saudi Arabia has the most religiously Islamic legal system in the world. This presents a source of fear to outsiders, particularly western businessmen or commercial law lawyers, especially when they find out that much of Saudi Arabia's everyday basic contract and commercial law is based on the *fiqh* that we have seen above, and that law is wholly uncodified, and that the few commercial law principles are very limited, and not up to date (Vogel *in* Ruttley and Mallat 1995:31).

The concern of international investors over Saudi Law is not insignificant.[6] It constitutes a major issue for international trade, and also to the future economic development of the country. It seems surprising that so little has been done, despite the fact that King Abdulaziz proposed codification in the early days of the kingdom, and King Faisal repeated the proposal in 1962. The opposition movement would always reject the replacement of God's laws by man-made ones (Vogel *in* Ruttley and Mallat 1995:32).

[6] This information was given by Abdulah al Dabag (Former Secretary of the Saudi Council of Chambers of Commerce) who regularly meets foreign businessmen.

The Saudi System in Practice

At this point, it is important to see how the system works in Saudi Arabia. If the King with his Council of Ministers is the legislator of regulations, it is the *ulama* that are the legislators of the *fiqh*, but the *ulama* (religious experts in legal matters) legislate in a peculiar way. This is done case by case; moreover, each judge has the discretion to rule by God's Law, which he is entitled to take directly from the revealed religious texts. His decision, moreover, has no precedential value, and is subject to only limited review. This would result in having a system wholly unsystematic and lacking in predictability. The *ulama* believe that codification would deprive them of their legislative role, and make every Saudi court a constitutional court, so they would lose their check on the ruler (Vogel *in* Ruttley and Mallat 1995: 34).

There is a desperate need for some codification to rescue the law from that solely made by the *ulama*. But many Islamic scholars do not see codification emerging soon,[7] as Saudi judges are more traditionalist's *(muqallidun)* than free innovators *(mugtahedean)*. They follow the rules of the old Hanbali School where possible and cannot do otherwise (Vogel in Ruttley and Mallat 1995:35-36).

(d) The Field of Application of Islamic Law

If someone's native language is Arabic, the application of Islamic Law will be easier. In reading or researching in the field of contracts, for example, you will have those rules dealing with many aspects of contracts, such as offer and acceptance, consideration, capacity, privity, misrepresentation, mistakes, illegality, discharge and remedies (Rayner 1991:103-143).

Comparable with other legal systems before the 19th century, talking about contracts in Islam would not be like talking about a concrete theory, but rather about rules of various specific contracts. In Islamic jurisprudence, moreover, we can find a mention of some contracts like sale, lease, pledge, and so forth. However, the closest thing to the general law of contract is the contract of sell, which is used by Muslim Jurists as a prototype and analogy for all other contracts. This fact raises a very important question as to whether the parties are free to create new contracts and remedies. It is important to mention that classical scholars do not discuss the topic of new contracts; their goal is to develop a web of rulings covering all events by analogy

[7] This is due to the fact that many Islamic judges in the Kingdom of Saudi Arabia are against the codification on religious grounds. (For example, see Majalat al Majalh Magazine, *The Debate Between Salah Al Hejelan and Other Leading Saudi Academics and Judges*, Issue No. 1086 3-9/12/2000.

(Vogel and Hayes 1998: 97-99). This means that a contract must first exist or be imagined. However, their silence on new contracts may not imply opposition to creating them.

This has led modern Islamic scholars to consider all contracts and their remedies as private lawmaking between the parties, and valid until the appearance of what is contrary to the *Qur'an* or the *Sunnah* (Rayner 1991:91). In Saudi Arabia, as we have seen before, this allowed direct influence by the civil law system of the Ottomans and allowed the adoption of many civil law principles and rules, which became embodied in a law called the Regulations of the Commercial Court *Nedam al Mahkama Al Tegarea*[8], which was replaced by many Saudi regulations (Al Jaber 1996:18-19). This is not to say that Islamic jurisprudence did not know other types of contracts. Islamic scholars moreover, gave examples of the contract of *sharika* (partnership), and also the contract of *muqawala* combining the sale of materials and the hire of construction services (Al- Mughni *by* Ibn Qudama 1972: 6:32 Qari, art. 567 & n).

The Experience of the Author

One of the very interesting experiences that I had in London, was when Dr. Loukas A. Mistelis at the Centre for Commercial Law Studies at Queen Mary College, University of London, came to me before he started his lecturing on the LLM arbitration class at the Centre, and asked me if I could lecture on liabilities under Islamic Law for one of the legal work shops associated with the Centre.

At the end of the lecture, he came to me and gave me the telephone number of the person responsible for the organisation of the workshop. When I called, I was promised a copy of all the questions that needed to be answered for the seminar. After reading the answers of the other speakers, I had to call the organiser of the program, and let him know that I would not be dealing with codes or legal digests in order to answer all the given questions; instead I would be depending on different Islamic jurisprudence books.

In the process of doing this work, I came to feel that there was still a lot to be clarified about Islamic law in general, before answering the questions given. One of the first impressions at that time was that if someone's native language were not Arabic, he or she would not find it easy to know anything about Islamic Law in general. Moreover, the person will feel that Islamic law is not acceptable because of the obstacle of the language.

