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The recognition and enforcement of foreign commercial arbitral awards in Saudi Arabia: comparative study with Australia

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THE RECOGNITION AND ENFORCEMENT OF FOREIGN COMMERCIAL
ARBITRAL AWARDS IN SAUDI ARABIA: COMPARATIVE STUDY WITH AUSTRALIA

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LLB (King Saud University)

LLM in Law (University of Jordan)

This thesis is presented as part of the requirement for the award of the Degree of Doctor of
Philosophy of the University of Wollongong

The University of Wollongong

School of Law

March 2014

THESIS CERTIFICATION

I, Abdulaziz Mohammed bin Zaid, declare that this thesis is my own work, unless referenced otherwise, and has been submitted for the award of Doctor of Philosophy from the Faculty of Law of the University of Wollongong and no other academic institution.

Abdulaziz Mohammed bin Zaid

March 2014

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ABBREVIATIONS LIST

ADR	Alternative Dispute Resolution techniques
AH	<i>Anno Hijirae</i> (Latin) (sometimes simply written as H for <i>Hijri</i>): the Arabic calendar wherein year 1 AH corresponds to the Gregorian calendar year 622 AD, the year in which the Prophet Mohammed (PBUH) journeyed from Mecca to Medina
Aramco	Arabian American Oil Company
CAA	<i>Commercial Arbitration Act 1984</i> (NSW)
CIETAC	China International Economic and Trade Arbitration Commission
<i>New York Convention</i>	<i>Convention on the Recognition and Enforcement of Foreign Arbitral Awards</i> opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (' <i>New York Convention</i> ')
DR	Dispute Resolution: techniques other than litigation through the court system, including arbitration, mediation etc
<i>FJA</i>	<i>Foreign Judgments Act 1991</i> (Cth)
GCC	Gulf Cooperation Council
IAA	<i>International Arbitration Act 1974</i> (Cth)
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
<i>ICSID</i>	<i>Convention on the Settlement of Investment Disputes between States and Nationals of Other States</i>
KSA	Kingdom of Saudi Arabia
<i>Model Law</i>	<i>UNCITRAL Model Law on International Commercial Arbitration 1985</i> (also ' <i>UNCITRAL Model Law</i> ')
NSW	New South Wales.
PBUH	Peace Be Upon Him (an acronym formed by the initial letters of the English translation of the Arabic blessing (<i>salat</i>) traditionally invoked after the name of the Prophet Mohammed)
Public policy exception	<i>New York Convention</i> art V(2)(b); <i>Model Law</i> art 36(1)(b)(ii); IAA s 8(7)(b)
SAGIA	Saudi Arabian General Investment Authority
SAS	<i>Saudi Arbitration System 1983</i>
<i>Tahkim</i> (or <i>Tahkeem</i>)	Arabic word for Arbitration

UNCITRAL

United Nations Commission on International Trade Law

GLOSSARY OF ARABIC TERMS

<i>Ahkam Adliye</i>	Mecelle Code: ‘the civil code in force in the Ottoman Empire from 1869’
<i>Aladab</i>	Morals
<i>Aladab</i>	Behaviours
<i>Alqadha</i>	Judiciary
<i>Dawair Farei’h</i>	Sub-Circuit in the Saudi Grievances Board
<i>Diwan Al-Mazalem</i>	Grievances Board
<i>Estinaf</i>	Appeal
<i>Hadd</i>	Penalty prescribed by Allah himself on certain crimes
<i>Gharrer</i>	Legal status or condition that makes the contract forbidden according to the <i>Shari’a</i> law
<i>Hanafi</i>	Abu Hanifa Al-Naman (699–767), born and died in Kufa and he is one of the four imams in the Sunni sector.
<i>Hanbali</i>	Imam Ahmad Ibn Hanbal (780–855), one of the leading scholars of the Sunni Schools and founder of the Hanbali school
<i>Hudūd</i>	A set of specific offences that have specific penalties in <i>Shari’a</i> law.
<i>Ijma’a</i>	One of the four sources of Islamic jurisprudence, the consensus of the Muslim Scholars about particular issue.
Islamic Schools	The Sunni schools, <i>Shafi’i</i> , Hanafi, Hanbali and Maliki
<i>Li’aan</i>	A method of advocacy, ‘oath taking’, available in the event of a dispute between the spouses
<i>Maliki</i>	Imam Malik bin Anas (715–796), one of the four imams in Sunni schools in Islamic jurisprudence and the founder of Maliki School
<i>Masaleh Morsalah</i>	Public policy
<i>Quiās/ Quyas</i>	The means of reasoning by analogy that extends the cause of a particular issue solved by any source of Islam to a new one
<i>Qur’ān</i>	The holy Book of Muslims which is believed by Muslims to have been revealed by Allah (‘God’) to the Prophet Muhammad (PBUH) and contains the divine commands that Muslims believe
<i>Quisas</i>	Retaliatory punishment determined by Allah himself
<i>Ta’zir</i>	Discretionary punishments determined by Allah himself

<i>Ribā</i>	Financial interest which has several types (<i>Ribā Al-jahhiliyya</i> , <i>Ribā Al-Nasi'a</i> and <i>Ribā Al-Fadhl</i>)
<i>Shafi'i</i>	Muhammad ibn Idris Al-Shafi'i (766–820), one of the leading scholars of the Sunni schools and the founder of the Shafi'i school of Islamic jurisprudence
<i>Sunnah</i>	The speech or tradition of the Prophet Muhammad (PBUH)
<i>Tadgeeg</i>	Audit-Circuit
<i>Thkim/Thkeem</i>	Arbitration
<i>Wilaiat Almadhalem</i>	The special court for dealing with compliance on part of government employees

TRANSLITERATION

Table of the system of transliteration of Arabic words and names used by the Institute of Islamic Studies, McGill University.

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
ḥ = ح	ḍ = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = هـ
dh = ذ	‘ = ع	w = و
r = ر	gh = غ	y = يـ

Short: a = اَ ; i = اِ ; u = اُ

Long: ā = آ ; ī = اِي ; ū = اُو

Diphthong: ay = اَي ; aw = اَو

ABSTRACT

Arbitration is a system for settling disputes and a substitute for litigation in court. This system has been used throughout the ages. It has, however, evolved over time in to the current system of arbitration, which has been shaped by changes in the world. Because of the growth of international commercial interaction, the number of disputes has increased. A faster way than litigation to resolve disputes is through the use of arbitration. Different nations, however, have different customs, language, culture and religion, and these may result in some conflicts and disagreements in applying foreign arbitral awards. This is exactly the case with Saudi Arabia. The country has been mistaken in discouraging arbitration of foreign awards, without much understanding of their culture, and the laws that regulate foreign arbitration. There is no country that would willingly discourage arbitration if it is an important source of economic development. This research is a comparative study between Saudi Arabia and Australia, to show that Saudi Arabia, indeed implements foreign arbitral awards, and that it is the difference in culture, laws, and practice that lead to different negative perceptions about the country's arbitration system. This has been achieved through the examination of the legal provisions regulating foreign arbitration in Australia, and of the Grievances Board in Saudi Arabia in dealing with a foreign arbitral award. The examination focused on comparing experiences, case studies in approving foreign arbitral awards, and literature about implementation of foreign arbitral awards in Australia and Saudi Arabia. The comparison is based on efficiency, justice to the parties in the individual case, and societal values.

One of the most important finding is that there is a higher level of efficiency in regard to Australia, and equal maintenance by both jurisdictions of societal values and justice to the parties concerned, although some judgments appeared to discourage arbitration in both countries. These findings and analysis show that it is important to understand different countries' legal systems, cultures, customs, language and religion, in order to improve understanding of foreign legal regulations related to arbitration. This will also help increase efficiency in implementing foreign arbitral awards in the respective countries.

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Finally, I would like to stress that I consider this thesis to be the start of a challenging research program, rather than my final word on this topic.

1 INTRODUCTION

1.1 General Background

Arbitration has been known since the initial stages of the formation of legal thinking in humans and evolved with the development of societies throughout the ages.¹ The Sumerians knew of arbitration, as did the Greeks, Romans and the Arabs before Islam, and it has been given legitimacy as a system by Islamic law.² Simply put, this system is a method for settling disputes that is at the same time binding on the parties, and it is a substitute for litigation in court.³

It is clear that the increase in international commercial transactions has contributed to the globalisation of the legal community. It has also led to increased recourse to arbitration as a peaceful means of resolving disputes, (and of avoiding generally costly and time-consuming court action). This in turn has led to a realisation by the legal community of the importance of understanding arbitration. Arbitration offers a number of advantages: it preserves the ongoing relationship between the parties where ‘doing business during or after litigation is rarely feasible.’⁴ Additionally, it gives the parties multiple options to guarantee the application of the law which they themselves have chosen.

¹ See Kahtan Al-Doari, ‘*Alḥkīm fī Alfqh ū Alqanwn Alwad’y* [Arbitration Contract in the Fiqh and the Law]’ (Dar Al-Furqan, 2003) 38.

² For more information about arbitration from the pre-Islamic era to the emergence of the four Islamic schools of thought, see Abdulrahman Yahya Baamir, *Shari’a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing, 2010) 45; also see Mona Rafeeq, ‘Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?’ (2010) 28(1) *Wisconsin International Law Journal* 108, 113, 118. In fact, ‘international arbitration has survived and prospered for hundreds of years despite the emergence of strong national legal and political systems in the 19th century’: at 2. For more information, see Richard Garnett, ‘International Arbitration Law: Progress towards Harmonisation’ (2002) 3(2) *Melbourne Journal of International Law* 400, 401–402.

³ However, this binding nature might be affected by some theories which characterise the nature of commercial arbitration. One of them is that the arbitration has a contractual theory where it depends on the parties’ selection of or ‘will’ in regard to arbitration. For more information, see Hong-Lin Yu, ‘A Theoretical Overview of the Foundations of International Commercial Arbitration’ (2008) 1(2) *Contemporary Asia Arbitration Journal* 255, 265.

⁴ See Thomas W Walde, ‘Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation’ (2006) 22(2) *Arbitration International* 205, 205.

It should be noted that arbitration is considered a legal means of resolving disputes outside the courts with the agreement of the parties, who refer disputes that cover the full gamut of legal problems to the process. Individuals called ‘arbitrators’ are assigned to determine the outcome of listed disputes instead of the parties otherwise resorting to the competent court.⁵

The possibility of resorting to arbitration is often created in a clause which is a condition in the contract of the main transaction between the parties.⁶ This feature records the prior desire of the parties to resort to arbitration as a means for settling future disputes between the parties. Where there is no reference in the contract between the parties to resort to arbitration to resolve any potential conflicts of the future, arbitration may also be derived from a separate agreement.⁷ These types of agreements have been provided by a number of international conventions (namely, the *New York Convention* of 1958 and the *Geneva Convention* of 21 April 1961 (which also include the details of such agreements)).

Arbitration also provides multiple choices in terms of the selection of the tribunal, the law applicable to the dispute, times of meetings, and period for resolving the dispute. It is possible to say that the increased resort to arbitration is due to the fact that arbitration is cheaper and faster than the litigation, which makes arbitration the perfect and practical means for solving any disputes,⁸ and with the confidentiality offered by a non-litigious settlement where the

⁵ There are several definitions for this means in Arabic and in the Western culture and these definitions revolve around that meaning. For more information, see Sulaiman Ibrahim Al-Eyari, ‘*Althkīm Alwaṭny ū Aldawfī* [National and International Commercial Arbitration]’ (1st ed, 2007) 22; Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International, 2nd ed, 2001) 1.

⁶ See John Humphrey Carlile Morris, John David McLean and Kisch Beevers, *The Conflict of Law* (Sweet & Maxwell, 6th ed, 2005) 176–7.

⁷ See Symposium on Commercial Arbitration and University of Adelaide, Corporate and Business Law Centre, *Current Issues in Domestic and International Commercial Arbitration’: Papers Presented at the Second Symposium on Commercial Arbitration Held at the University of Adelaide on Saturday August 11 1990* (University of Adelaide, Corporate Law Centre, 1990) 31.

⁸ For more information, see Edward Sykes and Michael Pryles, *Australian Private International Law* (Law Book, 1991) 141; Rafeeq, above n 2, 115. For more details, see Marei Bin Mahfouz, ‘*Althkīm Altjarī Aldawfī ū Qwa’d Alshri’h Alislāmīh* [International Commercial Arbitration and the Rules of Islamic Law]’ (Bin Mahfouz, 2002) 101–103.

investors are able to keep the dispute as much as possible *private*.⁹ The best example of this is the case of *Government of Saudi Arabia v Arabian American Oil Co (Aramco)* in the 1970s, which was solved by arbitration and away from the national courts. Hence the facts of this case were not fully declared to the public as would occur in public issues related to the Saudi government.¹⁰ Such outcome will help protect trade reputation and also the possibility of continued relations and future transactions between the parties, where litigation in national court jurisdictions does not offer such guarantees. Furthermore, the willingness of the parties to apply the rules and norms of international transactions makes them prefer arbitration because the arbitrator will apply the law chosen by the parties and which may not comply with all provisions of the law of the state where the arbitration is conducted or where it is to be applied. Unlike the litigation conducted before the judiciary, arbitration is more liberal and broader in terms of the accepted rules and international norms.

That is because the arbitrator is not restricted objectively by the law of a state unless it is the choice of the parties, nor is he/she restricted by the formalities followed in the courts, such as the dates and locations of meetings to consider the case.¹¹

Consequently, the increasing recourse to arbitration generates an increased interest in arbitration by legislators and governments around the world, who seek to organise the laws that govern its procedures. Thus, the United Nations held some international seminars and conferences and issued several conventions to organise the resort to the arbitration, including, for example, the

⁹ See Ashraf Al-Refai, '*Etfaq Althkīm ū Almshklat Af mīah ū Alqanwnyah fy Af laqat Alkhaṣah Aldawlīh* [Arbitration Agreement and Legal and Practical Problems of International Private Relationship]' (Dar-Alfeker, 2003) 4.

¹⁰ Aramco is the Saudi Arabia Oil Company and this case was resolved in the 1970s. For more information on this case, see Walaa Refat, '*Althkīm Altjarī Alwtnī ū Aldwī fy Almmlaka Al'rbīah Als'wdīah* [International and National Commercial Arbitration in Saudi Arabia]' (Chamber of Commerce and Industry in Jeddah, 1999); Yahya Al-Samaan, 'Dispute Resolution in Saudi Arabia' in Eugene Cotran (ed), *Yearbook of Islamic and Middle Eastern Law* vol 7 (2000–2001) 71, 79; Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and Sharia: The Case of *Pacta Sunt Servanda v Ordre Public*: The Use of *Ijtihad* to Achieve Higher Award Enforcement' (2009) 6 *Macquarie Journal of Business Law* 93, 114; Jalal El-Ahdab and Abd Al-Hamid El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 3rd ed, 2011) 605.

¹¹ See Jaber Nassar, '*Althkīm fy Al 'qwd Alcdarīh* [The Arbitration in Administrative Contracts]' (Dar-Alnahda, 1997) 5.

New York Convention of 1958 ('the *Convention*')¹² (which concerns the recognition and enforcement of foreign arbitral awards) and the *UNCITRAL Model Law* of 1985.¹³ Additionally, the *Convention on the Settlement of Investment Disputes between States [that] Host Arab Investments and the Citizens of Other Arab Countries* was signed on 10 June 1974¹⁴ and, also within the Arab States, the *Convention on the Enforcement of Judgments and Arbitral Awards* was concluded and approved by the Council of the League of Arab States on 14 September 1952.¹⁵

This international attention highlights the importance of arbitration as a quick and effective method in resolving disputes in the area of world trade and contributes to making arbitration the primary and most rapid means of pacific settlement of disputes for many participants in international trade.¹⁶ However, this resource raises several problems, especially in the implementation phase. Thus, it is important to describe such problems precisely and adopt a clear method to reach the best results, especially in regard to a comparative study.

¹² *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*' or herein '*the Convention*').

¹³ *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17, (21 June 1985) annex 1 (*UNCITRAL Model Law*).

¹⁴ Iraq, Jordan, Sudan, Syria, Kuwait, Egypt and Yemen were the initial signatories of the *Arab Convention*, with Libya and UAE later adhering to it: Hamid G Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer, 2002) 182–3.

¹⁵ *Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards*, 14 September 1952 (entered into force in 10 November 1952).

¹⁶ Recognising the importance of arbitration and on the principle of cooperation between states in the implementation of the provisions of international commercial arbitration, the Arab Gulf Countries ratified the *Convention for the Execution of Judgments, Delegations and Judicial Notifications*, opened for signature 29 Shawwal 1414 AH corresponding to 10 April, 1994 (entered into force 14 Rajab 1416 AH corresponding to 4 December 1995) and established a special arbitration centre under the Gulf Cooperation Council on 19 March 1995). For more information about this centre, see Brian W Totterdill, 'Arbitration Rules: The GCC Commercial Arbitration Rules' (Paper presented at the Arbitration Workshop for Contracts and Procurement Engineering under the GCC, Abu Dhabi, United Arab Emirates, 23–25 October 2000); the Unified Bill of arbitration for the Gulf Cooperation Council (GCC) which is not yet approved; Ahmed Sheta, 'The Enforcement of Arbitral Award in the Unified Bill of Arbitration for the Gulf Cooperation Council' (Paper presented at the New York Convention 50 Years: Practical Perspectives on the Recognition and Enforcement of Foreign Arbitral Awards, Cairo, 10–11 November 2008).

1.2 The Problem

The rapid recourse to arbitration raises many questions and problems about the laws that govern the resort to arbitration, and laws governing the conduct of its procedures. One such problem is the misunderstanding or different interpretations of the legal system of different countries by the various parties, particularly those foreign to any of the countries involved, leading to wrong public and international perceptions about those countries. Such is the case with Saudi Arabia. This is evident from a number of previous studies conducted by various researchers or in opinions expressed by influential professionals.¹⁷ Additionally, questions of effectiveness, application and jurisdictional coverage of the arbitration system continue to demand more attention and work. This research will, therefore, critically analyse the role of the competent court, and the principles guiding the implementation of foreign arbitration in both Saudi Arabia and Australia to show that Saudi Arabia implements foreign arbitral awards, while examining how differences in culture, laws, and practice can lead to various negative perceptions about the country's arbitration system. This means that the analysis of such provisions is urgently needed in order to discover the practical application before the competent courts in the implementation of the provisions of Foreign Arbitral Awards. This method necessarily involves an examination and analysis of the role of the national judge in the implementation of national rules, international conventions and the international norms that govern the operation of commercial arbitration. Unfortunately, there are some studies that have provided inaccurate material and reached inaccurate conclusions about the role of Saudi courts in implementing the provisions of Foreign Arbitral Awards (as we shall see in section 1.6.2 Implementation in Saudi Arabia). This in turn requires an analysis of the provisions in order to know the real role of the Saudi judge compared to the role played by the Australian judge in performing the same task in order to find out how flexible and efficient the Saudi judge in implementing the provisions of foreign arbitral awards.

¹⁷ See section 1.6.2 Implementation in Saudi Arabia (B) 'Previous Studies' which discusses these studies.

It should be noted that the competent court in Saudi Arabia is the Grievances Board.¹⁸ In Australia it is the Supreme Court of each State and the Federal Court at Commonwealth level. The role of these courts will be explained in more detail later in this thesis.

1.3 Research Questions

This research will address the following questions in order to identify and evaluate the respective roles of the Saudi and Australian courts in approving or rejecting the implementation of foreign arbitral awards:

- (1) Why is arbitration so commonly used in the resolution of commercial disputes? What advantages does it have over litigation? In particular, what is the advantage of arbitration in disputes in the area of international commercial trade?
- (2) What particular legal obstacles exist to the enforcement or recognition of an arbitral award made in one country within the territory of another country?
- (3) What international or regional conventions have been entered into to overcome the difficulties identified in (2)? Why is the *New York Convention* the most important of these?
- (4) How have the provisions of the *New York Convention* been adopted in Saudi Arabia and Australia respectively? Are there any significant textual differences in the way the *Convention* has been adopted in these countries? Are there any constitutional issues governing the implementation of the provisions of foreign arbitral awards?
- (5) From a review of the decisions of the Saudi Grievances Board that have been obtained, have there been any distinctive interpretations or applications of the *New York Convention* under Saudi law, particularly having regard to the following legal issues: (a) the constitutionality of laws implementing the provisions of foreign arbitral awards, (b)

¹⁸ *Saudi Grievances Board System 2007* s 13(G).

public policy, (c) the principle of reciprocity, (d) the extent of the judge's authority to consider the subject matter of the case, (e) and the possible severability of the ruling if it includes one part which is considered contrary to public policy (and that provision is severable)?