[8] Royal Order No. 32 in the year 1350H

When I finished my session I felt that the delegates, who were lawyers and in-house legal advisors for high profile companies had more questions to ask about the efficiency of the application of Islamic Law in general. Of course, they had seen that Islamic law and jurisprudence addresses most of the general aspects of contracts that are seen in comparative jurisdictions. But what they found difficult to understand is that Islamic Law, in current practice, does not constitute case law, or statute law. What they saw is a system, in which different opinions can be taken, or left, by individual judges and arbitrators. Therefore, they asked about the possibility of including an arbitration clause in their contracts with Saudi businessmen.[9]

3. KEY UNDERSTANDINGS IN DEVELOPING ISLAMIC LAW

(a) Generally

I have no intention in this part of the project to make any religious legal comments about the position of the four leading jurists, namely, Abu Haneefah, Malik, al-Shafiee and Ahmad. Any researcher in Islamic legal matters will always have to see and benefit from the knowledge they possess. But what we have to understand, and focus on is not to be confused between the terms "Islamic *Shari'a*" and the term "Islamic *Fiqh*, jurisprudence (Al Qadi 1993:39).

(b) The Real Position of the Previous Jurists' Input

In general, previous jurists' inputs and additions have come to our attention in the form of interpretations that were taken from the *Qur'an,* and the *Sunnah* of the Prophet Mohammed. The early jurists solutions and findings differed in regard to the same issue. This was a result of the *'Urf*, which means customs, that differed from one time to another, and from one place to another.

Great Imams in general did not encourage the imitation of other scholars. These scholars pointed out that the knowledge derived by such Imams is based, basically, on their own

[9] The author lectured twice on Liabilities and Damages in International Contracts Under the Islamic System with the Legal Workshop in 2000 and 2001. The lectures took place at the London School of Economics, and at the law offices of the international law firm, Herbert Smith.

opinions, and if other scholars produced a better opinion that is suitable for a specific matter and time, then that will have to be followed[10].

At the present time, the universities and educational programs in the Arab Middle East are only aiming to make the students memorize old jurisprudence and its texts and not training them how to produce *Ijtihad* or new theories in order to generate new rulings appropriate for new matters. Therefore, we see that many scholars do not make any effort to think about new issues, but prefer instead to select the easiest opinions developed by previous scholars. It is seen furthermore that scholars are always reluctant to produce a somewhat different opinion from that of the old jurists, even if it was on the same *Fiqh* jurisprudence basis. The example that could be given in this regard is that in large syndicated loans that take place in Saudi Arabia, the contractual relationship between the parties (The borrower and the Agent bank) are always governed by the very few basic rules that exist in Islamic jurisprudence. These rules could be developed and modernised to meet the modern social economic conditions that exist in the society.

It is an established fact that the majority of Islamic jurisprudence accumulated by university students as well as the general public is the product of the 4th Hijra century[11] (Al Qadi 1993:43). A scribe wrote a master copy, and then several other copies were made by hand, based on the need for that manuscript within the circle of jurists (Al Qadi 1993: 43).

(c) Legal Education in the Old Islamic Societies

In the old Islamic societies, students learned either verbally or by writing what was dictated to them by their teachers. A student at the time, moreover, was unable to visit a publishing warehouse or a bookstore to get all that he needed of his teachers' works. A student had to attend the teaching circle of his teacher until he matured, and became a "*Mu'eed*" (Someone who is permitted by the teacher to repeat the lessons to junior students). This term may be classified today as assistant teaching staff. The general public and educated people were unable to acquire the manuscripts which were the result of those teachings simply because they were not kept in libraries (Al Qadi 1993: 43).

Because of this, the subject of *Fiqh*' jurisprudence was limited to specialised books written for this purpose only (teaching). All that a reader found in the various books written on

[10] This is the statement of Imam Abu Haneefah (the Founder of the Hanafi School) mentioned in Chapter 1.
[11] In order to convert the Hijra year to the Gregorian system, the Hijra year is to be multiplied by 0.03, then the result subtracted from the Hijra year and 622 added. For example, 1375 (H) x 0.03 = 41.25, 1375 – 41 = 1334, 1334 + 622 = 1956(AD).

this subject is the skill of *Ijithad,* which is the result of finding a solution for a matter not governed by the *Qur'an* or the *Sunnah* of Prophet Mohammed.

Moreover, when reading the old Islamic jurisprudence books, there is no reference to the basis of a ruling in general except when the explanation of the rulings requires such a reference. When such a need for reference arises, however, only a brief mention of the reference is given. Therefore, there was no urgent need for such references, as scholars knew the sources. Moreover, this meant that the number of such reference sources was very few, and some old scholars named the collection of their references *"Daftar"*, notes rather than books (AlQadi 1993:44).

(d) The Present Position

At the turn of the 20th century, the press and publishers played a serious role in printing old manuscripts to make them available to interested students and the general educated public. All those who were interested either in Islamic legal studies or other Islamic social sciences were welcome to read these published books. However, the books dealing with *"Fiqh"* rulings were more widespread. Some rulings were more easily understood than others due to the simplicity of the language (Al Qadi 1993:44).

The general public, in Islamic Societies, who were not in the field of Islamic studies, considered such books (the old manuscripts) as holy books that established final authority. Moreover, people started to deal with the materials contained in these books as if they contained the *Qur'an* and the *Sunnah* of the Prophet, and that is because of the fact that the books did not refer to the source from which the references were derived (Al Qadi 1993:44).

However, as mentioned above, the old scholars were aware that most of these rulings were based on old traditions, *Istihsan* (best choice) and *Masaleh al Morsalah* (public interest) but the general public did not. The contents of such books required a specific level of education in order to understand the subject and its specialized terminology (Al Qadi 1993: 45).

At the present time, scholars are required to exert every possible effort to study the *Fiqh* rulings book, which is readily available to the public and links, at least, every ruling with a close source. This means that they point out the source of the ruling, whether it is the *Qur'an or* the *Sunnah* of the Prophet, etc. But in the end the reader or the researcher will find that most of the jurisprudence rulings are merely old traditions, or the best choice and interest of their time and environment.

(e) How Will This Understanding Develop Arbitral Issues?

An understanding of the above will help the authorities in Islamic countries, including Saudi Arabia, to develop the requirements mentioned in the Islamic jurisprudence schools for arbitral matters.

Women and Arbitration

From the legal point of view, some Saudi practitioners, such as Dr. Mohammad Nader believe that there is nothing to prevent the appointment of a woman as an arbitrator (1995:16). However, some people base the requirement that only men shall be appointed as arbitrators on two authorities. First, the *Qur'an* fixed the number of witnesses required in an Islamic court. The *Qur'an* furthermore says the following:

> "And get to witnesses,
> out of your own men,
> And if there are not two men,
> Then a man and two women,
> Such as ye choose,
> For witnesses,
> So, that if one of them errs,
> The other can remind her"
>
> (Sura of the Cow (2) 282)

Prophet Mohammad on the other hand said that

> "No people will succeed if they refer such matters to a woman."
> (Nel Al Alatwar by Al Shokani 1971: 297)

By reading the first authority and applying the rules of *Qiyas* (reasoning by analogy), one can understand that arbitration is the equivalent to witness statements, because witness statements are useful in revealing the truth. If, however, the statements of two women are equivalent to one man, how could one woman arbitrate between Muslims? What we have to understand and convince modern Islamic scholars of is that women were forbidden from arbitrating in certain times because they had less practical experience than men. This has been the situation in many parts of the world. For example, the old French law did not give the same value to testimony of a woman as to that of a man.[12]

[12] That could be seen in Articles 37 and 980 prior to modification of the Law on 7th December 1897.

What this proves this is that women in Islam are wholly competent to administrate their own property and this is not changed by marriage. Furthermore, women are free to dispose of their property or to enter into any contract they wish regardless of whether or not they are married (El-Ahdab 1999:33). Also, when the Prophet Mohammad said the *hadeath* (saying) mentioned above, it was because of the bad social situation of women before the Islamic era. The situation, moreover, was mentioned briefly in Chapter 1.

Non- Muslims and Arbitration

According to one of the principles of the *Shari'a* :

"A judge may be appointed if he is of age, mentally sound, Muslim, free, fair, educated in matters of *Figh* ..."[13]

Furthermore, as we mentioned before, an arbitrator in Saudi Arabia can be chosen among Saudi nationals or foreigners. This means that an arbitrator maybe foreign provided he is a Muslim. This requirement might make sense in national arbitration since the appointed person has to know about the applicable *Shari'a* law, but whatever is applicable to a national arbitration is not necessarily applicable to international arbitration.

What could be understood from the requirements mentioned above is that a non-Muslim could not have a guardianship over a Muslim. However, there is a different view, which is based on the following verse of the *Qur'an:*

"If ye fear a breach
between them twain,
appoint (two) arbiters,
One from his family,
And the other from hers:
If they wish for peace,
Allah will cause
Their reconciliation;
For Allah hath full knowledge,
And is acquainted
With all things"

(The Sura of the Women, Verse 35)

By analogy, the above-mentioned verse could be taken and leads us to consider that arbitration can be entrusted to a non-Muslim. Moreover, on the basis of the above, if the wife is non-Muslim the arbitration on her side maybe made by a non-Muslim. The verse did not make any exceptions regarding the requirements of her arbitrator.

[13] Al –Mughini by the Ibn Qudama, sayings of Abou Al-Kassem – in: *Explanation of the new arbitration rules,* by Dr. Eid Massud Al-Jubhani – 'Tajarat Al-Riyadh' published by the Riyadh Chamber of Commerce and Industry, October 1983.

Also, if the arbitration is taking place in a non-Muslim country, Muslims may choose a non-Muslim arbitrator; this opinion is based on an analogy with the text of the *Qur'an,* which authorises a dying person to have two non-Muslim witnesses. This exception, which is permitted by the *Qur'an* and based on necessity or urgency, maybe extended to an arbitration taking place in a non-Muslim country or in an Islamic country where the arbitration needs a deep knowledge of a foreign law or specific industry such as construction, e-commerce, insurance etc.

On the basis of the above, what should take place at the present time is a call for the opening of *Ijtihad,* so the Islamic community can find solutions to the new issues facing the Islamic world. I do believe that Saudi Arabia should take the lead in this matter since it is considered by many international academics to be the most classical Islamic country in the world (Vogel *in* Ruttley and Mallat 1995:31).

Developing the Theory of Delocalisation in Islam

The main consideration here is to examine the point to which arbitration may be delocalised, or lifted out of the jurisdiction of the courts, or to examine and see how far courts will exercise their powers of intervention, just like the way it has been developed in other systems mentioned in Chapter 6.

What makes things even more difficult in this regard is that there is no concept of 'international', as distinct from 'national' arbitration. The courts, in any case, national or international, may have intervening jurisdiction (Ballantyne 2000: 44). It would probably be helpful to establish some grounds for distinction between the two concepts based on some Islamic jurisprudence opinions. It must be mentioned that Islamic jurisprudence knows the delocalisation theory as seen when it allowed the *Dhimmis* (Jews and Christians who live in an Islamic country) to resort to their own courts and means of settling disputes (El Ahdab 1999:34). If this concept is taken and modernized by analogy *(Qiyas)* then it can be seen as identical to *Geographical Delocalisation* as mentioned in Chapter 6 by Professor Pierre Mayer.