- (6) From a review of the decisions of the Australian superior courts (the Federal Court and the State Supreme Courts), have there been any distinctive interpretations or applications of the *New York Convention* under Australian law, particularly having regard to the following legal issues: (a) the constitutionality of laws implementing the provisions of foreign arbitral awards, (b) public policy, (c) the principle of reciprocity, (d) the extent of the judge's authority to consider the subject matter of the case, (e) and the possible severability of the ruling if it includes one part which is considered contrary to public policy (and that provision is severable)?
- (7) What conclusions can be drawn from the similarities and differences of the Saudi and Australian approaches? If there are significant differences, can they be explained in terms of differing emphasis being given to the competing ideals of: (a) efficiency, (b) justice to the parties in the individual case, and (c) societal values?

1.4 Scope and Methodology

1.4.1 The Scope

This thesis will focus on the approval of foreign arbitral awards in Saudi Arabia and Australia only. Consequently, domestic arbitral awards will not be examined.

In order to compare these laws, this study will be specific and focused on the following aspects:

- A. The constitutionality of laws that govern the implementation of foreign arbitral awards in both countries.
- B. The formal and substantive requirements in applying foreign awards in both jurisdictions.

C. The legal nature of the decision of the competent court with regard to the implementation of foreign judgments.

D. The principles of the court in the adoption of the provisions of foreign arbitral awards, which are:

- i.* Judicial precedents (with analysis of some important issues which may clarify the position of the court).
- ii.* Public policy and its impact.
- iii.* The principle of reciprocity.
- iv.* The role of international and regional conventions in the adoption of the implementation of the provisions of foreign arbitral awards.

Consequently, the thesis structure will comprise six chapters, where the first chapter is the introduction, and the second will be about foreign arbitration and the competent courts. The third covers the foundations for the implementation of the foreign arbitral awards and will discuss the role and the effects of legislation and international/regional conventions on the judge's work in the recognition of foreign arbitral awards. The fourth chapter will discuss generally the conditions of implementation and the judicial role in implementing foreign arbitral award, and will address the formal requirements and the role of the national judge in approving foreign arbitral awards. The fifth chapter will be more specific and will discuss the most important defence in refusing the implementation, that is, 'the substantive defence', which is the public policy defence. Finally the sixth chapter will comprise the conclusion, findings and recommendations of this research.

1.4.2 Dimensions of the Comparison

This study is a comparative study of the role of the competent courts in Saudi Arabia and Australia in the implementation of foreign arbitral awards; thus, the dimensions of this comparison are based on:

1. Comparisons of various aspects of English and Egyptian laws as needed. This is because English law is the basis of the law in Australia and Egyptian law is very close to the Saudi law. In addition, the Egyptian law emanates from the Islamic rules which are the basic rules that the Saudi law relies on. English and Egyptian laws are also considered because of the ready availability of adequate references in this discipline. It should be also noted that the Supreme Court of New South Wales will be taken as a model for the State Supreme Courts in Australia, while reference to and use of other Supreme Court decisions/rulings will be made as needed. This is due to the fact that this research is conducted in NSW and this State was the first State in Australia to enact relevant legislation, that is, the *Commercial Arbitration Act 1974*, which was last amended in 2010.
2. Analysis of legal texts used and related to the approval of foreign arbitral awards. These comprise the *Saudi Arbitration System*, No M / 46 issued in 1983,¹⁹ and its Implementing Regulations issued by the decision of the Council of Ministers 7 / 2021 issued in 1985;²⁰ and the Australian *International Arbitration Act 1974* (Cth). As the efficient resolution of disputes is the primary goal of arbitration, this comparison will explore which legal system is more suited to achieving that end.

¹⁹ *Saudi Arbitration System*, issued by Royal Decree No M / 46 of 12/7/1403 AH 24 April 1983. It is important to mention that there is a new Saudi Arbitration law that has been issued recently after I finished conducting this research and had largely completed writing this thesis. It was issued by the Royal Decree No M / 34 of 24/5/1433 AH (16/4/2012) *Umm Al-Qura Gazette* No 4413, 18/7/1433 AH (8/6/2012). This new Saudi arbitration law will not be assessed in this research.

²⁰ *Saudi Implementing Regulations to the 1983 Arbitration Act*, issued by Royal Decree No M / 7 / 2021 of 8/9/1405 AH 1985.

3. Analysis will be undertaken of and explanation given for the principles contained in the decisions of the competent courts (Saudi Grievances Board and the Federal Court of Australia and the State Supreme courts). The trend of the court in regard to the application of the principles of international conventions will be extracted. In addition, relevant cases will be analysed and evaluated to provide a real test and to explore the limits of public policy and its impact on the implementation of the provisions of foreign awards.

1.4.3 Research Methodology

The methodology in this study will be descriptive, analytical and comparative and will examine the legal provisions that regulate the verdicts of the NSW Supreme Court and the Federal Court of Australia and the Grievances Board in Saudi Arabia in dealing with a foreign arbitral award.

A. Comparative Law as a Research Method

The comparative method of research has been used in much research and is of importance for various reasons. In fact, comparisons are essential and useful in law studies to establish systematic similarities and differences between observed laws and, possibly, to develop and test hypotheses and theories about their causal relationships.²¹ Thus, the comparative method is a unique, systematic, jurisprudential method, which can be applied to advance new knowledge about the legal systems in respect of what we apply and how we apply it.²² This can be done by taking cognisance of the similarities and differences of the legal systems being compared.²³ This exactly explains the reason for the selection of the comparative method for this research. It will provide similarities and differences between the role of the Australian and the Saudi courts in

²¹ See Esin Öricü, 'Methodological Aspects of Comparative Law' (2007) 8(1) *Methodological Aspects of Comparative Law* 29, 30–1; also see D Berg-Schlosser, *Comparative Studies: Method and Design*, (2001) *International Encyclopedia of the Social & Behavioral Sciences* 24, 27.

²² Mónika Ambrus, *Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law* (2009) 2(3) *Erasmus Law Review* 353; Edward J Eberle, 'The Method And Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 451; T J Scott, *the Comparative Method of Legal Research*, University of Pretoria <http://web.up.ac.za/sitefiles/file/47/J%20Scott%20-%20Comparative%20research%20perspectives%20_Private%20law_.pdf> 1–2.

²³ Scott, n 22 above; Eberle, n 22 above; Ambrus, n 22 above.

enforcing foreign arbitral awards, and can be used to deduce the best way to implement the provisions of foreign arbitral awards. Most especially important to this process is an understanding of the Saudi system and recognition of the source of its difference to other systems. Comparative law as a methodology has various aims. Some of these are:

- a. To promote mutual understanding and acquisition of knowledge of foreign legal systems. With statesmen and jurists' greater knowledge and understanding of foreign attitudes to law, the risk such attitudes as bad faith is reduced or completely eliminated.
- b. As a way of moving towards internationalisation, which is itself due to the realisation of the importance of unification of legal rules across different countries.
- c. To promote national law development. There are several examples of how borrowings from the law of other nations have helped to develop national laws. For example, the United States, Australia, Canada, New Zealand, and India, have all borrowed from the English common law that they inherited from the colonial era and developed their national laws. The results of this study could produce information beneficial to both Australia and Saudi Arabia in the development of their national laws.
- d. To enhance a broad understanding of methodology. It explains the reasons why certain laws were developed, that is, the social functions of specific laws. It also encourages a closer examination of specific legal principles.²⁴

Since the research aims to prove that Saudi Arabia does implement foreign arbitral awards and is not hostile to such awards, a comparative method is the best way of meeting the above stated aims. Additionally, Australia is considered 'pro-arbitration';²⁵ hence it is very useful to adopt the comparative method to examine laws and regulations regarding arbitration as it could be

²⁴ Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, Harvard John M Olin Center for Law, Economics, and Business Fellows' Discussion Paper Series <http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_32.pdf>.

²⁵ For more information, see Gregory Nell SC, 'Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia' (2012) 26 *Australian and New Zealand Maritime Law Journal* 24, 37.

seen as a relevant benchmark. In fact, the policy of supporting arbitration in Australia makes it fertile ground for comparison with a system that is unknown to several Eastern and Western researchers — or about which little is known or what is known may well be inaccurate — as we shall see in the literature review (1.6.2 Implementation in Saudi Arabia ((B) Previous Studies). Thus comparison can provide an effective means of explaining the arbitration process in Saudi Arabia by providing a recognised ‘pro-arbitration’ model, which will show whether the Saudi laws and courts are supportive of arbitration. The use of a comparative method will provide more information for understanding the Saudi attitude towards foreign arbitration as compared to the Australian laws. It will provide more information on why certain laws exist in Saudi Arabia and the purpose of such laws, and it will also promote the development of the respective national laws through increased mutual exposure to accurate information and greater understanding.

This comparison will be useful as it will be based on the actual role of the court by analysing the provisions of the courts in both countries regarding foreign arbitration. This makes the use of such comparative methodology of high value especially with regard to the interpretation of international norms and conventions that are related to international arbitration where the two countries are currently parties to the *New York Convention*.

In fact, comparative study as a method has gained universal acceptance and use and its application has revealed several advantages.²⁶ This is the same as saying that this method has provided information that enables differentiation of legal systems on both a general and specific basis. The general laws that apply to most countries are known through the comparative law

²⁶ For more information, see Djalil Kiekbayev, ‘Comparative Law: Method, Science or Educational Discipline?’ 2003) 7(3) *Electronic Journal of Comparative Law*, <<http://www.ejcl.org/73/art73-2.html>> (the researcher was discussing the different approaches of comparative law); Aqeel Hussein Aqeel, *Toroq wa Manahij Albahth Al’Imi* [Rules and Methods of Scientific Research] (Dar Ibn Katheer, 1434 / 2010).

method. Application of this methodology is revealed by Kiekbayev, who also indicates that it is perceived as a science as well as an educational discipline.²⁷

Palmer gives examples of comparative law methodology based on an argument that comparative law research cannot have one exclusive method.²⁸ This is because research and teaching of historical investigation and law reforms are too varied to have a specific methodology.²⁹ An analysis from one single perspective, or treatment of matters with the same depth and detail, or even preparation of matters to the same degree would not produce accurate results. This is because different research studies have different and specific purposes.

Comparisons can therefore be carried out for historical, functional, evolutionary, thematic, structural, statistical, and empirical reasons. All these can be done at either macro or micro points of view with an endless range of possibilities.³⁰ The above information has provided guidance and confidence in the use of comparative law methodology for this research.

B. Case Studies

Court cases will be included in this study to determine the position of the judiciary in both countries in regard to the foreign arbitral award; and all the relevant cases that are publicly available in Saudi Arabia and Australia will be collected for the period from 1983 to 2012 for both countries. Saudi Arabia became a party to the *New York Convention* in 1994, so it is important to know the court's position before joining the *Convention* and after that event. These materials will help in the analysis of the real position of the courts in Saudi Arabia over that span as well as for the same period in Australia. The choice of the two countries will be clear from the reasons outlined immediately below.

²⁷ Kiekbayev, above n 26; see also Valentina Vadi, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration' (2010) 39(1) *Denver Journal of International Law and Policy* 67, 67–77.

²⁸ Vernon Valentine Palmer, 'From Leretholi to Lando: Some Examples of Comparative Law Methodology' (2004) 4(2) *Global Jurist Frontiers*, Article 1, 1.

²⁹ *Ibid* 29.

³⁰ *Ibid* 2.

Australia was among the first countries to join the *Convention*, which represents the largest international effort in regard to the approval of foreign arbitral awards; whilst, on the other hand, Saudi Arabia is a relatively recent signatory and might be able to benefit from considering how the provisions of the *Convention* have been applied in Australia. It is therefore important to examine the Saudi and Australian judicial authorities on the implementation of the *Convention*. Additionally, the comparison may enrich both Saudi and Australia by providing their respective judges with an illustration of the experience of their counterparts in another jurisdiction. Also it is important to compare the experiences of an Islamic country like Saudi Arabia with those of a Western country like Australia to find the similarities and differences, with the possibility of facilitating the implementation of the provision of arbitration between those countries, especially with the proliferation of arbitration and with the increasing economic importance of the Middle East, Saudi Arabia in particular. Additionally, it is important to study the experiences of developed countries such as Australia to locate strengths and weaknesses in their laws and their application, and also with regard to the judiciary, so as to be able to try to benefit from their experiences and transfer the knowledge obtained from these experiences to developing countries. Accordingly, case studies on the approval of foreign arbitral awards will be extensively used in this research.

It should be noted that in accordance with the *Saudi Grievances Board System 2007* Chapter III Part III Article 13(g), the Saudi Grievances Board deals with the decisions of foreign courts and foreign arbitral awards in the same manner, and the number of foreign court rulings before the Grievances Board is far higher than the number of foreign arbitral awards; thus, there are several decisions unrelated to trade issues (such as family cases) that will be analysed in this research because this shall show the Grievances Board's trend in the implementation of the formal and substantive requirements in applying foreign arbitral awards.

Finally, this research will also present and analyse some Western research findings on Saudi courts regarding their implementation of the provisions of foreign arbitral awards, where some

researchers have a significant misunderstanding of the role of the Saudi courts in this regard. This step is to determine the real role of the Saudi courts in the implementation of the provisions of foreign arbitral awards and also to discern the reasons for these errors and the shortcomings in these research efforts.

C. Data Collection

As explained above, this project required the analysis of judicial decisions issued by courts in Saudi Arabia and Australia on enforcement of foreign arbitral awards between 1983 and 2012. Unfortunately, there were no judicial publication series available from the Saudi Grievances Board. Due to the lack of official published decisions, I found myself compelled to procure the Saudi judicial orders using other sources. Fortunately, I obtained a number of judicial decisions from the old Grievances Board's library and others from the judges themselves. I also used an Unpublished Provisions Set 1407 AH that was found in the archives of the Library of the Grievances Board (Unpublished Commercial Audit-Circuit Principles: Guideline Principles and Case Law, from 1407 AH (1987) to 1419 AH (1999)). Moreover, there were not many Saudi rulings in this area of law, which is the reason that I also have chosen to use decisions from other jurisdictions whose legal systems are similar to that of Saudi Arabia.

The case of Australian court decisions was very different in terms of access and availability. Electronic libraries such as LexisNexus AU, Westlaw AU and Australasian Legal Information Institute (AustLII) were used to review decisions on enforcement of foreign arbitral awards made by the High Court of Australia, Federal courts and the NSW Supreme Court between 1983 and 2012. There were not significant difficulties such as those encountered in the process of collecting Saudi provisions.

D. Method of Comparison

The methods which will be adopted in this comparison between the two countries (Saudi Arabia and Australia) will be selected to measure (1) efficiency; (2) justice to the parties in the individual case; and (3) societal values.

1. Efficiency

a. Background

‘Efficiency’ literally means the good use of time and energy without any waste.³¹ This may mean the optimal use of the available information with a desired speed achieved. Thus, efficiency in general could involve the presence of all the elements that help to achieve the goal or end without negative effects or obstacles preventing the achievement of those objectives.

In fact, ‘the dominant economic theory, neoclassical economics, employs a single economic evaluative criterion: efficiency.’³² This shows that the *efficiency* as a criterion is an economic measure more than a legal standard; it analyses the profit and loss and the true amount of compensation.³³ Thus, it could be said that in the economic field the power of *efficiency* analysis stems primarily from a single assumption which is that of the reduction of ‘value’ to money. In this research, the power of efficiency analysis is revealed primarily only when the court implements the foreign arbitral award in a speedy manner without reconsidering the merits of the case (except in instances of a clear violation of the public policy of the state or the presence of an explicit violation of any of the implementation’s formal requirements).

³¹ *Cambridge Learner’s Dictionary* (Cambridge University Press, 3rd ed, 2007) 255.

³² See Irene van Staveren, ‘Efficiency’ in Jan Peil and Irene van Staveren (eds), *Handbook of Economics and Ethics* (Edward Elgar Publishing, 2009) 107.

³³ See Alfred C Yen, ‘When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law’ (1991) 62 *University of Colorado Law Review* 79. For more information on the efficiency criterion as an economic standard, see van Staveren, above n 32, 107; Max F Millikan, ‘Criteria for Decision-making in Economic Planning’ in Howe Martyn, *Multinational Business Management* (Arden Media, 1972) 124; additionally see Russell Hardin, ‘The Morality of Law and Economics’ (1992) 11(4) *Law and Philosophy* 331.

Posner in his book '*The Economics of Justice*' discusses the notions of 'justice and efficiency'.³⁴ Generally, and in the debate around the philosophical foundations of economic analysis of law, Posner made two claims: '(I) Common law legal rules are, in fact, efficient; and (II) Legal rules ought to be efficient. In both claims, "efficient" means maximization of the social willingness-to-pay.'³⁵ He also argues that the particular form of efficiency that the law should promote is wealth maximisation, which 'provides the soundest ethical basis for the organization and operation of social institutions.'³⁶

On the other hand, Bromley has used *efficiency* as an objective truth rule where he believes that the efficiency 'survives as a mere value judgment of the economist who recommends it.'³⁷ However, there are some law researchers who have used efficiency as a criterion. For example, Fisch in her paper '*Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*' discussed regulatory efficiency.³⁸ Efficiency in this paper is given a broad definition that is far from the norm. The norm is that regulatory efficiency is defined in terms of shareholder wealth. Fisch argues against this giving as the main reason that other stakeholder interests are also important. Shareholder wealth is frequently used as the basis to determine efficient regulatory policy. Accordingly, 'many empirical scholars measure the efficiency of legal rules in terms of their effect on shareholder wealth.'³⁹ Fisch argues that it is not necessary to maximise shareholder wealth at the expense of other stakeholders; and that this is demonstrated by existing legal doctrine. The main idea obtained here is that the concept of efficiency is more than wealth creation or a focus on wealth as a measure of efficiency. It entails other aspects

³⁴ See Richard Posner, '*The Economics of Justice*' (President and Fellows of Harvard College, 1981, 1983) 13.

³⁵ See Lewis Kornhauser, 'The Economic Analysis of Law' 2011 (Fall) *The Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/archives/fall2011/entries/legal-econanalysis/>>.

³⁶ See Posner, above n 34, 60. For more information and discussion on Posner's view see Richard Schmalbeck, 'The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal' (1983) 83 *Columbia Law Review* 488; also see Hardin, above n 33, 384.

³⁷ Daniel W Bromley, *The Ideology of Efficiency: Searching for a Theory of Policy Analysis* (1990) 19 *Journal of Environmental Economics and Management* 86, 87.

³⁸ Jill Fisch, 'Measuring Efficiency in Corporate Law: the Role of Shareholder Primacy' (Paper presented at the Law and Economics Workshop, Berkeley Program in Law and Economics, UC Berkeley, 15 December 2004 <<http://escholarship.org/uc/item/3pj8s2p9>>.

³⁹ Ibid 2.

which are specific to the objective of analysis to determine whether a law/policy is efficient. The paper reveals the questionable assumptions of the economic analysis that influences the use of shareholder primacy to determine efficient regulatory policy. It concludes that there should be clear justifications to the reliance on shareholder wealth and why it should dominate regulatory policy.

Others also criticise the unquestioning adoption of economic efficiency as the sole criterion and query its traditional measurement in ‘money’ alone. Yen in his article ‘When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law’ discussed copyright law in regard to fair use treatment parody and issues of economic efficiency replacing the judicial intuition exercised in regard copyright laws and the again largely intuitive balance struck between public benefit and artists’ rights and how such benefits are best measured, and without an evaluation of ‘whether social welfare is best measured in money’.⁴⁰ Yen provides a good illustration of ‘how the failure of economists’ assumptions prevents efficiency theorists from completely explaining the results of traditional copyright intuition.’⁴¹ From what is described in this article, economists assume that efficiency is best calculated using money, so that if one suffers losses, compensation is calculated in terms of money.⁴² The challenge here is that in copyright law, authors suffer damages that cannot be compensated by use of money.⁴³ They value their works and that value cannot be equated to money. The damage caused by parodists to their works therefore, cannot be fully compensated. Examples of such losses are: emotional attachment to works, public ridicule and so on.

The author gives the idea that economists define efficiency differently from efficiency theorists. They use the cost benefit analysis procedure. Efficiency theorists consider more than just money. They consider all sorts of gains: public welfare, gains to the parodist, and the author of

⁴⁰ See Yen, above n 33, 79.

⁴¹ Ibid 80.

⁴² Ibid 101.