The task of modernizing arbitration law in Saudi Arabia presents considerable difficulties. Among these a formidable obstacle is that the judge always has the power to intervene, that there is restriction on arbitrable cases, and also on the extent to which *Shari'a* must be applicable. In addition, and as we mentioned above women and non-Muslims cannot

act as arbitrators. Although this pertains to domestic arbitrations under the local arbitration regulations, lawyers in international arbitrations with Saudis are hesitant to appoint non-Muslim or female arbitrators, fearing that this will affect the chances of enforcing the award in the Kingdom, and may be challenged on public policy grounds, even if institutional rules such as the ICC apply.

(f) The Role of Legislation (Board of Experts)

The early generation of jurists addressed *Masaleh al-Morsalah* as a way of improving Islamic society in general. But, in reality, we cannot consider *Masaleh al-Morsalah*, in itself, as a source of the *Shari'a;* public interest is the considered factor in this regard.

These are the interests that people in an Islamic community could live without. However, it would be better for the public if they had them in order to create a better life for themselves (Al Qadi 1993: 210-211). Therefore, it is permitted for governments in any Islamic state to make plans and pass laws to increase foreign investment and tourism, for example. This *Masaleha Tahseneah* principle therefore, could be applied to improve the laws related to arbitration since arbitration is one of the ways of encouraging foreign investment.

As we have mentioned before, Islamic law is considered the main law of the land. It has supremacy over all the types of regulations passed which are often called *Anzema.* These regulations are there to govern issues, which are either not known in Islamic jurisprudence, or to supplement the *fiqh* and Islamic law. What has to be mentioned is that the passing of those regulations is based on the *al siyasa al shariyya* (Legal Policy) addressed above. The King has been obliged to supplement the *fiqh* in this way because the *ulama* (religious scholars) could not or would not fill these gaps wholesale with new modern laws (Vogel *in* Ruttley and Mallat 1995:33). This is where the legislation role of the Board of Experts at the Council of Ministers came from. We could see that this Board with its qualified experts in many subjects in international comparative law, may make a change by researching and studying the principles, that exist in Islamic *Fiqh*, and make it clear so it could be applied when drafting new modern laws including those which relate to modern arbitration.

Again, such studies must be with the cooperation of highly qualified experts in various fields such as religious leaders, politicians, economists and social scientists. The situation must be explained to them in many ways, and that should be the first step towards cooperation in the development of laws including arbitration. At the end, we will have some highly qualified experts who are the real *Mujtahid* scholars, and not the imitators, who imitate, and follow

traditional schools. They will be capable of distinguishing between the verses of the *Qur'an* that address an issue related to a specific time, and that which is flexible and changeable for different times, places, and policies. With this the experts will have to deal with many arbitral issues related to delocalisation in general, and preventing women and non-Muslims from arbitrating in the Islamic community.

Opening the door for *Ijtihad* is a must for development. There is an opinion that says this is a dangerous concept, because it would encourage qualified and non-qualified people to pitch in and volunteer their suggested and proposed rulings. However, it could be argued that this trend is taking place already today whether we like it or not. Both educated and non-educated people have an open ear for grabbing new rulings from qualified or non-qualified scholars.

4. THE NEED TO DEVELOP OTHER FORMS OF ADR

(a) Generally

The development mentioned above should not stop at arbitration as one of the forms of ADR, it should include however, other means of dispute resolution. It should be noted that there should not be religious issues that get in the way of developing other forms of ADR since the *Qur'an* would always call for mediation and conciliation as a way of settling disputes:

> 'If ye fear a breach
> between them twain,
> Appoint (two) arbiters'
> One from his family'
> And the Other from hers;
> If they wish for peace'
> Allah will cause
> Their reconciliation;
> For Allah hath full knowledge,
> And is acquainted
> With all things"
>
> (Verse 35, of the Surah of the Women)

Also, Saudi Arabian culture is known for being a culture of compromise, but as business relations grow and interests come into in conflict with each other, this compromise concept has been diminishing over the last two decades. And, therefore, the role of legislators mentioned above, should expand to include regulating official forms of ADR in the Saudi jurisdiction. Moreover, foreign investors look for ways of settling disputes in the country in

which they are doing business. It is not only arbitration and the legal system which concerns them, but also other forms of ADR that are available in such a jurisdiction.

But the practice, at the present time shows that ADR is not officially developed in Saudi Arabia, even though it is considered to be a culture of compromise, as mentioned above. As we saw in Chapter 1, mediation and conciliation in Saudi Arabia takes place *officially* in specific matters such as those relating to negotiable instruments, insurance, and commercial agencies. In these matters, the Chambers of Commerce or the Ministry of Commerce have the duty to carry out the ADR process, but the question that presents itself is whether this form of ADR is enough or whether some improvements have to take place. In most of the Arab Middle Eastern countries including Saudi Arabia, if one party seeks mediation or conciliation in settling their disputes, that gives the other party the impression that they have a bad case, and therefore they would rather settle it out of court[14]. This has made many people avoid using the facilities at the Chambers of Commerce in Saudi Arabia. In my opinion, the crisis is not just the bad impression given to the other party when requesting ADR, but it is also that most people do not want to show their willingness to compromise.