⁴³ Ibid 105.

the book, or work. Several aspects are considered depending on who is using the author's work, and for what purpose, and its consequences to all parties. According to Yen,

Efficiency theory provides both a definition of the public welfare and an unambiguous method for improving it. As an initial matter, the efficiency theorist defines the public welfare in terms of a single variable, usually money. This leads quickly to a method for improving and maximizing public welfare. Since dollars are quantifiable and measurable, the optimal copyright regime may be expressed as that regime which maximizes the amount by which copyright's benefits exceed its costs.⁴⁴ [But] In copyright, authors often form emotional attachments to their works which are non-pecuniary in nature. Expressing these interests in money terms would seem, at the very least, to raise the risk that efficiency will mischaracterize the social value of these interests and may therefore prove hostile to copyright doctrines which enjoy wide support.⁴⁵

Accordingly, the idea that the author tries to put across is that the construct of efficiency explanations (formulated on an economic basis without regard to broader issues also in play) cannot be used for copyright doctrine, especially in cases where authors value their copyright rights for non-monetary reasons.

This is not to say that economic efficiency can be disregarded. In relation to arbitration studies, Kovacs in his article 'Efficiency in International Arbitration: An Economic Approach' examines efficiency in international arbitration from a broader, economic perspective within the arbitral process and also what might be suggested for improving efficiency within the arbitral procedures.⁴⁶ Kovacs also discusses the market failures and barriers that may affect the efficiency of the arbitration procedure.

Kovacs believes that 'for at least two decades concerns have been voiced that international arbitration is becoming too slow, too formalized and too expensive.'⁴⁷ Kovacs believes:

Procedural efficiency in arbitration must be considered in the context of what the process is trying to achieve, and what is realistic ... [and] most users of international arbitration want a dispute resolution process that enables them to present their case, to have their respective positions considered in a fair and impartial manner, and have the

⁴⁴ Ibid 83.

⁴⁵ Ibid 84.

⁴⁶ See Robert B Kovacs, 'Efficiency in International Arbitration: An Economic Approach' (2012) 23(1) *American Review of International Arbitration* 155.

⁴⁷ Ibid 155.

law applied to the facts presented. What is efficient will depend on the context in each case.⁴⁸

Thus it is important to be aware of the differing interests of each group of actors where the analysis of such differing interests from an economic perspective may help to improve the efficiency of arbitral proceedings.⁴⁹

Additionally, Kovacs argues:

From an economic view, a legal dispute is resolved efficiently when legal entitlements are allocated to the parties who value them the most, legal liabilities are allocated to the parties who can bear them at the least cost and the transaction costs of dispute resolution are minimized.⁵⁰

Indeed the most important factors to contribute to the enhancing of efficiency are making the proceedings less time-consuming and cheaper⁵¹ (and without sacrificing fairness or a just outcome or societal values broader (as will be further discussed below)). Additionally, efficiency is served by dispute resolution mechanisms that not only reduce the costs of disputes but facilitate economic activity. However, drafting detailed arbitration agreements with specific procedural devices is highly problematic.⁵²

It is also true that the procedural efficiency in arbitration has been affected by the efficiency of the market, which in turn was affected by the structural barriers inherent in international arbitration.⁵³ Thus, the link between the efficiency of the international arbitration and the procedural efficiency of arbitration helps to explain any perceived efficiency deficit.⁵⁴

Consequently, the presentation of *efficiency* as a measurement in this thesis should not be perceived as a purely legal standard in arbitration or law more generally. Instead, *efficiency* is presented here in order to test its ability to explain the flexibility of the law and court's role in

⁴⁸ Ibid 156.

⁴⁹ Ibid 159.

⁵⁰ Ibid 175.

⁵¹ Ibid 167.

⁵² Ibid 169.

⁵³ Ibid 174.

⁵⁴ Ibid.

implementing foreign arbitral awards. In fact, *efficiency* is the dominant principle used to choose among legal rules and lawmaking institutions.⁵⁵

In the economic field the power of efficiency analysis stemmed primarily from a single assumption which is the reduction of ‘value’ to ‘money’. This assumption is important because it gave a single scale by which to measure the consequences of changing any status. In this research the power of efficiency analysis is revealed primarily only when the court implements the foreign arbitral award in a speedy manner without reconsidering the merits of the case (except in instances of a clear violation of the public policy of the state or the presence of an explicit violation of any of the formal requirements for implementation of foreign arbitral awards). The foregoing suggests a method by which a court could speed up the implementation process to promote efficiency. However, efficiency in the court role should not replace clarity in laws until we are certain that efficiency will support clarity in enforcing foreign awards. Therefore, in this thesis the efficiency of laws, as we shall see, will be examined beside the efficiency of the court’s role.

b. Definition of the Efficiency of Law

Clark defines efficiency as making the courts easily operable and more productive to a specific degree.⁵⁶ This definition is similar to ‘good use of time and energy without any waste’. Greater productivity means less time is required and less waste (of personnel and resources) generated; and ‘ease of operation’ encompasses not only making good use of available time and energy to produce the desired results but to do so without needless complexity and difficulty. A ‘good use of time’, for example, reduces delay in court processes and time required for decision making. Delays involved in court processes and complex litigation involving lengthy judicial consideration and/or shortage of appropriate personnel are contributing factors to inefficiency in courts. Studies previously conducted have shown that there are a number of factors that are to

⁵⁵ Generally, see van Staveren, above n 32.

⁵⁶ Charles E Clark, ‘Making Courts Efficient’ (1961) 8 *UCLA Law Review* 489.

be considered when dealing with efficiency of the courts. These factors include: the time spent to make a decision, the nature of the decision, the use of unpublished decisions by the courts to make decisions, the number of judges, judges sitting by designation, use of oral arguments, ideological diversity, treatment of the lower court, processing times, length of opinion,⁵⁷ and the degree of competency of the judges and court staff.⁵⁸ These, however, are dependent on the type of courts and the laws guiding the judicial process involved in a case. ‘Efficiency’ in various studies has a variety of different meanings when considering the above mentioned factors. If a study focused on time spent to make a decision and the nature of decisions as measures of efficiency, efficiency would be defined based on these two **factors**.⁵⁹ Efficiency also depends on the objectives of the courts in handling the cases.

In regard to this research, efficiency is based on the court’s role in the implementation process to achieve the objectives of arbitration (that being to secure a speedy resolution of conflict). Efficiency is, therefore, focused on the role of the courts, legislation and any other arbitration process in both countries, in achieving the aims of arbitration. Measures of efficiency in this research will therefore focus on factors that affect the achievement of the aims of recognition and enforcement of foreign arbitral awards in both countries. Based on the aims of arbitration, processing and decision making times, the structure of the court, the number of judges involved, the type of decisions made, any lack of authority of the judges and court staff, and the law, are important factors to consider. Judgment of efficiency will, therefore, be based on these factors.

In the context of recognising foreign arbitral awards, a concern for efficiency would necessarily involve consideration of a limited range of grounds for non-recognition because to do otherwise

⁵⁷ Robert K Christensen and John Szmer, ‘Examining the Efficiency of the U.S. Courts of Appeals: Pathologies and Prescriptions’ (IEL Paper in Comparative Analysis of Institutions, Economics and Law No 4, May 2011) <<http://polis.unipmn.it/pubbl/RePEc/uca/ucaiel/iel004.pdf>>.

⁵⁸ For more information, see Clark, above n 56.

⁵⁹ Generally see Katherine A Helm, ‘The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?’ (Nov 2006 – Jan 2007) 61(4) *Dispute Resolution Journal* 16; Corliss Olson and Allen Ponak, ‘Time Delays in Grievance Arbitration’ (1992) 47(4) *Relations Industrielles/Industrial Relations*, 690; Samuel Estreicher and Steven C Bennett, ‘Standards for Judicial Review of Arbitration Awards’ (2007) 238(8) *New York Law Journal* 3.

would detract from the certainty of the arbitral process, which may cause ambiguity in the arbitration process which in turn would prevent investors resorting to it as a peaceful means of resolving conflicts. A limited range of grounds also requires a less time-consuming process of the court re-trying the facts of the case. For example, according to Mayer and Sheppard the European Court of Justice in *Eco Swiss China Time Ltd v Benetton International NV* (1999) stressed that ‘it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances’.⁶⁰ This means that refusal should be exceptional and the reasons for rejection must be determined precisely if possible to achieve efficiency in both arbitration itself and the courts role in the implementation of foreign awards.

Efficiency here will focus on the role of the judge in applying the non-defective awards and enumerating, precisely if possible, the reasons for refusing recognition or enforcement of foreign awards. Therefore, it can be said that if the judiciary is not efficient in approving foreign arbitral award where it does not achieve the objectives of the resort to arbitration (that is, the need for a rapid decision and non-intervention in the merits of the case), people will not resort to arbitration as a means of solving disputes.⁶¹ These are the most important motivations for the resort to arbitration that may conflict, certainly, with the court’s desire to get the correct result, where the court’s goals are to get a result within a reasonable timeframe and at reasonable cost.

However, getting a perfectly just outcome may not always be efficient.⁶² Gelander believes that ‘review systems designed to protect the accuracy of an arbitration award and ensure legal precision may impede the attainment of “justice” through delay by eroding “confidence in the

⁶⁰ See Pierre Mayer and Audley Sheppard, ‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) *Arbitration International* 249, 255.

⁶¹ For more information about the efficiency of the arbitration process and speed as an element of this efficiency, see Michael McIlwrath and Roland Schroeder, ‘The View from an International Arbitration Customer: In Dire Need of Early Resolution’ (2008) 74(1) *Arbitration* 2, 4.

⁶² For more information, see Hafza El Hadad, ‘Review of Arbitral Awards: Between Duality and Uniformity’ (Paper presented at the *New York Convention 50 Years: Practical Perspectives on the Recognition and Enforcement of Foreign Arbitral Awards*, Cairo, 10–11 November 2008).

efficiency and fairness of the system”.⁶³ This could mean that the availability of such a mechanism, ‘the judicial review’, may be considered a delay and inefficiency in the judiciary, where justice delayed may mean justice denied.⁶⁴ However, it is a necessary step as judicial review protects the rule of law and also a State’s public policy. This requires the existence of a restricted process for reviewing foreign awards; and, if the review mechanism is to protect public policy, this review is an important element required to achieve justice. In fact, a clear example of the importance of the judicial review is *Soleimany v Soleimany*, where the efficient role of the court lies in the protection of *public policy* by examining the merits of the case. In this case the English Court of Appeal refused to enforce the foreign award due to the fact that the original contract involved smuggling carpets out of Iran and such a contract is contrary to British public policy.⁶⁵

However, it could be said that not every efficient process is just to the parties. For example, in regard to the formal requirements, it is efficient for the implementation process not to limit the documents that prove the availability of the reciprocity principle where the party who seeks implementation can prove the principle of ‘reciprocity’ by providing any document; however, the ambiguity of the required documents may not provide certainty for the parties since such a course renders the parties ignorant of what should be presented to demonstrate reciprocity where the court still has the authority to evaluate any documents that are presented.⁶⁶

Therefore, courts should work to provide full effective protection to the principle of justice as well as implement the arbitral award. This will contribute to the consolidation of the principles of justice in society and achieve the goal or purpose of the existence of courts.

⁶³ See Jessica L Geler, ‘Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations’ (1997) 80 *Marquette Law Review* 625, 626.

⁶⁴ Generally see Christa Roodt, ‘Conflicts of Procedure between Courts and Arbitral Tribunals with Particular Reference to the Right of Access to Court’ (2011) 19(2) *African Journal of International and Comparative Law* 236.

⁶⁵ *Soleimany v Soleimany* [1998] AppLR 02/19. This case will be closely analysed later in Chapter 5 (5.4.2 Australian Courts in Approving the Public Policy Exception).

⁶⁶ This is clear in regard to Saudi practice where the Sub-Circuit has ignored some documents and refused to implement foreign arbitral awards, as we shall see in Chapter 4 (4.1.1 Formal and Substantive Requirements in Saudi Arabia).

Finally, it is important to know the difference between the ‘efficiency’ and ‘effectiveness’ in judicial work in order to find out the limits of the efficiency of the judge’s role in implementing foreign arbitral awards. It could be simply said that ‘*efficiency* is the best use of resources; *effectiveness* is the achievement of goals.’⁶⁷ This means that efficiency is reflected in the method adopted or the manner of execution of the award (which should be effective). Effectiveness is the ultimate goal and to be achieved by rapid enforcement. This means that the court shall implement the foreign award in a speedy manner without reconsidering the merits of the case except in instances of a clear violation of the public policy of the state or the presence of an explicit violation of any of the formal requirements for implementation of foreign arbitral awards (as we shall see). Hence, the court aims to protect the general principles and at the same time it applies the conditions set forth in the law as to the basis of the powers given to the judge.

Therefore, the procedural system rules and their features are very important in achieving efficiency in the carrying out of the court’s functions in society and reducing the costs of commencing and maintaining the dispute process (that is, the costs of judges and the duration of litigation).⁶⁸ Legal efficiency therefore, also means ‘the extent to which a law and the way it is used provide the benefit that it was intended to achieve’.⁶⁹ Thus, the legal efficiency of arbitration involves a consideration of the need to achieve all the advantages of arbitration. The extent to which arbitration achieves its goals (that is, manifests its advantages) is an indication of its efficiency.

⁶⁷ See Héctor Fix-Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Oxford and Portland, Oregon, 2003) 8.

⁶⁸ Ibid 35. See also Waleed Haider Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies, and Lessons* (World Bank Publications, 2007) 67–70; also see William C Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Greenwood Publishing Group, 2000) 6; Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010) 362.

⁶⁹ See Frédérique Dahan and John Simpson, ‘Legal Efficiency of Secured Transactions Reform: Bridging the Gap between Economic Analysis and Legal Reasoning’ in Frédérique Dahan and John Simpson (eds), *Secured Transactions Reform and Access to Credit* (European Bank for Reconstruction and Development, 2008) 122,132–3.

In addition to the efficiency of the judge's role in the implementation of foreign arbitral awards, it is important, as explained above, to examine the efficiency of the laws that govern this implementation. This will contribute to a greater understanding of the role of the judge in the legal texts and also to a knowledge of the limits of the judge's role that exist in accordance with his general discretion in implementing foreign arbitration. In fact, efficient law in this research is the law that provides the greatest legal benefit for the arbitration system in general and gives more support to the implementation of the provisions of foreign arbitral awards in particular.

c. Efficiency Application

Efficiency in this research for the purposes of comparison between the Saudi and Australian courts focused on:

- i.* The examination of the *efficiency* of the competent courts role in the implementation of the provisions of foreign arbitral awards. This examination could be done by:
 - 1) The examination of the court's role in applying the legal texts where the courts are obliged to implement the legal texts without any expansion by adding new conditions to implement the arbitral awards where any new expansion may be considered as an obstacle to the implementation. For example, when the law requires the existence of reciprocity to implement any foreign award and simultaneously does not specify the documents that must be submitted to prove the existence of reciprocity, the court has the discretion to assess the documents but it has no power to limit the required documents. Thus, any attempt to limit these documents may be considered as adding a restriction to the legal text.
 - 2) The examination of the court's role in hearing the parties. In fact, the courts are obliged not to hear any substantive defences except the public policy defence, as the parties have been given full opportunity to make any substantive arguments before the arbitrators. Thus, the courts are obliged not to intervene in regard to the merits of the

case or re-consider the subject matter of the case. This may mean that any intervention or re-consideration of the merits of the case is contrary to efficiency.

- 3) The examination of the *accuracy* of the court's decision, which means whether the decision is more or less likely to be challenged in order to examine the accuracy of the first instance court's judgment.⁷⁰ According to Kaplow, '[a]ccuracy is a central concern with regard to a wide range of legal rules.'⁷¹ Thus, accuracy was also considered a major determinant of the efficiency of the courts in general and in the implementation of foreign arbitral awards in particular as it helps to accelerate implementation.

ii. The examination of the *efficiency* of the laws. This could be done through the examination of:

- 1) Which law is clearer — since ambiguity or a lack of the legal texts in some critical areas (that is, the limits of public policy or the required documents for the reciprocity) are considered to be an obstacle to implementation. Also it needs to be determined whether a uniform law is present to assist the judge in the implementation of the provisions of foreign arbitration (for example, the *International Arbitration Act 1974* (Cth)).
- 2) Which law eases implementation and achieves the greatest degree of freedom for the parties to resort to arbitration and give a larger circle of freedoms in the area of arbitration as quicker than litigation. This could be evaluated through an examination of the available legal texts and their consistency with relevant international conventions such as the *New York Convention* and the *Arab Convention* and with fewer reservations entered in regard to those conventions.

⁷⁰ Fix-Fierro, above n 67, 109.

⁷¹ See Louis Kaplow, 'The Value of Accuracy in Adjudication: An Economic Analysis' (1994) 23(1) *Journal of Legal Studies* 307. He also notes that 'a large portion of ... [such] rules ... involve an effort to strike a balance between accuracy and legal costs': at 308.

Additionally, consideration must be given to the number of formal requirements in both laws. The law that limits the number of formal requirements may be more efficient in the implementation of foreign arbitration.

This final criterion will be examined in this research by analysing the legal text of the *Saudi Arbitration System* (Royal Decree No M / 46 issued in 1983), and the *Implementing Regulations* issued by the Decision of the Council of Ministers 7 / 2021 issued in 1985, and the Australian *International Arbitration Act 1974* (Cth) ('IAA 1974'), as well as the *Commercial Arbitration Act 1984* (NSW) where required. Accordingly, the question in terms of this criterion is whether these laws provide adequate support for the implementation of the provisions of foreign arbitration.

2. Justice to the Parties in the Individual Case

The recourse to arbitration by the parties is a search for justice and also a search for an easier and faster means to resolve the dispute. This encourages the implementation court to abide by these goals (especially that of achieving justice), for the duty of the court is to secure justice in each case. Justice assessment is difficult in itself as it is difficult to determine absolute justice. In fact, 'equity' as an element of justice means 'fairness', which may mean treating people fairly and equally.⁷² This equity is 'the power to vary application of the norm; it is the justice of the individual case.'⁷³ Accordingly, determining that a law or judicial ruling is more just than the other is very difficult task, but it is not impossible. Thus, this requires identifying the meaning of the word 'justice'.

In fact, justice has often been identified as the 'oldest virtue in the history of mankind'.⁷⁴ The *Oxford Dictionary* defines justice as 'just behaviour or treatment'.⁷⁵ It could be said that the

⁷² B Brassil, *Excel HSC Legal Studies* (Pascal Press, 2004) 23; also see Eyāl Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use*, Cambridge Studies in International and Comparative Law, vol 23 (Cambridge University Press, 2002) 224.

⁷³ See John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 3rd ed, 2007) 71.

⁷⁴ Uwaezuoke Precious Obioha, 'The Nature of Justice' (2011) 29(2) *Journal of Social Science* 183, 184.

proper sense of justice is ‘giving one his or her due’.⁷⁶ Obioha believes that ‘the fundamental human right’ can determine this due where the natural right is ‘the ultimate basis of justice’.⁷⁷ In the judicial process the judge is the means of ensuring the implementation of this natural justice.⁷⁸ In this regard, justice to the parties in individual cases can be perceived as the treatment of these individuals in a just manner. Justice is often associated with fairness and equality. This concept is very important in the international arbitral award. This could mean that justice as fairness has a substantive nature rather than procedural.⁷⁹ However, according to Rawls the strength of the claims of procedural justice always depends on the substantive justice.⁸⁰ Therefore, it could be said that procedural and substantive justice are connected. However, procedural justice — from a legal perspective — is perceived to be fairer for the individual when affected individuals have a chance to influence the decision process or offer input.⁸¹ On the other hand, judicial equality regarding individual rights could mean that all individuals should have an equal chance of receiving the court’s protection, regardless of differentiating characteristics. Therefore, justice to the parties here means what the law provides equal rights to the parties in the litigation proceedings and to objection on any provision in an award.

⁷⁵ Oxford Dictionaries, ‘justice’, Oxford Dictionary (2012) <<http://oxforddictionaries.com/definition/justice>>. It is also said to encompass ‘the exercise of authority in maintenance of right’: *Concise Oxford Dictionary* (Clarendon Press, 6th ed, 1976); and ‘the administration of the law or authority in maintaining this’: Oxford Dictionaries (2012).

⁷⁶ See Obioha, above n 74, 186. See also Serena Olsaretti, *Liberty, Desert and the Market: A Philosophical Study* (Cambridge University Press, 2004) 162.

⁷⁷ See Obioha, above n 74, 187.

⁷⁸ For more information about the judge’s role in regard to parties to proceedings, see Roger Perrot, ‘Role of the Judge in a Democratic Judicial System; Guarantees of an Independent Justice’ in Council of Europe, *The Judge and International Law* (Council of Europe Publishing, 1998) 153, 161.

⁷⁹ See John Rawls and Erin Kelly, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 153; see also John Rawls, *Political Liberalism* (Columbia University Press, 2005) 421.

⁸⁰ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 51–2.

⁸¹ See Stephen W Gilliland, ‘The Perceived Fairness of Selection Systems: An Organizational Justice Perspective’ (1993) 18(4) *Academy of Management Review* 694, 696.

In fact, most commentators have pointed to the fact that justice to the parties in the individual cases is fundamental in any international arbitral award.⁸² This fact is supported by Lalive, who determined that justice in arbitration ought not only to be done but it ought to be seen manifestly and undoubtedly to be done.⁸³ This highlights the need for the judges to have a comprehensive knowledge about the goals of arbitration so as to be able to issue a judgment that encourages the enforcement process.

Thus, it is imperative to note that the majority of arbitral awards, both domestically and internationally, are voluntarily conformed to and thus do not necessitate judicial enforcement.⁸⁴ However, it is only if an arbitral award can be sufficiently enforced that successful claimants can be certain that they will essentially recover the damages awarded them.⁸⁵

From the above there are three probabilities concerning justice to the parties in the individual case. First, there is a possible clash between the efficiency of the court role and justice, which was discussed under the efficiency criterion. Secondly, there is the possible clash between the rights of the parties and public policy. This raises the question of the judge's judgment in such situation — that is, whether the judge is going to prioritise the rights of the parties based on the consensual nature of the arbitration process (which results in a binding arbitral award), or prioritise public policy and the rule of law and refuse to implement the foreign arbitration. Indeed Zekos believes that this 'public policy' defence exists to protect 'the fundamental legal and other precepts of national legal order'.⁸⁶ This means that the court will respond to achieve

⁸² Generally see Georgios I Zekos, *International Commercial and Marine Arbitration* (Taylor & Francis, 2008) 53; also see Anita Alibekova and Robert Carrow, *International Arbitration and Mediation: From the Professional's Perspective* (Yorkhill Law, 2007) 275–99.

⁸³ Pierre Lalive, 'On the Reasoning of International Arbitral Awards' (2010) 1(1) *Journal of International Dispute Settlement*, 55, 63. A variation on an aphorism: 'it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done': *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 (Lord Hewitt), as cited in J J Spigelman, 'Seen to be Done: The Principle of Open Justice' (Keynote Address to the 31st Australian Legal Convention, Canberra, 9 October 1999) 1. (He was at the time Chief Justice of NSW).

⁸⁴ Gary Born, *International Civil Litigation in United States Courts: Commentary and Materials* (Kluwer Law International, 1st ed, 1996) 1040.

⁸⁵ Ibid.

⁸⁶ See Zekos, above n 82, 189.

justice by protecting the ‘fundamental economic, legal, moral, religious, political and social standards of every country’,⁸⁷ which includes a people’s basic beliefs about how they are to live in that country. This also requires a balance between public and private rights, which raises the question about the judge’s role and which area he will favour.

The third possibility concerns the role of the parties in implementation, namely whether the parties can, as they resorted freely to arbitration as a parallel to the judiciary, determine the scope of the judicial review in accordance with their decision to enter arbitration and the determination freely achieved in the arbitration.

In fact, parties cannot interfere with the judicial process by dictating how the competent courts operate. Indeed, Moses believes that the ‘parties simply do not have the power to tell courts what to do.’⁸⁸ This is due to the fact that the parties cannot contractually expand judicial review, because ‘federal jurisdiction cannot be created by contract.’⁸⁹ Therefore, there must be a legal ground for the parties to interfere in such jurisdiction.

For instance, in Saudi Arabia in regard to justice being accorded to the parties in individual cases, a foreign award can be implemented through the Grievances Board if that award does not contravene the laws and regulations of the country or the tenets of the *Shari’a* law.⁹⁰ Additionally, the party who seeks the enforcement should prove to the court that the courts of the area that granted the judgment will eventually enforce the judgment of the Saudi Arabian courts in a reciprocal manner.⁹¹ This could show the equality between the parties regarding the enforcement requirements, but the question remains, as we shall see, about the clarity in the formal and substantive requirements.

⁸⁷ Ibid 467.

⁸⁸ See Margaret Moses, ‘Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards’ (2003–2004) 52 *Kansas Law Review* 429, 439.

⁸⁹ Ibid.

⁹⁰ Chapter 5 will discuss this concept in more detail (5.4.1 The Saudi Grievances Board and the Application of Public Policy).

⁹¹ This is regarding the formal requirements which will be discussed in more details in Chapter 4 (4.1.1 Formal and Substantive Requirements in Saudi Arabia).

In Australia, Digby determined that the country to a large extent embraces international arbitration. This is best exemplified by the fact that it has in the recent years revitalised its commitment to the *Convention* through the modernisation of the provisions as outlined in the *IAA 1974*.⁹²

Finally, it is imperative to explore why it is unfair to the parties if the courts engage in the discussions of the merits in specific cases which have been decided by arbitrators. According to the National Arbitration Forum (a major international Alternative Dispute Resolution service provider), there is extensive rigidity in the traditional litigation process based on the fact that the judge is bound to ‘follow applicable law and the constraining deliberations of appellate courts’.⁹³ Nonetheless, the arbitration process is endowed with greater flexibility, based on the fact that the parties involved agree beforehand on the procedures and thus this process to ‘reopen the case by the national judge’ is considered as a trespass on the parties rights in relation to the dispute. Thus, if the court discusses the merits of a case in specific cases which have been decided by arbitrators, it would be unfair to the parties because the court may overlook some of these factors and this would then culminate in injustice.

Secondly, some of the cases decided by arbitrators are endowed with extensive privacy provisions due to their confidential nature. This fact is supported by Ligeti, who determined that, in the recent decades, confidentiality has evolved to become one of the most important subjects in international commercial arbitration.⁹⁴ This is chiefly embedded in the Article 26(3) of the *Rules of Arbitration* of the International Chamber of Commerce (ICC) which clearly

⁹² G John Digby, ‘Is Australia Unfriendly to Arbitration?’ (2012) 7(1) *Construction Law International* 38.

⁹³ See National Arbitration Forum, *Business-to-Business Mediation/Arbitration vs Litigation: What Courts, Statistics & Public Perceptions Show about How Commercial Mediation and Commercial Arbitration Compare to the Litigation System* (2005) <<http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf>> 5.

⁹⁴ See Katalin Ligeti, *Confidentiality of Awards in International Commercial Arbitration* (LLM Thesis, Central European University, 2010). See also National Arbitration Forum, above n 93, 6.

states that unless there is a prior agreement by the parties and the arbitrators, persons who have no involvement in the arbitration process shall not be admitted.⁹⁵

Nonetheless, if the courts discuss the merits of cases which had been decided by arbitrators, generally those endowed with extensive confidentiality, the privacy of the disputes is bound to be compromised since litigation does not prohibit participation and involvement of third parties.⁹⁶ This is bound to be extremely unfair to the parties and might result in the course of justice being compromised. However, it is crucial to note that the national courts play a profound role in the implementation of arbitral awards in regard to confidentiality.⁹⁷

Thirdly, the eventual discussion by the courts on the merits in specific cases which were decided by arbitrators will result in added cost to both parties involved in the dispute which also will not be fair. This is based on the fact that court processes like litigation entail high costs, which in many cases make no allowance for the financial capacity of the disputing parties.⁹⁸ In this regard, court proceedings after deliberations by arbitrators will incur additional legal costs which one or both parties might not be able to bear, which is bound to affect the course of justice.⁹⁹

Indeed the discussion by the courts on the merits in specific cases which have been decided by arbitrators is bound to culminate in time wastage in the final delivery of justice to the parties, as the courts will spend more time discussing issues which had already been deliberated upon by the arbitrators. The delay involved has not only a financial cost. According to Krishnan and

⁹⁵ See International Chamber of Commerce (ICC), *Rules of Arbitration*, art 26(3). <<http://www.iccwbo.org/court/english/arbitration/rules.asp>>.

⁹⁶ For more information, see Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2nd revised ed), Kluwer Law International, 2001) 804.

⁹⁷ See Estreicher and Bennett, above n 59, 3.

⁹⁸ See F Peter Phillips, 'How Conflict Resolution Emerged in the Commercial Sector' *Alternatives to the High Cost of Litigation* [International Institute for Conflict Prevention & Resolution Newsletter] (January 2007) 3, 5. See also Rubino-Sammartano, above n 96, 22; McIlwrath and Savage, above n 68, 352.

⁹⁹ In fact there are some costs beside the court's fee. These costs are incurred to comply with formal requirements, such as 'a translation of the original awards' as well as any other certified copies which may involve some administrative fees. Such fees might be seen as a heavy burden on the parties to the dispute.

Kumar, a delay in justice to the parties involves an inherent injustice: justice delayed is always justice denied, they maintain.¹⁰⁰

The eventual referral of specific cases that have previously been decided by arbitrators to the courts is bound to create a backlog of cases which would gradually reduce the efficiency of the legal systems. In the long run, this would culminate in an enormous number of unresolved cases which would not only be unfair to the parties involved but would also impose detrimental impacts on the credibility of the judicial system.

Therefore, those framing the *Convention* and national laws (Saudi and Australian) have decided that the judge has no right to reconsider the merits of the case; instead the role is limited to ensuring the availability of certain formal conditions, as we shall see in Chapter 4. The only substantive exception, which authorises the judge to re-open the case, is the breach of public policy. Thus, the judge must not consider the merits of the case except in some situations that directly affect the public policy of the state. Therefore, this research will discuss some points in regard to the criterion '*Justice to the parties in the individual cases*'. These can be summarised as follows:

1. Which law provides greater justice to the parties by giving them what they ask for as provided in their defences; and which law ensures all individual rights in the arbitration dispute (regarding the procedural law that governs the formalities used in litigation). This is done by examining:
 - a. The clarity of the legal texts (procedural laws) which is a key demand of all parties to enable them to provide files and documents required for the implementation of foreign arbitral award. For example, the specification of certain documents as a

¹⁰⁰ See Jayanth K Krishnan and C Raj Kumar, 'Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective' (2011) 42 *Georgetown Journal of International Law* 747; see also Gabrielle Kaufmann-Kohler, 'Enforcement of Awards – A Few Introductory Thoughts' in Albert Jan van den Berg (ed), *New Horizons In International Commercial Arbitration and Beyond: ICCA International Arbitration Congress*, International Council for Commercial Arbitration Series No 12 (Kluwer Law International, 2005) 287, 288.

requirement to prove the principle of *reciprocity* is one of the procedural justice elements for both parties where they equally aware of what needs to be submitted as a document in such cases. If, on the other hand, the law does not specify any documents that are necessary to prove the principle of reciprocity, the court is obliged to accept any legal evidence that proves the existence of reciprocity without any intervention or imposition of any other conditions not included in the law.

b. The clarity in the role of the judge in considering the case is a very important aspect of justice, where he/she should not reconsider the merits of the case again out of respect to the will of the parties that have chosen arbitration to resolve the dispute and where judges are also required to hold parties to their original bargain. Finally, judges are obliged to respect the arbitration system in general as a system approved by the national laws and international conventions, where they supposed to support the implementation of any valid arbitration regardless of the place of issue as long as it is not contrary to the public policy.

2. Proof of right to sue in the implementation of foreign arbitral award: this requires research on the competent court which has jurisdiction over the implementation of foreign arbitral awards. Additionally, it is important to know the degree and extent of these courts' competence, and the compatibility of those jurisdictions in terms of international rules and norms as well as their compatibility with international conventions for the implementation of the provisions of foreign arbitral awards.

Therefore, this research will determine the competent court in the implementation of foreign arbitral awards in both Saudi Arabia and Australia. Additionally, it will examine the limits of the courts in considering the subject matter of the provisions of the foreign arbitral awards through the analysis of the legal provisions that give the court the jurisdiction to consider the implementation of foreign arbitral awards. Moreover, this will also be achieved by analysing

and the extrapolating from the decisions of those courts to find out what are the judicial principles in the implementation of the provisions of foreign arbitral awards. The analysis of these judgments will facilitate the comparison between the judicial systems in the implementation of foreign arbitral awards, and makes it easy to know the limits of the courts and judicial principles that have been settled in that regard.

3. *Societal Values*

It is important to define values in a societal arrangement in order to gain a comprehensive understanding of the role of the courts in protecting the society from any foreign arbitral award that violates the public policy of a state, most notably (in this research) in Saudi Arabia and Australia. Thus, this criterion is more relevant and more applicable to the final chapter, which covers the defence of ‘public policy’. In fact, the public policy defence is one of the major grounds for setting aside foreign arbitral awards, and many countries have interpreted this concept in accordance with domestic legislation rather than international laws and values.¹⁰¹ Consequently, it is essential to understand this concept ‘*societal values*’ in order to define its aspects, which will help in the comparison between Saudi Arabia and Australia. In fact, there is no specific or precise definition of the principle of the ‘public policy’ defence. However, most researchers agree that this defence includes the social values on which society depends.¹⁰²

¹⁰¹ For more information see Fifi Junita, ‘Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia’ (2008) 5 *Macquarie Journal of Business Law* 384. See also Gennady M Danilenko, ‘Implementation of International Law in CIS States: Theory and Practice’ (1999) 10 *European Journal of International Law* 51.

¹⁰² See Erman Rajagukguk, ‘Implementation of the 1958 *New York Convention* in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy’ (Paper presented at the 3rd Asian Law Institute (ASLI) Annual Conference on the Development of Law in Asia: Convergence versus Divergence?, Shanghai, 25–26 May 2006) 1–2; Wafa Janahi, ‘Problems and Weaknesses Arising from the Enforcement of Foreign Arbitral Awards in National Courts’ (2011) 47 (July) *Journal of Sharia and Law* 43, 51; see also S I Strong, ‘Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns’ (2008–2009) 30 *University of Pennsylvania Journal of International Law* 1, 66; also Christopher S Gibson, ‘Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law’ (2009) 113(4) *Pennsylvania State Law Review* 101, 104.

According to Park, ‘Judges bear direct obligations to the appointing citizenry, and thus respond to significant societal values that may trump private choices.’¹⁰³ This makes the criterion of societal values relevant to the public policy defence more than any other formal requirements. What supports that is the fact that several judicial decisions identified the public policy in morals and social values. For example, Joseph Smith J stated in regard to the public policy defence that the ‘enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.’¹⁰⁴ This is a clear, logical and natural vision where the formal requirements, for example, do not strongly express the societal values as the public policy defence.

However, the concept ‘societal values’ has to be defined and it must be determined whether it is restricted to certain acts.

According to Shuchman, “‘Values” [are] defined as a normative standard of the desirable, functioning as an operational force in human behavior.’¹⁰⁵ This indicates that these values are essential principles that cannot be waived and their role is one directed towards influencing human behaviours. Nevertheless, the majority of commentators have determined that the definition of the concept of values is endowed with ambiguity despite extensive efforts to define it.¹⁰⁶ However, in a generic sense, values have been perceived as trans-situational goals which are desirable in nature.¹⁰⁷ Additionally, these values have variance in importance and serve as

¹⁰³ See William W Park, ‘Arbitrators and Accuracy’ (2010) 1(1) *Journal of International Dispute Settlement* 25, 43.

¹⁰⁴ For more information, see *Parsons & Whittemore Overseas Co Inc, Plaintiff-Appellant-Appellee v Société Générale de l’Industrie du Papier (RAKTA), and Bank of America, Defendants-Appellees, Société Générale de l’Industrie du Papier (RAKTA), Defendant-Appellee-Appellant*, 508 F 2d 969 (2d Cir, 1974) (2012) Federal-circuits vlex <<http://federal-circuits.vlex.com/vid/whittemore-papier-rakta-37634820>>.

¹⁰⁵ See Hedvah L Shuchman, ‘Research Note: The Influence of Social Values on Public Policy Determination’ (1962) 6(2) *Journal of Conflict Resolution* 175, 175.

¹⁰⁶ See Meg J Rohan, ‘A Rose by Any Name? The Values Construct’ (2000) 4(3) *Personality and Social Psychology Review* 255, 256; see also Maria Miceli and Cristiano Castelfranchi, ‘A Cognitive Approach to Values’ (1989) 19(2) *Journal for the Theory of Social Behaviour* 169.

¹⁰⁷ Generally, see Shalom H Schwartz, ‘Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries’ (1992) 25 *Advances in Experimental Social Psychology* 1, 4.

the guiding principles in the life of an individual or the wider societal entity.¹⁰⁸ Furthermore, Preston-Shoot, Roberts and Vernon believe that values are ‘the moral statements or beliefs held to be true, with rights as an operational response to ... or visible and tangible expression of value positions.’¹⁰⁹

Societal values can thus be viewed as the principles, assumptions and beliefs which guide the decision-making process among people, and the society’s actions. But the question however remains whether all societal values are related to the implementation of the provisions of foreign arbitral awards, and the societal values that the judge intends to protect in this regard.

In fact, the public interest that is served by the public litigation system regarding the implementation of foreign arbitral awards could be limited to the protection of the rule of law.¹¹⁰ This may mean that the litigation system shall ‘ensure predictable, fair, and consistent interpretation of the society’s law’.¹¹¹ Therefore, judges shall protect the community values that are related to moral, religious and social customs. Therefore, foreign arbitral awards must not be contrary to these values in addition to those expressed as *jus cogens*, and which represent the rule of law.

The societal values in Saudi Arabia are a strong intertwining of the cultural orientation of the people and the country’s predominant religion of Islam.¹¹² This is evident in the first and seventh articles of the Saudi *Basic Law of Governance*, which state that the *Qur’ān* and *Sunnah* are the nation’s *Constitution* and govern all laws and regulations (as noted earlier). Additionally,

¹⁰⁸ Ibid; also see T L van der Weide et al, ‘Practical Reasoning Using Values: Giving Meaning to Values’ in Peter McBurney et al (eds), *Argumentation in Multi-agent Systems: 6th International Workshop, Budapest, Hungary, May 2009*, (University of Utrecht, 2009) 2.

¹⁰⁹ See Michael Preston-Shoot, Gwyneth Roberts and Stuart Vernon, ‘Values in Social Work Law: Strained Relations or Sustaining Relationships?’ (2001) 23(1) *Journal of Social Welfare and Family Law* 1, 13.

¹¹⁰ This is with regard to the societal values that will be protected by the judge in the case of the implementation of a foreign arbitral award. Generally, for more information about the ‘public good that are served by the public litigation system’, see Jean R Sternlight, ‘Creeping Mandatory Arbitration: Is It Just?’ (2005) 57 *Stanford Law Review* 1631, 1662.

¹¹¹ Ibid.

¹¹² For more information, see Baamir, above n 2, 28.

it is clear in the two decisions of the President of the Saudi Grievances Board where public policy is linked with *Shari'a* tenets.¹¹³

In Australia, the values of respect of individual worth, self-determination of individuals, dignity, democracy, freedom, equality, wellbeing, responsibility, ethical culture and respect and care of the land are some of the often cited values embedded in this particular country, and play a major role in guiding actions in the society.¹¹⁴ In addition, every individual in Australia is expected to respect and uphold these principles and share these values.¹¹⁵

In both countries, societal values play a fundamental role in determining the role of the competent courts in protecting the society from any foreign arbitral award that violates public policy by using the public policy defence. This is based on the fact that in order for any sense of civilisation to endure, the shared factors which define it ought to be safeguarded.¹¹⁶ This can only be achieved through the declaration of laws that conserve the rudimentary nature of the society, its institutions and values.¹¹⁷

In fact, the legal system in Saudi Arabia is a unique one as it is based on the *Holy Qur'an* and *Sunnah* being the primary representation of the principles for judgments and the legal system.¹¹⁸

In regard to the protection of the societal values in regard to foreign arbitral awards, the Saudi Grievances Board has limited the public policy defence to public morals and the tenets of *Shari'a* in addition to the *jus cogens*. For example, the Fourth Audit-Circuit in *Ruling No 92 / T / 4 of 1424 AH 2004* states that the award that was required to be implemented is 'not contrary to Islamic law or public morals and public policy in Saudi Arabia and it meets the requirements

¹¹³ This requires the court to limit these aspects. This will be discussed in detail in Chapter 5 (5.4.1 The Saudi Grievances Board and the Application of Public Policy).

¹¹⁴ See Michelle Sowe, Australian Societal Values, *The Australian Collaboration: A Collaboration of National Community Organisations* (January 2012) <<http://www.australiancollaboration.com.au/view-all-resources/complete-list-of-fact-issue-sheets/>>.