In addition, there are mediatable cases in Saudi Arabia, which are not in other jurisdictions; for example, commercial papers (cheques, drafts and promissory notes). This type of case is not mediatable in other parts of the world, even in developing countries that have economic problems, because the aim of ADR is to compromise and not allow people to get away with writing bad cheques. Mediation in such cases may affect hundreds or even thousands of people. [15]

In some of the mediations that take place in the matter of commercial papers, it can be seen that the points of principle are no longer important at all and all that matters is to do a deal. In some situations, one party may find it better to delay and not agree to any meaningful resolution, and in that case the other party will only have added to the delay and expense incurred in reaching a resolution to the dispute.[16]

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[14] This is based on the author's experience at the Chamber of Commerce and Industry in Riyadh in which he sat as a Mediator in unregistered commercial agency contracts.

[15] It is worth mentioning that in Saudi Arabia there was no mediation in these matters before 1991. However, the economic problems that occurred in Saudi Arabia after the Gulf War forced the Minister of Commerce to pass a resolution requiring the plaintiff to submit his/her complaint for mediation, within the Chamber of Commerce, in order to give the defendant a good chance of making all the necessary payments.

[16] This is based on the author's experience as a former member of the Legal Department and Secretary of the Arbitration Board at the Chamber of Commerce and Industry in Riyadh, Saudi Arabia.

ADR deserves to become well established within the Saudi private sector, given its potential to save the parties legal fees and related costs, and may help them solve their legal disputes quickly. Correspondingly, business partners will be ready to enter into new business deals, since they are protected from being damaged by the public hearings that would take place in litigation.

(b) Are International ADR Mechanisms Applicable in Saudi Arabia?

As most ADR textbooks suggest, it is no longer the case that ADR is purely a North American phenomenon. Its techniques are being put to use in other parts of the world including England continental Europe, Canada, Australia, and some parts of the Middle East.

When we highlighted the arbitration centres in the Middle East earlier, we had the chance to see that most of the arbitration centres in that part of the world have some mediation and conciliation mechanisms before arbitration, and they would adapt the main principles of mediation that exist in Islamic jurisprudence for that reason. On the other hand, Switzerland, for example, has the Zurich mini-trial. This was drawn up by the Zurich Chamber of Commerce and has been in existence since 1984 (Redfern and Hunter 1991:32). In England moreover, developments have taken place in family and community matters as well as commercial spheres. An example is the Centre for Dispute Resolution (CEDR) that offers a full range of ADR procedures for commercial disputes (Palmer and Roberts 1998: 47).

(c) Forms of ADR Suitable for Saudi Arabia

In reading about the forms of ADR applicable in other jurisdictions and based on the experience taken from the practice of the Chambers of Commerce, we believe that the following ADR mechanisms are suitable for the Saudi Arabian legal culture.

Rent-a-Judge

Under this system, the position is regulated by legislation in the USA. The parties may request that a court appoints a referee, and in most cases the referee is a retired judge. The referee adopts an informal process and delivers a judgement, which can be enforced by the courts (Riskin & Westbrook 1997:670 –671). I believe that this would work in Land disputes in Saudi Arabia, since it usually takes time to be settled in the Islamic courts. In addition, some of the issues related to international loan agreements include those related to land in Saudi Arabia.

As mentioned in Chapter 1, Islamic courts in Saudi Arabia do not hear banking disputes nor register mortgages in the Courts, and therefore the *Rent-a-judge* method could help fill a gap in the Saudi banking sector, as a way of settling disputes. [17]

Mini-trial

This is a process whereby a senior member of management for each of the disputing parties appoints a third party to meet and agree the ground rules of the process, which will concentrate on the limitation of the number of documents to be disclosed, and also on the time to be taken by each party in presenting its brief and its case. If so requested, the neutral advisor will give an oral opinion on the likely outcome. The parties after that may again attempt to negotiate a settlement. The proceedings, sometimes described as compromise negotiation, are confidential, and may not be used in any subsequent litigation, except for the evidence (Reisman, Craig, Park & Paulsson 1997:85-86). We believe that this method is adequate for construction disputes, since the Board of Grievances on many occasions would suggest the parties go for arbitration on the grounds that those type of disputes involve many technical issues, as for example *Al-Hoshan Ltd v Al Farhan Ltd (1995)* mentioned in Chapter 2. Even though this method of ADR was adopted in a major dispute involving the construction of military air base hangars, the process failed and the parties went for arbitration.

Neutral Listener Agreement

In this process, each party to the dispute submits its best settlement offer in confidence to a mutually selected third party, who then informs the parties whether the offers are similar or overlapping, or within a range, which he or she considers to be negotiable. In this case, he would help them to negotiate and close the gap. It is worth mentioning that this method has been established in the United States Centre for Public Resources (CPR), which plays an important role in promoting ADR in the United States (Redfern and Hunter 1991: 29). It should be mentioned that this method is suitable for insurance contracts in Saudi Arabia since they are not allowed in Saudi courts. Some of the insurance claims however, are not for a large amount, and therefore, not worth taking to arbitration. Many people think that there should be some other official mechanism, as mentioned above, to solve these small insurance claims.[18] It should

[17] This is based on the experience of the author as former Mediator and Secretary of the Arbitration Board in Saudi Arabia.

[18] If the claim were less than 100,000 SR, the Ministry of Commerce would refer the parties to ADR through the Chambers of Commerce.

be mentioned, however, that this type of ADR would work more effectively upon the establishment of a Saudi commercial court as we should suggest below.