¹¹⁵ Generally see Australian Government: Department of Immigration and Citizenship, *Life in Australia* (Commonwealth of Australia, 2007). See also Sowe, above n 114.

¹¹⁶ See Faisal Kutty, 'The *Shari'a* Factor in International Commercial Arbitration' (2006) 28(3) *Loyola of Los Angeles International and Comparative Law Review* 565, 577.

¹¹⁷ Ibid.

¹¹⁸ See Baamir, above n 2, 7.

specified in the agreement'.¹¹⁹ This shows the court's obligation to refuse an award if it is contrary to these principles. Thus, it could be said that the Saudi judicial system is founded on the societal values in the country where the court is obliged to protect the public interest of members of the Saudi population. Thus, if the court fails to consider these principles in enforcing foreign arbitral awards, societal values would be harmed and the court would not achieve the required protection.

Just like Saudi Arabia, Australia is a signatory to the *Convention* but has advanced further in regard to its arbitral regime by also adopting the *Model Law*, both of which have been exclusively entrenched in Australian domestic law. This is primarily through the provisions of the *IAA 1974*.¹²⁰

Monichino noted that Australia has been in the extensive process of initiating substantial reforms in its arbitral legislative regime which is the key to the regulation of both domestic and international arbitrations.¹²¹ This reform in the arbitration law has been perceived by diverse commentators as the first step aimed at elevating the utility of arbitration in Australia¹²².

Australia is a common law country with a profound hybrid of statute law and case law and is bound to experience extensive internationalisation.¹²³ This is anticipated to impose complex effects on the enforcement of foreign arbitral awards in the country both now and in the future.

Therefore, it is apparent from the above discourse that the enforcement of international arbitral awards in both countries usually considers the societal values which guide the nature of actions

¹¹⁹ See *Ruling No 92 / T / 4 of 1424 AH 2004*.

¹²⁰ See generally Gregory Nell, 'Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia' (Paper presented at the Fall Meeting of the Maritime Law Associations of the United States, Canada, Australia and New Zealand, Hawaii, December 2011).

¹²¹ See Albert Monichino, 'Arbitration Reforms in Australia: Striving for International Best Practices' (Paper presented at the Challenge and Change Conference, Christchurch, New Zealand, 5–7 August 2010).

¹²² Clyde Croft, 'Arbitration Reform in Australia and the Arbitration List (List G) in the Commercial Court - Supreme Court of Victoria: Commentary' (Notes for a Commentary presented at a Seminar of the Commercial Bar Association of the Australian Bar, 24 May, 2010) <<http://www.austlii.edu.au/au/journals/VicJSchol/2010/10.pdf>>.

¹²³ See Winnie (Jo-Mei) Ma, *Public Policy in the Judicial Enforcement of Arbitral Award: Lessons for and from Australia* (Thesis of Doctor of Legal Science (SJD), Bond University, December 2005) 49.

in their respective societies. This is because profound consideration to the nature of specific societies is fundamental in the successful enforcement of these awards.¹²⁴

This criterion requires study and an exploration of the relevant laws to determine the law and court role that would efficiently provide the following two important elements at the same time. First, the court shall provide justice and fairness for both parties and achieve their interests and maintain their rights. Secondly, the court shall simultaneously maintain the society's social values and public policy.

A court that would bring these two elements together is the court that is relatively better and more worthy of being followed as a model because it maintains public and private rights at the same time, and facilitates and encourages people to resort to arbitration.

Therefore, it could be said that social values are not utopian or simply stating an ideal because they are an integral part of reality; they guide practical conduct and inspire people to determine their options. Therefore, values are the ideals that guide individuals and groups in all of their everyday actions. Public policy, which contains these values, is divided into two aspects, namely domestic and international public policy. In that regard, the *Convention* in Article V(2)(b) gives the national judge the right to refuse to implement any foreign arbitral award if the 'recognition or enforcement of the award would be contrary to the public policy of that country'. This means that the public policy here referred to is the domestic public policy, though scholars differ on that;¹²⁵ and this definition is still wide, undisciplined, and loosely rather than precisely defined.

Considering that such general definitions are non-specific and undisciplined, and also in view of the *Convention* which gives national courts the right to refuse the implementation of foreign

¹²⁴ See generally Marvin F Hill and Emily DeLacenserie, 'Interest Criteria in Fact-Finding and Arbitration: Evidentiary and Substantive Considerations' (1990–1991) 74 *Marquette Law Review* 399.

¹²⁵ This point will be discussed in more details in Chapter 5 (5.3 Scope and Impact of Public Policy). On that difference, see Fathi Wali, '*Althkīm fy Alnzrya ū Altaṭ bīq* [The Arbitration Law in Theory and Practice]' (Manshat Alma'rf, 2007) 504.

arbitral awards within the country, if that ruling or award constitutes a violation and a threat to public policy and public values, this opens the door for judges — on the basis of this exception — to reject any foreign arbitral awards. Hence there is a need to determine a standard comprised of those social values that can be the basis of refusing to implement the rule of foreign arbitration in the event of their violation. This research will try to determine the standard of this concept by:

1. Attempting to explain and provide a definition of the public policy concept as a purely academic scientific principle.
2. Analysis of provisions that have been rejected by courts in regard to the implementation of foreign arbitral awards (in both countries) in order to determine the legal standards in defining the concept of public policy and attempting to express them in a specific rule or principle.

It should be noted that the use of these criteria as a method of scientific enquiry does not mean that all of these criteria will be used at each point of the research or in all chapters. That is because all criteria are not suitable for all chapters; in some a single criteria is sufficient where some chapters cannot afford all of these criteria, so only one of these criteria is utilised where that will suffice. However, these factors will be used in regard to this research ‘as a whole’ to ensure a rational analysis of all the points at the end, where such an analysis produces scientific results that help to make a decision on the material.

From the above discourse, it is apparent that courts in diverse states play a fundamental role in protecting their societies from any arbitral award that violates the respective state’s public policy, in which is chiefly embedded the societal values. Nonetheless, there is some intrinsic variance in regard to the role of the courts in fulfilling this mandate based on the legal orientation of different countries. This role will be discussed in regard to the Saudi and Australian courts.

In addition, it should be noted that justice within the judicial processes — which is directly related to the equality of the individuals and collectives in receiving the protection of the court despite the diversity of their characteristics — is paramount in both countries. Nonetheless, the above analysis has evidenced the tendency towards permitting the courts to discuss the merits of specific cases which had been decided by arbitrators and is bound to inflict negative impacts on the course of justice in terms of time wastage and other detrimental impacts on the disputing parties.

1.5 Significance of the Study

The importance of this research stems from the importance of arbitration as a less expensive and peaceful means to settle disputes in the field of international trade. In fact, the application of foreign arbitration raises several problems affecting the freedom of parties which may prevent them in some cases from resorting to arbitration, and that may lead to parties incurring heavy economic losses. Additionally, different dates of accession to the *Convention*, which is considered the most important international effort in the recognition and enforcement of the foreign arbitral awards (Australia: 1974 and Saudi Arabia: 1994), is an important factor which will benefit consideration as to how the provisions of the *Convention* have been applied in Australia. Moreover, the significant differences between Australia and Saudi Arabia in their legal basis and traditions makes such a comparative study very worthy, as it shows the differences and highlights areas of strengths and weaknesses of the law prevailing in each jurisdiction.

Furthermore, the absence of comparative studies in international commercial arbitration in Saudi Arabia and the gap in Saudi legal literature in general make such a study very important, as it enriches the legal library with a contemporary comparative study. On the other hand, in the Australian literature, there are a number of examples of research in this area that deal with the theory of arbitration and discuss the substantive requirements, such as the requirement of public policy; however, it could be said that there is no comprehensive and detailed analysis of all of

the formal and substantive requirements for the implementation of the provisions of foreign arbitral awards. There are also no studies comparing the role of the courts regarding the implementation of foreign arbitration between Saudi Arabia and Australia.

In addition, the lack of texts and papers in English on the implementation of the *Convention* in Arab countries, especially Saudi Arabia, and the importance of the Middle East in international commerce will make such a study useful for the development of domestic laws to encourage and attract foreign investment.

Finally, one of the significant factors that demonstrate the importance of this research is that it will highlight the reasons for the shortcomings in some Western research on the Saudi regime and clarify the *Saudi Arbitration System 1983* where there is a fundamental misunderstanding on the part of Western and Eastern scholars about the implementation of foreign arbitral awards under the *Saudi Arbitration System*, as we shall see in the literature review.

1.6 Literature Review

1.6.1 Background

There is a distinction between recognition and enforcement of foreign arbitral awards.¹²⁶ Thus, the differences between the recognition and implementation of arbitration should be taken into account because the arbitral award could be recognised by a national jurisdiction but it is possible from the court to reject the application of the provision within the state for a particular reason (that is, the arbitral award is contrary to public policy). On the other hand, the arbitral award which is given enforceability by the national jurisdiction certainly has recognition, so the award has then both recognition and implementation, which is not the case if the court refuses to recognise the award. Therefore, ‘recognition’ means that the decision is correct and binding on

¹²⁶ For more information about these differences, see Julian D M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 690.

the parties, and ‘implementation’ means that the arbitral award can be enforced and also includes the possibility of execution by force if a party refuses to comply with the award.

The importance of arbitration in international trade motivates countries to build a system to recognise and implement foreign arbitral awards. The procedures which govern the recognition and implementation of arbitral awards are established by collective international conventions, bilateral and regional agreements and national laws.

Generally, the rules for the international convention govern the methods of recognition and implementation of foreign arbitral awards and limit a judge’s control. This limit ‘to the judge’s authority’ is to a review of the formal requirements and the procedural rules that were applied by the arbitral tribunal and to make sure that the parties have met all of the official requirements (that is, have provided the official documents which are required for the implementation of any foreign arbitral award).

Therefore, these Rules have excluded consideration of the subject matter of the dispute from the authority of the judge. However, they have left to the national laws the freedom of determining the competent court and the procedural rules of pleading to request the implementation of the foreign arbitral award.

This shows that international conventions have left room for national laws to determine the competent court to consider such provisions, as well as the conditions to be followed, and for the formal procedural requirements to be established in the litigation laws. These conventions have also left the door open for the national authority to refuse the foreign arbitral award if it contrary to public policy and public morals.

It should be noted that the method of the analysis and discussion of the previous studies in both countries will be separate, which means that the analysis of the previous studies on the role of Saudi judge will be first undertaken and then the analysis of the role of the Australian judge. Comparisons between these two judiciaries will be in the conclusion of this chapter. This is due

to the fact that there are fundamental differences between the court systems in both countries, which entail the difference in the manner of dealing with all the studies and research work.

1.6.2 Implementation of Foreign Arbitral Awards in Saudi Arabia

A. Background

Due to the importance of arbitration in the international context, which is increasing every day, many Arab countries are involved in it in various fields, whether concluding regional international agreements, joining standing ones or creating national legislation. In addition, the requirements of international trade involve establishing Arabic arbitration centres and/or holding conferences and seminars about arbitration. The *New York Convention* is the most important of the international agreements, and has effectively become a global law. Saudi Arabia ratified this convention in 1994.

There are also several agreements between Arab states that are relevant to this research. These agreements can be divided into two groups. The first contains agreements which include the settlement of conflicts through arbitration, namely:

1. The *Convention Establishing the Inter-Arab Investment Guarantee Corporation* (1971).¹²⁷ This includes reference in Articles 34(2) and 35 of an annex on dispute settlement. The annex covers disputes that may emerge as to the Convention's interpretation or application that may arise after the cessation of the Corporation or where a dispute arises in regard to a party that has withdrawn from the Convention or whose membership otherwise is interrupted. It also specifically covers conflicts emerging between any of the member states of the Agreement, or between such states and the establishing organisation regarding any investment which is insured under this

¹²⁷ *Convention Establishing the Inter-Arab Investment Guarantee Corporation*, opened for signature May 1971 (entered into force April 1974). For text, see United Nations Conference on Trade and Development (UNCTAD), *International Investment Instruments: A Compendium, vol II Regional Instruments* (1996) UN Doc No UNCTAD/DTCI/30(Vol.II) 127 et seq <http://unctad.org/en/docs/dtci30vol2_en.pdf>.

convention. The settlement can be carried out through negotiations, reconciliation or arbitration (Articles 2, 3 and 4 of the Annex respectively), depending on the circumstances. The Annex is an integral part of the Convention and is not open to any reservation.¹²⁸

2. The *Convention on the Settlement of Investment Disputes between States [that] Host Arab Investments and the Citizens of Other Arab Countries* 1974.¹²⁹ This convention is specifically for settling the conflicts that directly emerge from an investment between the hosting Arab countries or one of their staff or public organisations and the citizens of other Arab countries. Settlement can be undertaken through reconciliation and arbitration (Article 2).
3. The *Unified Agreement for the Investment of Arab Capital in the Arab States* (1980).¹³⁰ This League of Arab States agreement also includes an annex covering the settlement of conflicts by reconciliation and arbitration.
4. The *Arab Convention on Commercial Arbitration* (1987) (the ‘*Amman Convention*’),¹³¹ which is considered the most important Arab agreement in the field of commercial arbitration, as it is the only one that organises arbitration in an integrated institutional framework with respect to the different trade conflicts. It starts with the formation of a permanent unified Arab centre to resolve conflicts through arbitration, then establishes

¹²⁸ *Convention Establishing the Inter-Arab Investment Guarantee Corporation*, Annex, art 1. The Convention also provides for appointment of an arbitrator by the Arab Court of Justice should an arbitrator not be agreed upon within the period set: art 4(1)(b).

¹²⁹ *Convention on the Settlement of Investment Disputes between States [that] Host Arab Investments and the Citizens of Other Arab Countries* 1974, opened for signature 10 June 1974 (entered into force 12 August 1976).

¹³⁰ This League of Arab States Agreement was signed 26 November 1980 (entered into force 7 September 1981). For text see United Nations Conference on Trade and Development (UNCTAD), *International Investment Instruments: A Compendium, vol II Regional Instruments* (1996) UN Doc No UNCTAD/DTCI/30(Vol.II) 211 et seq <http://unctad.org/en/docs/dtci30vol2_en.pdf>.

¹³¹ *Arab Convention on Commercial Arbitration*, opened for signature 14 April 1987 (entered into force 25 June 1992) (‘the *Amman Convention*’).

arbitration procedures, and concludes with the issuance, correction and challenging of arbitration decisions, and even their execution.

The second group comprises some conventions that concern the execution of arbitration decisions. The most two prominent of these agreements are:

1. The *Convention on the Enforcement of Judgments and Arbitral Awards 1952* (League of Arab States),¹³² which is concerned with the execution in one Arab country of decisions made in another Arab country, whether those decisions were judicial or arbitral.
2. *Riyadh Convention on Judicial Cooperation 1983* (League of Arab States)¹³³ which contains provisions related to the execution of arbitration decisions that are issued in one of the contracting countries by other countries.

As for the national laws, Saudi Arabia has adopted a special law (*Saudi Arbitration System 1983*) relating to commercial arbitration and including but not comprehensive in regard to the international type. This law governs the implementation of arbitration and was issued by Royal Decree No M / 46.¹³⁴

In fact, several researchers¹³⁵ rely upon the conditions contained in the dissemination of the Decision of the President of the Grievances Board No 7 of 15/8/1405 (1985),¹³⁶ which was provided for in the *Arab Convention*.¹³⁷

¹³² *Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards*, 14 September 1952 (entered into force in 10 November 1952).

¹³³ *Convention of the Arab League on Judicial Cooperation between the League of Arab States*, opened for signature 6 April 1983 (entered into force October 1985) ('*Riyadh Convention*').

¹³⁴ This Royal Decree was issued on 12/7/1403 AH 24 April 1983, *Umm Al-Qura Gazette* No 2969, 22/8/1403 AH 1983.

¹³⁵ For more information, see Mohammed Al-Mqswdi, '*Alshrūt Alshklīh ū Almwqūih ltnfīth ḥkm Althkīm Alajnby fy Almmīlakh* [Substantive and Procedural Requirements to Implement the Provisions of Foreign Arbitral Awards in Saudi Arabia]' (Al-Dar Alhndsih, 2000) 19.

¹³⁶ This decision is quite longstanding (1985). However, there is a more recent decision (No 116 1428/2008) that has not been dealt with by the researchers. Nonetheless, the constitutionality of the older decision has not been fully analysed (by measuring the legal authority of the President of the Grievances Board in issuing such decision and also measuring such a decision in the light of the

These conditions include the objective conditions for the implementation of the foreign arbitral award. Briefly this includes ‘*arbitrability*’ and finality, the latter requiring that the arbitral award must be final and have acquired peremptory status. That is because finality gives the arbitral award a legal power to be enforceable.¹³⁸

Al-Foraian in his book ‘*National and International Arbitration and Ways of Implementing the Provisions*’ affirms that¹³⁹ the finality condition is commensurate with the non-examination of the case by the competent implementing authority because such examination has already occurred in the country where the arbitral award was made; however, he did not detail what examination had occurred. Therefore, it is not clear that Al-Foraian here was referring to the examination of the merits of the case or to the examination of the formal and procedural conditions of the arbitration. Additionally, these conditions include that the verdict must be issued on the basis of correct and proper procedures, which exist in the interest of the parties; and the verdict must be issued within the jurisdiction of the arbitral tribunal.

The ‘*Public Policy*’ defence is one of these conditions as is the requirement that the arbitral award not be inconsistent with any court judgment to be implemented based on the same dispute or any case list.¹⁴⁰

On the other hand, these conditions of the arbitration (which are present in the international conventions, the *Saudi Arbitration System 1983* and in the decisions of the President of the

Constitution principles). Thus, the question is whether the President of the Grievances Board has the legal right to address such a decision or not.

¹³⁷ See Abdulaziz Al-Foraian, ‘*Alṥkīm Alwaṥany ū Aldwly ū Trq Tanfīdh* [National and International Arbitration and Ways of Implementing the Provisions]’ (Almiman, 2007) 140.

¹³⁸ However, in practice France has violated this requirement by accepting an arbitral award which had been set aside in the country where it was issued. So what is the legal justification in such a case, and what is also the position of the French courts under the *New York Convention* (1958) which provides for acceptance of any arbitral award only if that award is final (and accepted as peremptory) in the country where this award was issued? For more information, see Mohammed Aboul-Enein, ‘*Tnfīth Itfaīat New York fy Aldwl Al’rbiah* [Application of the *New York Convention 1958* on the Recognition of Foreign Arbitral Awards and Implementation in the Arab World]’ (Paper presented at the *New York Convention 50 Years: Practical Perspectives on the Recognition and Enforcement of Foreign Arbitral Awards*, Cairo, 10–11 November 2008)10.

¹³⁹ Al-Foraian, above n 137, 144.

¹⁴⁰ These formal and substantive conditions will be discussed and analysed in more details in Chapters 4 and 5.

Grievances Board) must be seen in the context of their practical application. This is achieved by analysing court judgments to determine the operation of these conditions in practice. In fact most of the previous studies are not that significant for this research because they only present some of the provisions and some of the decisions that have been issued by the Grievances Board, and without any real analysis to establish and develop the principles on which the court implements foreign arbitral awards. For example, Al-Foraiaian presents some judgments in applying foreign arbitral awards with a brief explanation on the facts; but fails to demonstrate the deep analysis necessary to reveal the true practice of the Grievances Board in the implementation of such awards.¹⁴¹

B. Previous Studies

The implementation of the provisions of foreign arbitral awards in Saudi Arabia has not been fully researched to represent an academic view or establish a basis that helps in understanding the process of implementation. This may be one of the reasons for the misunderstanding and wrong perceptions of several researchers about the role of the Saudi courts in the implementation of foreign arbitral awards.

Baamir, a Saudi lawyer and the author of the most important book on arbitration in terms of the discussion of methods and formal and substantive conditions for the implementation of foreign arbitral awards, in his book '*Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia*'¹⁴² is mistaken in some of his assertions about the application of foreign arbitral awards in Saudi Arabia where he had recourse to some *fatwa*,¹⁴³ as well as a number of court decisions released by the *Shari'a* Supreme Courts in different cities concerning

¹⁴¹ Al-Foraiaian, above n 137, 249.

¹⁴² See Baamir, above n 2.