Michigan Mediation ("The Velvet Hammer")

This process started in Michigan where the courts maintain lists of lawyers who have been trained and certified as mediators. Each party in this ADR method chooses a mediator, and then the chosen mediators choose a third mediator to act as umpire. The court clerk then sets a time and place for the mediation hearing, and notifies both the parties and the mediators. The mediators have to deliver their decision within 10 days of the hearing, and the parties are given 20 days from the decision date to accept or reject the panel's award (Redfern and Hunter 1991:30). This process could be adapted to fit the ADR philosophy in Saudi Arabia, especially in *Family Business* disputes. The Chambers of Commerce in Saudi Arabia have been looking for a mechanism to protect family businesses from collapsing after the death of the founder of the business. They believe that they have to do something for names that constitute trademarks in the Saudi private sector after the collapse of a couple of Saudi business names in Jeddah.

(d) Forms of Informal Arbitration

In recent years we have started to see some *Shari'a* law offices advertising " *Mediation and Arbitration Services*". The person who began this type of ADR was Shak Abdulaziz Al Mosnad (a former judge and a leading religious talk show host in Saudi Arabia). The ADR process would start based on an agreement between the parties to refer the matter to him instead of to the *Shari'a* court at which he had been a senior judge. This type of ADR is useful in property and inheritance matters since they often take time to be settled and also people insist upon confidentiality. The other advantage is that this ADR is not subject to the supervision of the *Shari'a* court. Moreover, ADR is conducted by someone highly respected by all the judges in Saudi Arabia and is an expert in *Shari'a* law. This made many people believe in this method of settling disputes because of its efficiency, and adequacy. However it should be noted that this type of ADR is not useful either for commercial or for construction disputes. The judges from this type of background would not be experts in applying the customary rules relating to these particular activities. The validity of this method of arbitration in an international context is not clear. Moreover, there remains the question as to whether this arbitration leads to an award, which may be enforced in another country under the New York Convention. The lack of a clear answer has resulted in lawyers in general, avoiding using this type of informal arbitration,

especially in international commercial disputes where they have to be enforced in another country.

Does Amiable Compositeurs and Ex Aequo et Bono Exist in Saudi Arabia?

As seen by many academics, it is almost impossible to frame a definition of *amiable compositeurs* Redfern and Hunter 1991:36).[19] What we have to know is that it is a process where the arbitral tribunal may disregard some requirements in the interest of reaching an equitable solution to the dispute (Redfern and Hunter 1991:36). The process moreover, is for the purpose of finding a binding and enforceable award. It has to take a flexible approach to the quantification of damages, in order to reflect commercial fairness and reality, rather than regarding itself as bound by the rules of law governing the measure of compensation. When acting this way in a formal Saudi arbitration, the arbitral tribunal, however, has to consider the requirements of public policy, and that the award does not conflict with Islamic jurisprudence (Article 20 of the Saudi Arbitration Regulations).

Ex aequo et bono on the other hand, was a method formerly used only between states, as seen in Chapter 6, but is now used in private arbitrations (Redfern and Hunter 1991:38). The arbitrator in this process would have to be authorised by the parties to disregard the rights and obligations in force between the parties, if they are not equitable. This method is recognised under the Saudi Arbitration Regulations as mentioned in chapter five when we compared the Saudi Regulations with the Model Law, but, again, Islamic general principles have to be considered[20]

5. GOVERNMENTAL ACTION TO IMPROVE THE PRACTICE OF ARBITRATION

(a) Generally

We believe that there are many key factors that should be considered in developing the arbitration system. At this point we need to examine what has to be done by the government to improve these factors.

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[19] Compromise in Islamic jurisprudence means that it must not permit what is prohibited, or prohibit what is permitted.

[20] Article 16 of the Saudi Arbitration Regulations reads as follows: "A decision of arbitrators shall be taken by a majority of votes and where they are authorized to make a conciliation, the award shall be made unanimously."

(b) The Role of Legal Education

In Saudi Arabia there are two routes for legal education. The first of these is the *Shari'a* Law School Programmes. These programs are designed to produce graduate judges for all the *Shari'a* Courts. The second is the law departments in the colleges of Administrative Science in different universities throughout the Kingdom. The second route is mainly to educate lawyers and legal advisors either in the private sector or in the government. The fact that these two programs are detached from each other, and that the main core subjects are not taught in both programs, results in having all the legal issues looked at from two different perspectives. In the view of many practitioners and academics that has resulted in the so-called legal parallelism, that can be seen when the *Shari'a* courts claim jurisdiction over a purely commercial dispute, and perhaps refuse to apply the applicable Saudi regulations. From an international academic point of view, reading about the structure of the courts and legal system in Saudi Arabia gives the reader the impression that legal parallelism exists in the Saudi jurisdiction.[21]

To change an issue or an aspect in our legal system, we have to go to the source of the issue that we have to change. In this situation, it is the Saudi legal education that has to be unified so that we can ensure that the judges, lawyers and academics of the future will look at all the legal issues from the same perspective and encourage interpretation and legal opinions with regard to many Islamic matters that are considered in many international systems and transactions. We believe that if the private sector is allowed to establish colleges and universities in Saudi Arabia, they would help the government to overcome the problem. The business community moreover, would know what the new law graduates have to learn about commercial law in general, based on their experience in doing business in the international community. These universities would then design their programs to teach *Shari'a* as the main law of the land, and teach more about international law, in general. Moreover, these programs would enable students to look into the *Shari'a* aspects and know how to develop it as they learn about all international law subjects including arbitration. [22]

[21] This was the first question Professor Simon Roberts asked the author when he drafted his description of the legal system. The author believes his question to be extremely relevant.
[22] Take, for example, the LLB (Bachelor of Law) of al Khartoum University before 1991 where students would study Islamic law and common law at the same time.

(c) The Need to Establish a Saudi Commercial Court

When we highlighted the important aspects of the Saudi legal system, we had the chance to see that commercial disputes are currently under the jurisdiction of the Board of Grievances. As we also have seen this board was established by King Abdulaziz, the founder of Saudi Arabia, to hear complaints and grievances in order to resolve them personally (Nader 1990:4). As mentioned in Chapter 1 the establishment of the Board could be compared with the jurisdiction of equity, which is central to English law. The situation was similar in that the parties had the chance of entering the King's sitting area to submit their problems and disputes in order to find an amicable solution instead of going to the *Shari'a* judge.

As seen in Chapter 1, the task of the Board of Grievances developed in two different stages. At first, the Board was located within the Council of Ministers whose job was to receive complaints, investigate them and suggest an opinion. This opinion would then be sent to the concerned body to be either accepted or rejected, based on the reasons given in each case. A second phase was entered in 1954, when the Board became independent and gained jurisdiction over administrative, commercial and some criminal matters.

From the perspective of many local and foreign practitioners, the fact that the educational background of the judges is not based on comparative law alongside their Islamic law studies, means that the judges are not considered trained enough to hear purely commercial disputes, and realise all the types of liabilities and damages that arise in certain fields. For example, in some jurisdictions, the claimant can bring a claim for pure economic loss. This can be seen when for example a factory closes temporarily because of a power cut, and the claimant tries to bring a claim for loss of profit, which would have been gained during the time the factory was closed. The practice in Saudi Arabia does not allow this claim since any wrong doing or non-fulfilment of any contractual obligations must cause actual and direct damage to the claimant.[23]

I believe that establishing pure commercial courts in Saudi Arabia where the judges are trained in comparative and Islamic law as mentioned above, would help in developing commercial legal practice in Saudi Arabia. It would also help in dealing with international

[23] This is based on the author's experience as a former Secretary of the Arbitration Board at the Chambers of Commerce in Saudi Arabia. In an arbitration case, concerning a commercial agency, between Al Babtain and a German Saudi computer company, (Saudi Microsoft) the Saudi party, was not able to recover the profit that they would have made, if the agency was still effected between the parties. This decision was arrived at even though the termination was by the Germany party in violation of the contract.

arbitral tribunals sitting in Saudi Arabia. In addition to this, many legal systems in the world are abolishing their specialised tribunals for human rights reasons.

The situation in Saudi Arabia at the present time has to change to be brought in line with Saudi Arabia's efforts to enter the World Trade Organisation (WTO). Establishing a commercial court, therefore, is no longer an option but a must in order to cope with all the requirements of WTO membership.[24]

Establishing a commercial court will also have an effect on the partnership between the courts and the arbitral tribunals sitting in Saudi Arabia. Many arbitral matters will be well observed by judges who are trained in dealing with urgent, commercial matters such as interim measures of protection and other related issues that have been discussed in chapter five under the heading of court support for the Arbitration Agreement and other Matters

(d) Creating the Practical Legal Environment for International Arbitral Tribunals.

As we have seen in different parts of this study, parties to an international commercial arbitration are free to choose for themselves where their arbitration should take place. The issue is not just concerned with the availability of arbitration centres and suitable arbitration laws. Moreover, when parties are faced with such a question there will be no universal answer. However, the nationality of the parties will have to be considered since the arbitration generally has to be held in a neutral country (Redfern and Hunter 1991:296).

In the process of answering the question concerning the seat, there are other factors that have to be taken into consideration. One of the factors is political. This can be seen when examining the acceptability of the particular location to the parties. In particular, the question of whether any restrictions are imposed on the entry of the arbitral tribunal, the parties, their advisors and witnesses (Redfern and Hunter 1991:296). Saudi Arabia at the present time is working on changing its rules for obtaining a visa. The Ministry of the Interior is coping with other governmental bodies to change the current rules to make them much more flexible than before. This will have the effect of making Saudi Arabia accessible for international arbitral tribunals willing to sit in Saudi Arabia.[25]

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[24] Even though there is not much material written on the subject, Saudi people read in the local newspapers about the arguments between Saudi officials and the WTO over the above-mentioned specialized tribunals and the applicability of Islamic Law.

[25] Based on the experience of the author, in 1994 a famous Egyptian arbitrator had difficulty in obtaining a visa for the purpose of attending the final hearing of an arbitration case.

Furthermore, among the factors that have to be considered, are economic factors. The most important example that can be given in this regard is the question that faces the parties, as to whether there is freedom to transfer the necessary funds to and from the country concerned (Redfern and Hunter 1991: 296). As we have seen above, when we mentioned the new Saudi Investment law, there is a great deal of flexibility in the applicable regulations with regard to the transfer of funds. Such regulations will be applicable to an arbitration that takes place in Saudi Arabia.

Finally, there are other practical considerations such as the availability of suitable premises for the hearing, and suitable infrastructure to accommodate the parties, advisors and witnesses (Redfern and Hunter 1991:297). The question, also, of the availability of the highly technical equipment that could be used in arbitration has to be considered. As proposed at the LCIA seminar, *'21st Century Technology in International Commercial Arbitration'*, lawyers should no longer have to carry copious documents with them when travelling for arbitration hearings, since they could be scanned and then presented at the hearings. Moreover, there is more advanced technology allowing video conferencing, which could obviate the parties and their lawyers having to travel frequently during the arbitration proceedings. [26]

The availability of such facilities will have to be considered by the parties when deciding on the place of arbitration. The Saudi Arabian Chambers of Commerce or other entities concerned with international commercial arbitration will have to consider all these factors when improving the environment for international arbitration.