¹⁴³ *Fatwa* as an Arabic word that literally means 'opinion'. In the religious context, *fatwa* means an opinion from an Islamic point of view given by a Muslim scholar ('*mufti*') based on his understanding and interpretation of the religious evidence from the Islamic sources (that is, the *Qur'an*, *Sunnah*, *Ijma'a* and *Quias*). However, such an opinion is not binding on Muslims unless it comes from a direct text of *Qura'n* or *Sunnah* or it reaches the *Ijma'a* level. For more information, see Mozaffar Hossain, 'The Story of Fatwa' (2002) 4(2) *Interventions: International Journal of Postcolonial Studies* 237.

some commercial matters, and he also dealt with a number of rulings issued by the Saudi Grievances Board concerning domestic arbitration. Finally, he used some international arbitral awards released by some international arbitration centres as examples of international arbitration.

Unfortunately, he did not consider any decision from the Saudi Grievances Board concerning the implementation of international arbitral awards and that in turn has affected his final result where he reached some conclusions without any real evidence. For example, he assumed that a musical instruments contract would be refused on public policy grounds by the Grievances Board because musical songs are forbidden in Islam. This statement is obviously wrong as the Grievances Board considered that musical songs is a matter of controversy between scholars; thus, it is unrelated to the public policy defence which is limited to the Islamic assets (or certainties).¹⁴⁴ Hence such an award will be enforced in Saudi Arabia. Thus, he did not discuss what could be considered as material governed by *Shari'a* law.¹⁴⁵ He was also wrong about the role of the Saudi judges in interpreting public policy when he stated that 'the judges decide on the basis of their personal opinions and are not obliged to adhere to any precedent, even if a decision of review Committee [Audit-Circuit or court of appeal] of the *Diwan* [the Grievances Board] exists on particular matter.'¹⁴⁶ This contradicts *Ruling No 189 / T / 4 in 1427 AH 2007* as we shall see in Chapter 5 (5.4.1 (B) Scope of 'Violation of Islamic Law' in the View of the Saudi Grievances Board).

Furthermore, Baamir believes that the implementation of foreign arbitral awards was a theoretical possibility prior to the enactment of the *Saudi Arbitration System 1983* but was not practically possible in regard to any court. Thus, according to Baamir the Saudi courts did not accept any arbitration clause before the issuance of that law because of the absence of a legal

¹⁴⁴ These assets will be explained in 5.4.1 The Saudi Grievances Board and the Application of Public Policy, but generally refer to what has been cited in the holy *Qur'ān* and *Sunnah* and agreed on among the scholars.

¹⁴⁵ See Baamir, above n 2, 139.

¹⁴⁶ Ibid 148.

text that obliged the court to accept such process.¹⁴⁷ In fact, such a view ignores the arbitration process under *Shari'a* in general and also ignores the text of the *Saudi Commercial Court System* 1350 AH (1930), where arbitration is addressed in five Articles (Articles 493–497). These Articles had organised the resort to arbitration, and required that the agreement shall be in writing and ratified by the Commercial Court. It also left full freedom for the parties to create arbitration clauses. In addition, the parties can outline the role of arbitrators and to choose the arbitration process. Finally these articles had organised the Court's role in the implementation of the arbitral award (which shall not violate public policy).

It is true that the Grievances Board was not the competent court to consider the application of the arbitral awards at that time, but the domestic arbitration as a process existed under the *Saudi Commercial Court System 1930*. This shows the seriousness of this understanding which ignores the role of arbitration in settling disputes before the issuance of that law and also ignores the role of the Saudi judiciary in implementing arbitral awards.

In fact, Baamir cites Dr Al-bjad, who believed that the resort to the arbitration was limited at that time (prior to the *Saudi Arbitration System 1983*) because of the absence of an independent legal framework to define the limits of arbitration.¹⁴⁸ Therefore, the enactment of that law helps in the understanding of the limits of arbitration in Saudi Arabia. Baamir also argued that the *Convention* has a limited application in Saudi Arabia.¹⁴⁹ It is obvious that the Grievances Board is applying the relevant Arab League conventions in any case that concerns the provisions of an award issued in any Arab country. The Grievances Board also applies the Gulf Cooperation Council (GCC) *Convention for the Execution of Judgments, Delegations and Judicial Notifications*¹⁵⁰ ('GCC Convention') in applying any arbitral provision issued in any GCC

¹⁴⁷ Ibid 117.

¹⁴⁸ Ibid 117–18, where the author cites Mohammed Al-Bajd, '*Althkīm fy Almamlakah Al'rabia Als'wdih* [Arbitration in Kingdom of Saudi Arabia]' (Public Administration Institute, 1999).

¹⁴⁹ Baamir, above n 2, 140–2.

¹⁵⁰ *Convention for the Execution of Judgments, Delegations and Judicial Notifications*, opened for signature 29 Shawwal 1414 AH corresponding to 10 April 1994 (entered into force 14 Rajab 1416 AH corresponding to 4 December 1995) ('GCC Convention').

country. Thus, the limited use of the *Convention* is explained by the existence of the Arab League and the GCC conventions whereas the *Convention* would be applied in any provision issued in non-Arab countries as long as that country is a party to that convention. Otherwise the Saudi courts will apply the reciprocity principle and will apply the decisions released by the President of the Grievances Board.¹⁵¹

On the other hand, a number of Western researchers have a fundamental misunderstanding about the process of the enforcement of foreign arbitral awards within Saudi Arabia; they believed that the *Saudi Arbitration System 1983* always ‘unfairly’ favours the Saudi party. For example, Wakim believes that in Saudi Arabia the public policy standard, which will be invoked upon review during enforcement proceedings, remains unclear and undetermined.¹⁵² This ignores the fact that the principle of *public policy* is still a general principle and is not defined precisely in theory or in any judicial system. Such a view also ignores the first and the second decisions that have been released by the President of the Saudi Grievances Board which have been mentioned earlier. Wakim also states that ‘Saudi Arabia has been described as “traditionally hostile” to the recognition and enforcement of non-domestic arbitral awards, finding such awards contrary to Saudi Arabian law and public policy.’¹⁵³ Despite the fact that he did not review or explore any court decision, or give a direct textual reference supporting that view, he asked, whether the question remained how an award can be contrary to Saudi public policy or, he asked was an award rejected simply because it was foreign award. It is not even logical to say that without a real exploration of any court decision.

In fact, Wakim cites Kent Benedict Gravelle,¹⁵⁴ when he (Wakim) states that Saudi Arabia has refused to enforce some foreign arbitral awards; however, Gravelle was saying,

¹⁵¹ Baamir, above n 2, 116.

¹⁵² See Mark Wakim, ‘Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East’ (2008) 21(1) *New York International Law Review* 1, 27.

¹⁵³ Ibid 57.

¹⁵⁴ Ibid; also for more information, see Kent Benedict Gravelle, ‘Islamic Law in Sudan: A Comparative Analysis’ (1998) 5(1) *ILSA Journal of International & Comparative Law* 1.

Saudi Arabia refuses to enforce arbitrated awards if they are found to be contrary to *Shari'a* law. Thus, if an arbitrated award includes interest, part of, or all of, the award will not be enforced.¹⁵⁵

It is obvious that Gravelle was just giving a general explanation of the situation that might be applied in Saudi Arabia and he did not give an example of any real case that shows such result; also, he did not explain the possibility of partial application of the rule in any consideration (although he admitted partial enforcement as a possibility). Again, it not simply because the hypothetical award is 'foreign', it is because all or part of it is contrary to *Shari'a*. Gravelle said as much in the quote above, but in a general manner without citing actual cases. Hence, it is clear that both Wakim and Gravelle were just giving general statements without real cases to support their argument, which makes their analysis limited at best, and inaccurate and misleading at worst.

Another misunderstanding is that of Carbonneau about arbitration in Saudi Arabia and it is also noticeable, as he states that:

Saudi Arabia appears to be the country that has taken the most negative position on ICA [International Court of Arbitration], questioning its value, origins, and legitimacy. For example, although the Saudi government has ratified the *New York Arbitration Convention*, Saudi law makes the enforcement of an international arbitral award difficult and time consuming. Such an award is enforceable only if it is accompanied by a court judgment from the state of rendition [the finality]. The award must be authenticated by the Saudi Ministry of Foreign Affairs, the Saudi Ministry of Justice, and the Saudi consulate in the state of rendition [dually authenticated award as required by Article IV of the *New York Convention* and what has been addressed in s.9(2) in the IAA in Australia]. Moreover, an award not rendered in Arabic must be translated by a sworn [licensed] translator before it can be submitted to the Saudi government through proper diplomatic channels.¹⁵⁶

Basically, any foreign award that has been written in another language must be translated into Arabic because it is the language of the country; it must also be translated by a certified translation office that has a licence to do so. However, there is no requirement for the performance of a certain section of the translation; it requires the presence of seals of the office-based translation, which show the licence number. Thus, it is clear that Carbonneau just

¹⁵⁵ Ibid 19.

¹⁵⁶ See Thomas E Carbonneau, 'The Ballad of Transborder Arbitration' (2002) 56(4) *University of Miami Law Review* 773, 794-5.

addressed some formal requirements that have been set by the *Convention* (see, for example, Article IV) and cited them as an obstacle to implementation in Saudi Arabia. However, he did not give real cases as example or give a law text that supports his view. Additionally, the submission of the provisions of the arbitration is to be directed to the competent court in Saudi Arabia (that is, the Grievances Board) and not to any government department or not by any diplomatic procedures. This was stated in the Saudi arbitration regime and also the Saudi Grievances Board regime.

Furthermore, Thomas Carbonneau has misunderstood the implementation of foreign arbitral awards in Saudi Arabia where he states: ‘The Saudi government reserves the right to refuse enforcement of an award. Awards rendered by default against a Saudi party are automatically unenforceable.’¹⁵⁷ Such a provision is not even logical and in any case, any foreign award cannot be automatically unenforceable. There is no defence or law ground under which that can occur. He did not supply any supporting material directly from a legal text or at least a court case that expresses such provision. It appears that he has grossly misunderstood Article 2 of the *Saudi Arbitration System 1983* where it states:

Government departments may not resort to arbitration to settle their disputes with third parties except after approval of the president of the Council of Ministers. This ruling [the requirement of prior approval before recourse to arbitration] may be amended by a resolution from the Council of Ministers.

That means all government departments are not allowed to resort to or accept the arbitration clause in any contract without the prior approval of the President of the Council of Ministers. But when any government department has obtained approval to include the arbitration clause in any contract or has to obtain approval to resort to arbitration after conflict has arisen, the arbitration becomes binding on this department and the court will apply the conditions set by the Saudi laws. So there is no right at all for the Saudi government to ‘automatically’ refuse any arbitral award. The prohibition is about inclusion of a clause facilitating the resort to arbitration

¹⁵⁷ Ibid 795.

at the outset of the contract process or the referral of conflict to arbitration without the approval of the President of the Saudi Council of Ministers.

Additionally, Carbonneau states: ‘Enforcement of awards from countries that are not members of the Arab League Convention is based on reciprocity.’¹⁵⁸ This ignores a number of treaties and conventions that Saudi Arabia is a party to, which was explained above. Moreover, he seems to ignore the two decisions that have been released by the President of the Grievances Board, which clarify the enforcement of foreign judgments and foreign arbitral awards.¹⁵⁹ These decisions take account of the application of the rules of international and regional conventions signed by the Kingdom, and so include all Arab and non-Arab agreements. Carbonneau is thus incorrect when he states that reciprocity is always required before an award from a non-Arab League state can be enforced.

Surprisingly, Carbonneau maintains: ‘If an award is not enforceable, the party holding the award may file an action before the Saudi Grievances Board to obtain a determination of the dispute under Saudi law.’¹⁶⁰ There is no principle of law or article in the *Saudi Arbitration System 1983* that includes such a provision in dealing with any foreign awards. The situation is that the Grievances Board (as explained above) is the competent court for the approval of national and foreign awards; and, if the award is not enforceable, that means the parties can resort to any other alternative dispute resolution services or simply go to the competent court that originally had the authority to consider the dispute to start a new case (while ignoring the arbitral award).¹⁶¹ This last situation is nearly impossible as the defendant will claim that the court has no jurisdiction to consider the case due to the existence of an arbitral award. The

¹⁵⁸ Ibid 795.

¹⁵⁹ Of the same view of Carbonneau regarding the weaknesses of the Saudi legal System, see Fatima Akaddaf, ‘Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?’ (2001) 13(1) *Pace International Law Review* 1, 24.

¹⁶⁰ Carbonneau, above n 156, 795.

¹⁶¹ That was clear in Chapter III Article 13 of the *Saudi Grievances Board System*. For more information, see Chapter 2 of this thesis which discusses the competent courts in Saudi Arabia and Australia.

defendant will do this in order to avoid the powers of the court in the new case. Such cases are rare, but possible, which raises the question about possible practical solutions.

Noticeably, Carbonneau has also misunderstood the requirement of prior permission for any government agencies before resort to or acceptance of any arbitration clause, as he states: ‘An award rendered against the Saudi government or its agents is not enforceable. If the Saudi government or its agencies are a party to a contract, arbitration is prohibited unless the President of the Council of Ministers consents to the provision.’¹⁶² Again, the consent is to the resort to the arbitration process, as explained above, so it is not to the enforcement of the arbitral award. This prior consent requirement is clearly stated in Article 3 in the *Saudi Arbitration System*. It is obvious that arbitration is not permissible for the government’s agencies; however, there is an exception if that department obtains prior permission either for the inclusion of the arbitration clause in the original contract, or the entering into a specific arbitration agreement once a dispute has arisen.¹⁶³ Hence, Carbonneau is simply predicting what *might* happen without any evidence that could support this observation or he has misunderstood the real role of the Saudi Grievances Board.

Thomas Childs also believes that the application of foreign arbitral awards in Saudi Arabia in practice appears to be ‘almost impossible’.¹⁶⁴ Obviously, he made such a statement without any evidence or examining any real cases. He openly laments that while he himself does not know of a single example of where a foreign award has been implemented, it is difficult to ascertain the true position as the Board does not publish its decisions.¹⁶⁵ Thus, access to materials has

¹⁶² Carbonneau, above n 156, 23.

¹⁶³ For more information about arbitration in the government contracts, see Abdulaziz Bin Zaid, ‘*Mdā Jwaz Althkīm fī Al’qwd Alcdarīh*: Derasah Muqarnh [The Permissibility of Arbitration in the Government Contract]’ (Masters (Research) Thesis, Faculty of Law, University of Jordan, 2006). Roy also has misunderstood this point — he denies that any foreign arbitral award has been implemented in Saudi Arabia and states that it is nearly impossible to do so: Kristin T Roy, ‘The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ (1994) 18(3) *Fordham International Law Journal* 920, 951.

¹⁶⁴ See Thomas Childs, ‘Egypt, Syria and Saudi Arabia: Enforcement of Foreign Arbitral Awards in Egypt, Syria and Saudi Arabia’ *Arbitration Newsletter*, September 2010, 71, 72.

¹⁶⁵ *Ibid*.

clearly been a problem for many researchers. The 2007 amendments to the *Grievances Board System* will, it is hoped, help remedy this situation for domestic and overseas researchers as, over time, a ‘technical affairs bureau’ is expected to collect and publish at least some decisions of the Board.¹⁶⁶

Apparently, there are many researchers who have tried to explain the process of the application of foreign arbitral awards in Saudi Arabia; however, they did not deal directly with the Grievances Board’s decisions and thus were unable to give a clear view of the enforcement of foreign arbitration within Saudi Arabia.¹⁶⁷

Consequently, there is not much written about the enforcement of foreign arbitral awards in Saudi Arabia — as compared to that which occurs in Australia (as we shall see in the next few lines) — which is able to represent the academic view or provide a basis for the Saudi legal library to help create an understanding of the process of implementation. Additionally, the role of the judiciary is not discussed in arbitration, which in turn makes the research at this point very important in order to cover this shortfall. This requires a discussion of formal and substantive requirements as we shall see in chapters 4 and 5, where such research will show the foundations and methods of implementation.

¹⁶⁶ Ibid 72–3, where reference is made to Article 21 of the *Grievances Board System 2007 (The Implantation Mechanism of the Judiciary Law and the Board of Grievances Law, Royal Decree No M / 78, 19/9/1428 AH 2007)*.

¹⁶⁷ See Wakim, above n 152, 27; El-Ahdab and El-Ahdab, above n 10; Gravelle, above n 154 11; Carbonneau, above n 156, 773; Childs, above n 164, 71; Al-Foraian, above n 137; Abdullah Alassaf and Bruno Zeller, ‘The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985’ (2010) 7 *Macquarie Journal of Business Law* 170; Baamir, above n 2; Yahya Abdullah Al-Samaan, ‘*Tnfith Ahkam Althkīm Alajnaḃīah fy ḏw Itfaḓāt New York fy Almmlaka Al’rbīah Als’wdīah* [Implementation of the Provisions of Foreign Arbitral Awards in the Kingdom of Saudi Arabia in the Light of the New York Convention]’ (2000) 14 *Journal of Diplomatic Studies* 7; Yahya Al-Samaan, ‘The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia’ (1994) 9(3) *Arab Law Quarterly* 217; Al-Samaan, ‘Dispute Resolution in Saudi Arabia’, above n 10, 71, 79; G Bajaj, *Arbitration in the Kingdom of Saudi Arabia* (DLA Piper, 2009) <www.dlapiper.com/arbitration-in-the-kingdom-of-saudi-arabia/>; George Sayen, ‘Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia’ (Special Series 2003) 24(4) *University of Pennsylvania Journal of International Business Law* 509; Refat, above n 10; L Boshoff, ‘Saudi Arabia: Arbitration vs Litigation’ (1985–1986) 1 *Arab Law Quarterly* 299; Kristin T Roy, ‘The *New York Convention* and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ (1994) 18(3) *Fordham International Law Journal* 920.

Contrary to the impression gained from the writers above, in fact (as we shall see) Saudi courts have applied several foreign arbitral awards as long as they were not contrary to public policy and fulfilled the formal requirements. On the other hand, the Grievances Board will partly enforce the foreign arbitral award if it partly contrary to public policy, so the court will try to divide the award and apply the part that is correct by refusing the offending or the contrary part if possible.¹⁶⁸ The Saudi court, as we shall see, has implemented several arbitral awards before and after the ratification of the *Convention*. This application (before and after the ratification) was based on the *Saudi Arbitration System*, two decisions released by the President of the Saudi Grievances Board and some international conventions.

The analysis of foreign arbitral provisions will greatly increase understanding of the direction of the court dealing with such provisions. For example, it is important to know the extent of application of the formal requirements, such as the provision of specific documents (that is, the documents required to prove the *reciprocity* principle), and the extent of the obligation not to consider the subject matter of the case, the standard (and the violation) of public policy (or of the rules of Islamic law), and the extent of compliance with the terms of international conventions. This will also help to contribute to the identification of the parameters (or borders) of the implementation of foreign arbitral awards, which will make their application in Saudi Arabia clear and easy. Consequently, this research is undertaken to cover the shortfalls in this area, and it is based on an analysis of the decisions of the Saudi Grievances Board and conducted as a comparison with the situation in Australia.

¹⁶⁸ For example, *Ruling No 269 / ES / 4 of 1431 AH 2011*. In this case the court applied the rule of the International Court of Arbitration with the abolition of the usury part in the provision where it violated Islamic law (public policy in Saudi Arabia). In fact, the plaintiff has expressly requested the cancellation of the interest part in the provision. This case will be explained in more detail later in this thesis (Chapter 5 (B. Scope of ‘Violation of Islamic Law’ in the View of the Saudi Grievances Board)).

1.6.3 Implementation of Foreign Arbitral Awards in Australia

A. Background

The main area of focus is the role of the Australian courts in approving foreign arbitral awards and the applicable legal principles of applying these awards within Australia. In fact, the application of foreign arbitral awards in Australia is governed by a set of legal instruments: the *Convention*, *UNCITRAL Model Law*, Common Law, and Federal and State legislation.¹⁶⁹

Consequently, arbitration in Australia, which is performed as an event of litigation, is regulated by separate regimes: the Commonwealth *International Arbitration Act 1974* ('IAA'), a federal law, and the commercial arbitration Acts enacted by the various Australian states and territories.¹⁷⁰ In addition, an international commercial arbitration held in Australia is subject to both the *UNCITRAL Model Law* and the *Convention*, which are incorporated in the IAA.¹⁷¹

Under the IAA there are a number of formal requirements involved in the recognition and implementation of the foreign arbitration and, if the applicant satisfies these requirements, the court must recognise and enforce the award, and 'substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards...' ¹⁷² shall not be imposed.

Broadly speaking, the *UNCITRAL Model Law* leaves the parties with substantial autonomy in deciding whether or not their dispute is 'international'.¹⁷³ One consequence of this autonomy is that the parties can transform an otherwise 'domestic' agreement into an 'international' one

¹⁶⁹ See Morris, McLean and Beevers, above n 6, 175.