6. CONCLUSION

At the end of this project we should ask ourselves a question as to what would happen if all the arbitration laws that exist in the international business community were the same. Of course, the answer is that an arbitral tribunal would not have to enquire whether there were any special provisions governing arbitration in the law of the place where it had its seat. In reality this situation is not likely to be achieved as we have seen already, each state having its own national characteristics, its own interests to protect, and its own concepts of how arbitrations should be concluded in its territory. However, at some point it became inconvenient for the international business community to have the regulation of international commercial arbitration differ between one country and another and this has definitely led to the search for a solution.

[26] A computer company called Legal Technologies organised this seminar. The material used was a model case so that the participants would see how the system worked in practice.

Up to the present time two major developments can be seen. The first is for the State to loosen the controls which it seeks to exercise over international commercial arbitrations conducted in its own territory. As we have seen in Chapter 5, the Model Law provides that national courts should not intervene in the arbitrations unless authorised to do so. Also, as has been seen in Chapter 3, modern arbitration statutes consider this element even if they are not adopting the Model Law wholesale. The second development is to detach an international commercial arbitration from control by the law of the place in which it is held, and to observe the so-called delocalisation theory. The idea of this theory is, instead of having a dual system of control, one by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control and that is the place of enforcement. In this way, we could describe arbitration as a floating jurisdiction.

Saudi Arabia cannot remain detached from all types of international business transactions and activities. This is the reason why Saudi Arabia has adopted new regulations for arbitration, such as the Royal Decree M/46. The said regulations were not passed originally to govern international arbitration, but rather for those types of disputes that are either not allowed to come before the Saudi courts, such as insurance, or not jurispdentially developed by Saudi judges, such as construction disputes. But at the present time, we believe it is necessary to go further, because of the new environment recently created for international foreign investment in Saudi Arabia. This fact makes harmonisation of arbitration laws a must, rather than an option left to individual countries, to either adopt or reject the suggested international standards mentioned in the Arbitration Model Law that we already have addressed in Chapter 5.

When thinking about developing international commercial arbitration in a specific country, what has to be understood is that the parties in any international arbitration want their dispute to be resolved neutrally, and to be detached from the governmental institutions and cultural bias of either party. Moreover, the parties want to apply flexible international procedural rules, rather than a particular national legal system. Also, they have to understand that the parties need to ensure that there is no connection between the dispute and the state in which the proceedings are held.

In our opinion, on the other hand, old Islamic jurisprudence has had an opinion on the subject of delocalisation and harmonisation of arbitration laws. As quoted in El Adhab, Abu Zakaria Al Ansari took the view that the arbitration taking place in an Islamic country should be considered as foreign, if both parties to the dispute were foreigners and the subject matter of the dispute was legal in their own religions (1999:51). As can be seen from this opinion, it recognises the concept of international public policy, which is well known in today's

commercial arbitration practice. Even though this opinion represents a minority viewpoint there is a directive from the Saudi government to apply the easiest opinion in Islamic jurisprudence when it comes to passing judgements and establishing authorities.[27]

Also, there has to be some understanding and awareness of any developments that may take place in the future. The suggestions of Judge Holtzmann mentioned in Chapter 6 relating to establishing a new court for the enforcement of international arbitral awards, are not far from being established in the near future.

As seen in Chapter 6, a comparative study made in the 19th century by the French author Foelix, reveals that the jurisdictional approach was not the method adopted in most countries. By analogy, an arbitrator was considered an agent of the parties, and the award as a contract executed between them. The contractual approach, moreover, gave the application of local law weaker support than that of a jurisdictional one. On the other hand, as quoted in El-Adhab, Ibn Tamimiyya (one of the students of the Hanbali School which is officially applied in Saudi Arabia) concludes that any contract (and we assume arbitration as well) is binding unless it is contrary to public policy or deals with a purpose forbidden by God (1999:24-25). This indicates that Islamic jurisprudence knew both the jurisdictional and the contractual approach to delocalising arbitration.[28]

As we know already from this research, international commercial arbitration has undergone numerous fundamental changes, and the globalisation of the economy has opened up new directions for business activities, as well as arbitratable disputes. Therefore, the harmonisation of international commercial arbitration needs to take place with the participation of all countries. Each country, therefore, will have to retain its own identity, but at the same time overcome any legal, cultural, and educational differences, in order to ensure smooth and flexible harmonisation.

For the Islamic world, September 11 marked the beginning of a new era. The world has finally understood the distinction between fundamentalism and extremism. Moreover, it has understood the distinction between those who choose to be isolationist and those who believe that Islam exists and can be developed in all eras. On the other hand, International Arbitration is an area where that distinction can be presented, and instead of writing about a separate system

[27] The can be seen in the decision of the Judicial Board No. 3 dated 7/1/1347H. It was also attached with the High Approval dated 24/3/1347H.

[28] At the present time, the Board of Grievances in Saudi Arabia went to the extreme in referring the parties to arbitration, if they had an arbitration clause in their contract. This situation has been illustrated in the case between Al-Hoshan Ltd v Al-Hajez Ltd, mentioned in Chapter 2.

of Islamic arbitration, someone should ask the important question, what is so non-Islamic about all the aspects of international arbitration that have been addressed in this thesis.

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