¹⁷⁰ For example, the *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1990* (Qld).

¹⁷¹ See *International Arbitration Act 1974* (Cth) ss 2, 3.

¹⁷² *Ibid* s 1(3). These formal requirements will be discussed and analysed in Chapter 4.

¹⁷³ *UNCITRAL Model Law*, annex 1 art 1(3). It should be noted that the *UNCITRAL Model Law* only applies to arbitration agreements entered into after 12 June 1985, which is the adoption date for this model law by the United Nations Commission on International Trade Law. See *International Arbitration Act 1974* (Cth) (IAA) s 15. Nor should such agreements be entered into before that date where the parties expressly agreed that the *Model Law* would apply).

simply by choosing a place of arbitration outside Australia or by agreeing that the subject matter of the arbitration relates to more than one country. In addition, the parties to arbitration may agree to apply law other than Australian law to their dispute. They may also allow the arbitration panel to base the award on considerations of general justice and fairness.¹⁷⁴

Australia has adopted the *Convention* enacted in 1974 through the *International Arbitration Act 1974* (Cth) (hereafter referred to as the *IAA*) to give effect to the *Convention on the Recognition and Enforcement of Arbitral Awards* ('*New York Convention*' or '*the Convention*').¹⁷⁵ Accordingly, the *IAA* adopted the *Convention* and all of its provisions in Schedule 1.¹⁷⁶ Notably, questions remain as to whether it will include any future changes to the *Convention*. The arbitral regimes for international and domestic arbitrations are not mutually exclusive. Under the *IAA*, the parties to an international arbitration may agree to exclude the *UNCITRAL Model Law*. If the *Model Law* is excluded, the procedural law of the arbitration will be determined by the applicable State or Territory *Commercial Arbitration Acts*.¹⁷⁷

The definition of the arbitration agreement in the *IAA* is an agreement in writing of the kind referred to in Article II(1) of the *Convention*, which is '[t]he term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' Consequently, the Federal Court of Australia formulated a definition of arbitration which is consistent with the *IAA*.¹⁷⁸ However, this can lead to different interpretations in foreign jurisdictions. Thus, the *UNCITRAL Model Law* in 2006 broadly recommended interpretation by recognising that Article II(2) of the *Convention* provides a non-exhaustive list of ways in which an arbitration agreement may be made 'in

¹⁷⁴ *Commercial Arbitration Act 1984* (NSW) s 22(2).

¹⁷⁵ *New York Convention* art II(1).

¹⁷⁶ *International Arbitration Act 1974* (Cth) sch 1 'United Nations Conference on International Commercial Arbitration Convention'.

¹⁷⁷ For more information, see Richard Garnett, 'The Legal Framework for International Arbitration in Australia' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 38, 49.

¹⁷⁸ See *Pan Australia Shipping Pty Ltd v Ship 'Comandate'* (2006) 234 ALR 483.

writing'.¹⁷⁹ The purpose of a written agreement is to give the contracting parties certainty with regards to their rights and obligations both in performance and in the event of a dispute.¹⁸⁰

The *Convention* gives the signatory state the right to refuse the application as a matter of reciprocity. On the other hand, Garnett believes that a party, who wants to defeat an arbitration clause which falls within the scope of the *Convention* can argue that the arbitration clause does not cover this matter as a public policy.¹⁸¹

The arbitrator or arbitration panel can be empowered to make an interim award, which is normally available to the court.¹⁸² However, according to section 19 of the *IAA*, an interim measure or award conflicts with Australian public policy if: '(a) The making of the interim measure or award was induced or affected by fraud or corruption; or (b) A breach of the rules of natural justice occurred in connection with the making of the interim measure or award.'¹⁸³ Furthermore, if the wording of the arbitration clause is narrow or narrowly construed, then perhaps only the breach of contract claim will be referred to arbitration, with the result that the parties may have to contest claims in two different forums which is expensive and inconvenient. This issue has burdened the Australian courts on a number of occasions in recent years with divergent attitudes taken as to the proper scope of an arbitration clause.¹⁸⁴

It should be noted that the *Convention* (Article 5) places the burden on the defendant to prove that the award is invalid on at least one of the seven grounds enumerated in the *Convention*. However, it is necessary to find out the role of the Australian court in instances where there is

¹⁷⁹ See Commonwealth Attorney-General's Department, Office of International Law, 'Review of the *International Arbitration Act 1974* (Cth)' (Discussion Paper, November 2008).

¹⁸⁰ See Karyn S Weinberg, 'Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoria and Amiable Composition' (1994) 12 *Boston University International Law Journal* 277, 286.

¹⁸¹ See Richard Garnett, 'The Legal Framework for International Arbitration in Australia' (2008) 19(4) *Australasian Dispute Resolution Journal* 249.

¹⁸² *Commercial Arbitration Act 2010* (NSW) s 17, s 17J. Note: s 17(1) and (2) provisions are adopted from the *UNCITRAL Model Law* (unlike 17(3) which is additional); and 17J is 'substantially the same'.

¹⁸³ *International Arbitration Act 1974* (Cth) 34, 19.

¹⁸⁴ Garnett, 'The Legal Framework' for International Arbitration in, above n 181, 250.

no proof of the invalidity of the award or where the defendant does not know about the invalidity of the award or even when the parties want to apply that invalid award.

The Australian court's action should be understood in cases where there is an invalid arbitration agreement or, in other words, where the arbitration agreement is invalid because the underlying contract is invalid.¹⁸⁵ Additionally, the court's actions should be understood in terms of the application of the principle of independence of the arbitration clause or arbitration agreement from the original contract. One also needs to know the response of parties to situations where the arbitral tribunal violates the terms of the arbitration agreement and based the arbitral award on a foreign law.

Article 5¹⁸⁶ of the *Convention* states that '[r]ecognition and enforcement of the award **may** be refused... [If] (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.'¹⁸⁷ There should be a way in which the Australian courts could examine the procedures and standards to assess minimum procedures required for the purpose of defence.¹⁸⁸ On the other hand, '[e]xcept in limited statutorily defined circumstances, there is no right of

¹⁸⁵ For quick comparison, the situation in the United States and Britain (according to Lu) is that The defence that an arbitration agreement is invalid is rooted in contract law. Some parties have argued that an arbitration agreement is invalid because the underlying contract is invalid. However, this argument usually fails in the United States due to the separability doctrine. In other words, if a contract is invalid, the arbitration agreement is not automatically invalid. In contrast, the separability doctrine is not absolute in England: courts will uphold arbitration clauses unless doing so would clearly "offend the policy of the illegality rule". Thus, parties arguing this defence are more likely to succeed in English courts. A similar defence allows the party opposing enforcement to argue that the award is beyond the scope of the arbitration agreement - that is, the award concerns matters not covered by the agreement.

For more information, see May Lu, 'The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2006) 23(3) *Arizona Journal of International and Comparative Law* 747, 757.

¹⁸⁶ Article V of the *Convention* provides: 'Recognition and enforcement of the award **may** be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:...' and added seven defences to oppose the enforcement of a foreign arbitral award. More explanations about this convention and this particular Article 'V' will be presented in Chapter 3 (3.2.1 *New York Convention 1958*).

¹⁸⁷ *New York Convention* s 5(b).

¹⁸⁸ That is because some countries have that minimum 'when a party alleges it could not present its case, both U.S. and English courts will examine if this defence actually affected the outcome', see Lu, above n 185, 766.

appeal against an arbitral award, and arbitration does not have a supporting judicial hierarchy, while adjudication does.¹⁸⁹ Accordingly, this raises the question of whether an appeal against the court decision in enforcing or non-enforcing the award would be accepted in Australia, and (if so) the competent court that is authorised to consider such appeal.

Arbitrators can make minor procedural defects in the award, and there is the purpose of international arbitration to be considered. Information from previous studies will establish if the Australian courts refuse such arbitrators' decisions and if the purpose of international arbitration based on the rights extended under the *Convention* in which a party may assert one or more of the five procedural defences to oppose enforcement of the arbitral award will be undermined. One obstacle is that the *Convention* does not specify which law applies when determining whether procedures were violated.¹⁹⁰

Finally, it should be noted that there were some drafting inconsistencies in some Articles in the IAA where greater clarity would assist all parties — see section 23–27 and particularly sections 25–27 before the new amendment in 2010.¹⁹¹ However, the *International Arbitration*

¹⁸⁹ See S R Luttrell, 'Commercial Arbitration in Western Australia' (unpublished article, May 2006) 1; also for more information, see Alan Uzelac, 'Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the *UNCITRAL Model Law*' (2005) issue 5 *International Arbitration Law Review* 154. However, the *Commercial Arbitration Act 1974* (NSW) permits much greater judicial intervention in the arbitration process than does the *UNCITRAL Model Law*. Examples include the right to seek leave to appeal to a court when there is an error of law in the award (unless the parties have agreed otherwise. See *Commercial Arbitration Act* (NSW) s 38.

¹⁹⁰ In a comparison between the USA and UK Lu, states:

[t]he enforcing court could apply the procedural law chosen by the parties, the law of the arbitration seat (i.e., the country where the arbitration panel held the proceedings), or the law of the enforcing state. For instance, assume that in an arbitration agreement, the parties agree to hold the arbitration in England with Swiss law governing the proceedings. The winning party then wants to enforce the arbitral award in the United States. Thus, procedural arguments could be based on English, Swiss, or U.S. law. Failing to assert procedural defences to the arbitration panel usually results in a waiver of these defences at the enforcement stage.' Even if parties timely assert these defences, they should reserve them for serious discrepancies in the arbitration proceedings because repeated assertions of minor procedural violations could undermine the integrity of international arbitration.

See Lu, above n 185, 785.

¹⁹¹ See the Attorney-General's Department Office of International Law, 'Review of the *International Arbitration Act 1974* (Cth) (Discussion Paper, November, 2008) Comment E. Section 22 provides that ss 23–27 apply 'only if the parties themselves have agreed' yet ss 25–27 (relating to interest up to the making of the award, interest on the debt under award, and costs) are stated to apply unless the parties agree otherwise. He noted that: 'This implies that the provisions apply on an "opt-out" basis, whereas

Amendment Act 2010 did not adopt the suggestion made by the Commonwealth Attorney-General in regard to this matter. The question, therefore, remains whether these drafting inconsistencies in Part III, Division 3 of the *IAA* need to be remedied. These are very important questions about the implementation of the provisions of foreign arbitration in Australia. But what is the Court's interpretation of these texts and what is the position of the Australian jurisprudence?

B. Previous Studies

There are several important studies in the field of arbitration in Australia which cannot be ignored. These studies have enriched the field of arbitration in general. Also, the great debate between researchers about the public policy exception and the role of the Australian courts cannot be ignored where it provides a wonderful example for discussion and constructive criticism.

Richard Garnett, who has undertaken a very important research on national and international arbitration in Australia, in his article 'The Legal Framework for International Arbitration in Australia',¹⁹² provides an explanation of the importance of arbitration and laws related to the implementation of arbitration agreements in Australia. These laws are the *Convention*, the internal laws of the states and territories, and the *UNCITRAL Model Law*. He provides a review of the scope of application of these laws and also gives a brief explanation for the application of the arbitration clause under the federal law, the *IAA*. He supplies some examples of cases where the court refused to implement the foreign arbitral award on the basis of the public policy defence. Garnett also explains the execution of interim measures under the *UNCITRAL Model Law* and the confidentiality of arbitration. Finally, he addresses the investment agreement as one

section 22 states that they apply on an "opt-in" basis.' He recommended this be remedied by making ss 25–27 apply on an 'opt out' basis.

¹⁹² Garnett, 'The Legal Framework for International Arbitration in Australia', above n 181.

of the most important agreements that stimulate private investment between nation states and private investors.

However, Garnett does not address the legal texts that establish the competent courts for the implementation of the provisions of foreign arbitral awards. In addition, he did not discuss the formal requirements that must be met in any foreign arbitral award (besides meeting the public policy requirement) nor present a detailed explanation of the possibility of implementing interim orders issued by arbitrators under the *Convention* where such discussion will explain the real role of the national judge in the enforcement process.

Despite all these points, this article cannot be ignored because it contributes to determining the framework of international commercial arbitration in Australia and the methods of implementation. Therefore, it is essential article, contributing to an understanding of the legal framework for international commercial arbitration in Australia.¹⁹³

Furthermore, Ma in her doctoral research thesis, '*Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia*', presents very important research where she discusses the Western definition of public policy, its types, limits, its application, and cases of refusal to implement the arbitral award if it is contrary to public policy.¹⁹⁴ In fact, this research is very precise and specific about *public policy* and it provides many suggestions on the arbitration process regarding public policy which will increase confidence in arbitration and speed the implementation of foreign arbitral awards as well as preserve national public policy. This study will contribute to the understanding of several terms related to the enforcement of foreign arbitral awards in Australia, terms such as 'public policy' and 'foreign arbitral award' as understood in Australia. This understanding will help in writing Chapter 5 of this thesis which will be about the public policy defence.

¹⁹³ Ibid 249–58.

¹⁹⁴ See Ma, above n 123.

In addition, Rana and Sanson in their volume, ‘International Commercial Arbitration’— particularly in Chapter 12 which deals with the enforcement and challenges of the foreign awards — discuss some formal and substantive requirements.¹⁹⁵ In regard to the formal requirements they focused on the conditions contained in the *Convention*. The authors also presented and discussed a number of judicial decisions in several countries, which served to illustrate many important points, such as the finality of the arbitral award and the validity of that award where the original contract was contrary to public policy.

However, Rana and Sanson did not compare these judicial authorities. In fact, the end of Chapter 12 shows that the *New South Wales Act 2010 (CAA)* balances the rights of the parties to a fair hearing and the potential for unwarranted appeal by the losing party.¹⁹⁶ It represents a unique piece of research of its kind, as it asks practical questions and details possible scenarios on the implementation of foreign arbitral award in Australia as an exercise. However, there is no specific and clear standard for the choice between these judiciaries or the decisions that have been examined. Hence, we can say that this chapter made a general attempt to clarify the implementation process and to link the cases that have been presented with what can be applied in Australia.

On the other hand, Skinner and Simpkins believe that the field of the enforcement of foreign awards is not well developed and needs more research.¹⁹⁷ They discussed the statutory framework for the enforcement particularly in regard to the *IAA*’s new amendments in 2010.¹⁹⁸ However, they did not discuss in detail all the formal requirements or the limits of the judge’s authority, rather they just addressed the conditions set forth in the *Convention* and stressed that an Australian court will not review the merits of the case. In fact, the role of judge in the

¹⁹⁵ This book is an excellent source as a commentary book on the CAA 2010 in NSW, more than a source for the enforcement of foreign arbitral award. See Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Thomson Reuters, 2011) 294.

¹⁹⁶ Doug Jones, ‘Book Review: Commercial Arbitration in Australia’ (2011) 16(2) *Deakin Law Review* 569.

¹⁹⁷ See Matt Skinner and Justin Simpkins, ‘Enforcement of Foreign Awards in Australia’ (2011) 77(1) *Arbitration* 54.

¹⁹⁸ *Ibid.*

application of formal requirements cannot be overlooked where the court's interpretation of certain terms, such as 'agreement in writing', is very important in order to clarify and facilitate the information for the foreign investor about the orientation of the court in regard to implementation.

Additionally, Skinner and Simpkins present a very important point, namely that Australian arbitral enforcement of foreign awards jurisprudence 'is not well developed' when compared to the Singaporean level of experience.¹⁹⁹ This explains the shortage of legal research regarding the implementation of foreign arbitral awards in Australia. I believe that this thesis will try to enrich the details of this aspect (the enforcement of foreign award in Australia) where it discusses the formal and substantive requirements and the role of the judge in the enforcement process. Skinner and Simpkins note that 'the Australian courts still take a relatively narrow view of who the parties to the agreement [are] and the scope of the arbitration clause.'²⁰⁰ This requires more discussion on the existence of the arbitration agreement to determine the court trend in regard to the interpretation of the arbitration clause, as we shall see in Chapter 4 (which covers written agreement). In a brief discussion and utilising numerous recent cases, Skinner and Simpkins discussed the public policy defence, which will be the focus of Chapter 5 of this research. However, they could not enumerate or limit the cases where the court will use this defence and when the parties have the right to raise this defence.

On the other hand, there are several international studies on the implementation of foreign arbitration, which deal with the analysis of the relevant international conventions and undertake some study on a number of jurisdictions. There are also a few examples of research involving a comparison between two different jurisdictions with different standards that are worthy of mention.

¹⁹⁹ Ibid 55.

²⁰⁰ Ibid.

For example, Lu in her article analyses in detail the manner in which the *Convention* has been dealt with in the legal systems in the United States and in United Kingdom and the seven defences that have been used to oppose the enforcement of the foreign arbitral award.²⁰¹ Lu has broken down these seven defences into procedural and substantial defences. The article seeks to analyse the history and the rationale behind the formulation and the implementation of the *Convention*. She discusses the formal requirements that have been set by the *Convention* and mentions the accession to the *Convention* by the United States (1970) and the United Kingdom (1975). Lu presents five formal and two substantive requirements. Regarding enforcement, Lu's work presents the practice before the US and the UK courts more than comparing the two laws. She found that the application of public policy is construed narrowly in both countries. In the United States, 'various U.S. cases have indicated some parameters for the defence.'²⁰² However, she did not explain these parameters in greater detail. Generally, the party who seeks the refusal of the implementation on the ground of the public policy defence before a US court needs to prove that an implementation of the award would be in violation of and would affect negatively American notions of what is considered moral and justified under the nuances of the person's standard. On the other hand, in England in order to vacate an arbitral award on the basis of the public policy defence, the claimant party must show that there is

some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.²⁰³

In fact, Lu found that '[a]lthough this standard is less ambiguous than the U.S. standard, it still does not define what "clearly injurious" or "wholly offensive" means.'²⁰⁴ Additionally, while the language of both standards is different, US and English courts construe the public policy defence narrowly.

²⁰¹ Lu, above n 185, 747.

²⁰² Ibid 774.

²⁰³ Ibid 776.

²⁰⁴ Ibid.

Moreover, Lu has made great efforts to explain the status quo in both the United States and Britain. She supported the observations made in her article with examples and related cases. However, Lu did not use a clear standard for the comparison (like the *efficiency* criterion) to show which judicial system is more supportive of the implementation of foreign awards. That is due to the fact that the ‘parties have no less interest in correct decisions than in efficient proceedings’,²⁰⁵ which shows the importance of studying the judge’s role in the enforcement process. In fact, Lu provides a direct comparison between the two laws and shows what should be submitted for the implementation of a foreign arbitral award in both countries.

On the other hand, Randall Peerenboom in his article ‘Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC’ found that ‘many of the most extreme claims about the hazards of enforcing arbitral awards in China were based largely on a single widely reported case.’²⁰⁶ Therefore, his article is based on a survey of 89 foreign and China International Economic and Trade Arbitration Commission (CIETAC) arbitral award enforcement cases. The writer used different research methods than that which is used in this research. He obtained 66 cases through interviews and relied on written sources for a further 18 cases. Additionally, he combined a written source and interviews for 5 cases.²⁰⁷ His research sought to determine upon what basis some awards were enforced and others were not.

In order to answer this question, the research meant to test four hypotheses regarding the enforcement or refusal (as follows). The first hypothesis was that the Chinese applicants are much more likely to succeed than foreign applicants before the national courts. This brings in the question of the role of nationality in arbitration, and that of the courts in big cities. It should be established if the courts provide less protection to the local parties where these courts are more professional, and whether the role of the fact that foreign investment plays a large role in the local economy.

²⁰⁵ See Park, ‘Arbitration and Accuracy’, above n 103, 27.

²⁰⁶ See Randall Peerenboom, ‘Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC’ (2001) 49 *American Journal of Comparative Law* 249.

²⁰⁷ Ibid 253.

Secondly, the research tried to tease out any possible effect of China's progress in rebuilding the legal system and implementing the rule of law. He sought to examine whether there were weaknesses in the law or whether the courts lacked sufficient authority to enforce the award. The third hypothesis argued that China had remained a place of attraction for investments, but with many obstacles to arbitration, essentially operating a 'second economy'. In fact, investors in China, according to Peerenboom, rely on the rule of relationships as efficient (faster, cheaper) more than the rule of law.²⁰⁸ Fourthly, the article is an examination of China as a *New York Convention* country, where 'the survey measures China's willingness and ability to honour its international commitments, particularly in the commercial area.'²⁰⁹ This is measured by the possibility of implementing foreign arbitral awards in China through the implementation of WTO requirements.

Peerenboom came up with several important findings; and the most important is that the WTO will not help the approval system where the fate of foreign investors is 'in the hands of administrative officials who have considerable discretion whether to approve the transaction'.²¹⁰ Unfortunately, with the importance of judicial review, arbitration remains weak. This is due to the fact that the courts and their dependents are weak. Additionally, the 'courts are often reluctant to challenge administrative officials.'²¹¹

Therefore, it can be said that Peerenboom had taken up legal aspects and other social and commercial practices imposed by the relations in the field of international trade. However, he did not examine in particular the effectiveness of the role of the judiciary (*efficiency*) or what the court can provide to the parties (*justice in the individual cases*) or what the court can provide to protect the community (protecting the *societal values*).

²⁰⁸ Ibid 249, 315.

²⁰⁹ Ibid.

²¹⁰ Ibid 326.

²¹¹ Ibid.

Finally, it should be noted that there are several examples of research and articles that have dealt with the efficiency of arbitration and the public policy defence.²¹² However, less attention has been paid to the court's role with respect to national and international legal norms.

Nevertheless, it is important and worthwhile noting that these studies provide valuable information and represent great efforts that cannot be ignored. Consequently, their lack of discussion on the effectiveness of the court's role, on justice to parties at the individual level, and on the court's role in the protection of public policy do not mean that that research is useless. However, it does show that this research — in its comparison between two different laws (in this instance the Saudi and Australian laws) — is trying to explore areas that have not been addressed previously. These standards are very important and effective for revealing the court's role. This is clear from the reasons that show the importance of the selected criteria which have been discussed in the criteria section of this research (namely, *efficiency*, *justice in the individual cases* and the protection of *societal values*). In addition, it is true that the courts shall support implementation as 'justice delayed can mean justice denied',²¹³ with delays disrupting the advantages of the arbitration process.

Therefore, it is important to know the main features of the implementation process of the provisions of foreign arbitral awards in Australia, which will guide the analysis of this research. Such features can be explained as follows: in 1.6.3.C.

²¹² For example, see William W Park, 'Why Courts Review Arbitral Awards' in Briner et al, *Recht der Internationalen Wirtschaft und Streiterledigung im 21 Jahrhundert - Festschrift für Karl-Heinz Böckstiegel* [Law of International Business and Dispute Settlement in the 21st Century – Liber Amicorum Karl-Heinz Böckstiegel] (Bredow, 2001) 595, 599 (reprinted in (2001) 16 *International Arbitration Report* 27), where he dealt with the public policy defence; Jan Albert van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No 9 (Kluwer Law International, 1999) 197; Kareem Youssef, '*Mfhum Itfaq Althkim* [The Concept of the Arbitration Agreement (Paper presented at the International Conference on the Vital Role of State Courts in Arbitration, Sharm El Shiekh II, 19–20 November 2007)]'.

²¹³ Park, 'Arbitrators and Accuracy', above n 103, 27.

C. Rules Guiding the Enforcement of Foreign Arbitral Award in Australia

As explained above, there are two main statutory sources that regulate international arbitration in Australia: the uniform state legislation and the *IAA*, which is the most significant. In NSW, it is the *IAA* and the *Commercial Arbitration Act 2010* (NSW).²¹⁴ The *IAA* was endorsed to ‘give effect to the 1958 *New York Convention on the recognition and enforcement of arbitration awards*’.²¹⁵ Section 8 of the *IAA* provides regulations for enforcement for, and for refusal to enforce, foreign arbitral awards.²¹⁶ Australia’s obligations under the *Convention* have been implemented through the *IAA*. The *IAA* underwent amendment in 2010.

Section 8(2) reads: ‘Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.’²¹⁷ The Federal Court has also been given jurisdiction to enforce an award to the same effect as section 8(2). This is under the new Section 8(3). Some scholars and Australian judges may have expressed doubt as to judgments made by Australian courts due to the omission of the word ‘only’ in Section 8, giving the courts discretion in enforcing foreign awards.²¹⁸ An example of such a case is the *Resort Condominiums International Inc Case*.²¹⁹ The new amendment for this section provides that ‘[t]he court may *only* refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).’²²⁰ Whether the change made by adding the word ‘only’ excludes the court’s residual discretion requires reading and the development of deep analysis of the recent amendments and of the rest of this law, especially Subsections 5 and 7 which include reference to corruption, fraud and breach of natural justice. Additionally, it is important to analyse the

²¹⁴ Generally see Garnett, ‘The Legal Framework for International Arbitration in Australia’, above n 181, 249.

²¹⁵ *Ibid.*

²¹⁶ *Ibid* 251; Jesse Kennedy, ‘Arbitrate This! Enforcing Foreign Arbitral Awards and Chapter III of the Constitution’ (2010) 34(2) *Melbourne University Law Review* 558, 591.

²¹⁷ Kelly, above n 16, 562.

²¹⁸ *Ibid.*

²¹⁹ See *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, has been cited in *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700.

²²⁰ Kennedy, above n 216, 562; Luke Nottage and Richard Garnett, ‘The Top Twenty Things to Change in or around Australia’s International Arbitration Act’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 149, 162.

Australian courts' judgments to determine the judicial interpretation of this amendment and to extract the Australian courts' interpretations of these terms. This will be discussed in detail in Chapter 5. Hence, it should be noted that sections 9(1) and 10(1) have made the process of looking for enforcement easy. Section 9(1) provides that a person seeking enforcement should produce an original arbitration agreement and the award, or duly certified copies of both to the courts. Section 10(1) permits the production of a certificate showing that the country specified was a *Convention* country at the relevant time. These are documents to be supplied to the courts as prima facie evidence. The position of the court from these documents, or the court's interpretation of the articles concerning the formal requirements, should however be determined; as well as whether there are any other conditions placed by the court regarding these documents that need to be met in order to satisfy the court — such as the interpretation of any required documents to provide proof of the reciprocity principle.

Another important feature of the *IAA* is that the courts are not permitted to review the award; they are only allowed to refuse to enforce an award under sections 8(5) or (7).²²¹ Thus, in the case of a breach of the arbitral award on the basis of those subsections, the position of the court matters, considering what it will do if the matter violates public policy.

Australian courts support a pro-enforcement bias as can be seen in the case of *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*.²²² In this case, a Ugandan arbitral award was enforced under the *IAA* without consideration being given to the fact that not all the parties participated in the arbitration.²²³ According to Herzfeld, the Australian corporate respondent did not participate in

²²¹ Kennedy, above n 216, 563.

²²² *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 (22 February 2011).

²²³ See Perry Herzfeld, *Foreign Arbitration Awards in Australia: A 'Pro-enforcement Bias'* (25 May 2011) Conflict of Laws.net <<http://conflictoflaws.net/2011/foreign-arbitration-awards-in-australia-a-pro-enforcement-bias/>>.

the arbitration.²²⁴ There are two important factors considered by the court that led to its final decisions, essentially demonstrating a pro-enforcement bias.²²⁵ These two considerations are;

1. That the dispute was not outside its scope, the arbitration clause (which provided that ‘any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration’) was not void due to uncertainty, and the dispute was in agreement with the two parties’ consented procedure.
2. That the arbitration was not against public policy. The respondent had submitted that there were errors in law and fact made by the arbitrator when determining the award for general damages and this was against public policy. The court indicated that it is not against public policy for a foreign arbitral award to be enforced by the court without examining the result reflected in the award or the correctness of reasoning in the award. This opens the door for the question about the existence of the reasons, that is, the action of the courts if the foreign award for any reason did not contain any reasons. An additional argument was that the justification for Australian public policy was to ensure enforcements of such awards to support international arbitration that in turn supports finality and certainty in international dispute resolution. Enforcement of the award also meets the objects specified in section 2D of the *IAA*.

Additionally, the *Convention* is enforceable in Australia according to section 8 of the *IAA*. This section also has justifications for refusal to implement a foreign award (subsections (5), (7) and (8)). Recent Australian court decisions, however, provide an insight into the approaches taken in the recognition and enforcement of foreign arbitral awards. In a case involving a Chinese and an Australian corporation (*China Sichuan Changhong Electric Co Ltd v CTA International Pty Ltd* [2009] FCA 397), the Chinese corporation applied for an enforcement application, and the

²²⁴ Ibid; also see Kimberly Statham, ‘Testing the Enforceability of an International Arbitration Award in Australia’ [Law Society of NSW Young Lawyers] *Civil Litigation Committee Newsletter* No 2, 30 March 2011, 2.

²²⁵ Ibid.

Australian corporation, as the defendant, did not appear before the courts when they considered the matter of the enforcement of the application. The court made a decision based on the plaintiff's evidence and based on whether the defendant had been properly notified. The conclusion was that the award, which was issued by the Mianyang Arbitration Commission in the People's Republic of China, satisfied the foreign award requirements as provided for in the *IAA*. It was established that the agreement between the two parties had the relevant arbitration clause. These facts plus the consideration that the defendant had been properly notified of the enforcement application are the basis of the decision making which resulted in the Chinese corporation being granted the award. This was a decision made by the Federal Court of Australia. There are similar instances in the New South Wales Supreme Court. One such case is *Transpac Capital PTE Limited v Buntoro*,²²⁶ involving an Australian company and a Singaporean company. In this case too, the Australian company was the defendant and did not appear at the hearing.

The NSW Supreme Court made a decision based on the evidence that the Singapore arbitration was qualified for enforcement under the *IAA*, and had been in accordance with the agreement between the parties. Considering the absence of the defendant, the court used the defendant's own agreement to determine any grounds that applied for the court to refuse enforcement (considering section 8 of the Act) and found none. Accordingly, the court granted the enforcement of the award.²²⁷

Another example is the *Xiaodong Yang v S&L Consulting Pty Ltd* case.²²⁸ The defendants did not appear before the court, and the court used the plaintiff's evidence to find out if it met the decisive factor of enforcement under section 8 of the *IAA*. The court also determined whether the defendant had been properly notified before granting leave for the award to be enforced. The

²²⁶ [2008] NSWSC 671.

²²⁷ See Mark Darian-Smith, *Some Thoughts about Enforcement of Foreign Arbitral Awards under the International Arbitration Act 1974 (Cth) – Transpac Capital Pte Limited v Buntoro* [2008] NSWSC 671, King & Wood: Mallesons, 21 November 2008 <<http://www.mallesons.com/publications/marketAlerts/2008/Documents/9696007W.htm>>.

²²⁸ [2008] NSWSC 1051.

conclusion of the court was that there was no reason for refusal to enforce the award. It met the criteria for enforcement and the defendants were properly notified of the enforcement application.

These three decisions show the approach taken by Australian courts (exercising discretion under the *IAA*) where the defendants do not appear. They reflect clear practice in enforcement of foreign arbitral awards.

Another case was handled by Victorian Court of Appeal (*Altain Khuder LLC v IMC Mining Inc*) where the foreign arbitral award that was intended to be enforced in Victoria was against a party that was not named in the arbitration agreement. This decision was overturned by the Court of Appeal which cited the above issues in resisting enforcement of a foreign arbitral award under the *IAA*.²²⁹

In brief, in this case there was an operations management agreement (OMA) between Altain Khuder and IMC Mining relating to a Mongolian iron ore mine. Within the OMA, there was an arbitration agreement. After a disagreement about the provision of services under the OMA occurred, Altain Khuder started the arbitration under Mongolian National Arbitration Centre rules. The award, which constituted an arbitration fee of USD 50,257 and the real award of USD 5,903,098, was in favour of Altain Khuder. The arbitration tribunal also ordered a different entity (IMC Mining Solutions Pty Ltd) to pay the sum above on behalf of IMC Mining.

IMC Solutions applied to have the order set aside arguing that it was not an associate to the arbitration accord. This application was refused by the judge and indemnity costs were ordered against IMC on 28 January 2011. IMC then wanted an extension of stays which was still refused by the judge. The judge ordered them to pay indemnity costs of the application they made. IMC Solutions then appealed and Court of Appeal took different approaches and provided the

²²⁹ See *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1; also *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 (22 August 2011). This case will be discussed in greater detail later in this research.

following issues to be considered when enforcing foreign arbitral awards. The applicant has to establish a *prima facie* that the creditor and the debtor are parties to the arbitration agreement in any application for award enforcement.

This is like a burden of proof on the applicant where, if the parties are not named in the agreement, additional evidence will be required to show involvement of an agreement between the parties. Application of enforcement should also be made *inter partes* rather than *ex parte*. Here the judge discussed the ‘appropriateness of *ex parte* application.’²³⁰

In considering the jurisdiction, the courts given the responsibility of enforcing an award have the authority to find out the jurisdiction of the tribunal over the parties and are not restricted by tribunal findings. Respondents do not have a heavy onus in establishing defences in sections 8(5) and (7) of the *IAA*; it is, in fact, just a ‘balance of probabilities’ standard.

Hence, resisting enforcement may be on the basis that a person is not a party to the arbitration agreement even if the party does not apply to set aside the award at the seat of arbitration or even if he/she did not participate in the arbitration.

These cases show the court’s support and discretion regarding the enforcement of foreign arbitral awards under the *IAA*. There are, however, practical points that create difficulties in their implementation.

In conclusion, it is clear that there are many studies and jurisprudential opinions with regard to the Australian side and this represents a solid platform for the establishment of a clear vision for arbitration in general. In contrast, there are some deficiencies regarding the role of the court in the examination of the provisions of foreign arbitral awards regarding the formal and substantive requirements. While the Saudi side suffers from a lack of research in this area and this is one of the major reasons which creates misconceptions among some Saudi and Western

²³⁰ See Digby, above n 92, 39.

researchers on arbitration in Saudi Arabia. Additionally, Australian literature has been affected by some foreign researchers' work which contributes to the development of an international standard and a vision of the court's role in the implementation process.

It is unfortunate that there are some Saudi researchers who have some misconceptions, as explained above, about the Court's role in the implementation of the provisions of foreign arbitral awards. This may be due to the fact that there is also a lack of adequate research primarily due to the lack of publication of judicial decisions. The availability of such decisions facilitates the work of any researcher or judge and ensure a clearer vision of the implementation process. On the other hand, the e-libraries and the publications of judicial decisions in Australia contribute to facilitating the researchers and judges' role in understanding the process of implementation, which in turn helps to develop the discussion on the court's role on the enforcement of foreign arbitral awards.

1.7 Conclusion

At the end of this chapter it is clear that arbitration is important as a peaceful means to resolve a dispute. However, this method raises many questions for which clear answers need to be found, especially for those raised by the application of foreign arbitral awards. Otherwise difficulties may lead to a problematic burial of this peaceful means and make it devoid of any practical use. Research on this issue may contribute to the resolution of disputes arising between the parties in international business relationships.

This importance of arbitration, particularly with respect to arbitration in the international trade area, has led many laws (including those of Saudi Arabia, Australia, the countries the subject of this study) to pay attention and to legalise, regulate and issue their own laws in regard to arbitration. However, some of this legislation is deficient in a number of areas, such as the precise definition of the concept of *public policy*. Thus, the task of explaining such matters is left to the competent court. Thus, the judiciary in many cases refuses to implement certain provisions of arbitration under the pretext of its violating public policy. Giving such authority to

the national courts may eliminate the benefits of arbitration and produce a situation where recourse to it becomes a waste of time, effort and money.

In fact, the adoption by the Australian Parliament of the *Convention* within the *IAA* and annexed in the framework of national law is a great step in understanding and facilitating the implementation of the provisions of foreign arbitral awards. Comparing this with the situation in Saudi Arabia, where there is no special law to implement the provisions of foreign arbitral awards (such as the *IAA* in Australia), I believe that the Saudi judges have to consider several laws and conventions regarding to the implementation of the provisions of foreign arbitral awards.

It was clear that there is major academic activity and scientific rigour in relation to arbitration in Western studies, and on the contrary, there are limited empirical studies that deal with the provisions of the courts in the Saudi studies. These Western studies contributed greatly to crystallise the idea of implementing the provisions of foreign arbitration in Australia where there have been many discussions and opinions given regarding the role of the courts and the role of international agreements in the implementation process. On the other hand, the lack of the empirical studies in Saudi Arabia regarding the arbitration process makes a lot of Western and Arab researchers and even the Saudis fall into many errors in the results of their research and their expectations of what is applied by the Saudi judges in regard to the implementation of foreign arbitration.

Additionally, these Western studies helped in the discussion of several ideas and principles such as the idea of public policy. Yet there is no clear definition of such a principle. This is due to the ambiguity and lack of specific and disciplined ideas on this principle; however, researchers have helped to clarify some of the foundations and principles that underpin this principle, as we shall see in Chapter 5. Besides, these Western studies provide an analysis of the most important provisions, such as the case of *Soleimany v Soleimany*, which showed the most important

principle regarding the implementation of the provisions of a foreign arbitration, namely '*public policy*'. Moreover, these Western studies are analytical and discuss the theoretical principles.

On the Saudi side it is noticeable that most of the Arabic studies were theoretical, where there are no real deliberations on the provisions of the courts regarding the implementation of foreign arbitration. This in turn led to ambiguity as to the idea of implementation among many Western scholars *and* Saudis, particularly in regard to Saudi practice.

As a result, there is a significant misunderstanding about the real role of the Saudi Grievances Board and the process of enforcing foreign arbitral awards in Saudi Arabia. This shows the importance of any study that explores the enforcement of foreign arbitration in Saudi Arabia, and the importance of its clarification of any ambiguity and revelation of any shortcomings of the legal texts. Therefore, any study on these areas shall consider the court's judgments to find out the real position of judicial system and to clarify the principles that have been followed in this regard. Additionally, the apparent lack of scientific material in relation to arbitration and the lack of an adequate quantity of research on the theoretical side make the task look difficult. Thus, it is important to include some of the theoretical aspects in this research to complete the picture of the theoretical side and the empirical side, and also to standardise the definitions of the theory with the appropriate application.

2 FOREIGN ARBITRATION AND THE COMPETANT COURTS

2.1 Introduction

It was clear that the previous chapter describes arbitration and is the chapter that forms the basis of the study, particularly in regard to the problems arising from the implementation of foreign arbitration. Additionally, it discusses the previous studies in Saudi Arabia and Australia. It also describes the scope of the research and the methodology which will be used in this research. Moreover, it shows the significance of this research in studies related to international commercial arbitration. Finally, it refers to the role of the competent court in the implementation of the rule of foreign arbitration.

This chapter will review the competent courts in approving foreign arbitral awards in both Saudi Arabia and Australia where the discussion of the competent court — and the legal rules that will be applied to the implementation process — will facilitate the process of measuring and extrapolating the court's role in implementation. It will contribute to having an accurate picture of the role of the court in the implementation of foreign arbitral awards. Thus, the chapter will discuss the competent court in Saudi Arabia (Saudi Grievances Board) and explain its judicial role within the judiciary in Saudi Arabia, and the competent court in Australia and its judicial role.

In fact, it is necessary to know the competent court in implementing the provisions of foreign arbitral awards in order to provide direct information to the foreign investor or those who wish to enforce an award in one of the two countries. In addition, knowing the true role of the competent court within the judicial system helps researchers to discern the direction of the court in the implementation process and also the procedures which makes the implementation process easier.

Indeed the practice of the courts in both countries plays a very important role in making the arbitration process efficient. Judges and the courts have a role to play in achieving the aims of

arbitration. For that reason, it is important to assess the role of the courts in both countries and identify the differences, and/or similarities. Reforming the arbitration system in Saudi Arabia needs facts, and this assessment contributes to the state having the necessary information for making the appropriate changes to the system. Knowledge of the role of the competent courts in approving foreign arbitral awards in both Saudi Arabia and Australia will provide information that forms the basis for comparison and help in achieving the aim of this research. This information will be compared based on the criteria chosen for the research. It will provide more information on what role the courts play in encouraging arbitration.

2.2 Competent Courts

First of all, attention to arbitration in international trade disputes in the world is relatively new. There have been efforts made towards the creation of a system that would facilitate the application of international commercial arbitration. The basic reason for this is that most states want to work towards the development of cooperation in international trade.

The overall empowerment of the courts might be a result of the need to promote the principle of reciprocity, the respect of the other states, and good faith in the implementation of international conventions. It may also be to ensure justice in general. These types of courts generally do not consider the matter of the case, but they do make sure such cases do not breach public policy.¹

The idea of a competent court, therefore, would involve the appointment of a national court that would have expertise in dealing with the more peculiar nature that defines an international arbitral award, and in ensuring the preservation of the rights of the victorious party in the arbitration to ensure the application of justice. Also, the competent court is to facilitate and

¹ It should be noted that there are some grounds that give the national courts the right to refuse the implementation of the arbitration awards stated in Article V of the *Convention*. However, there is no defence or ground that gives the national court the right to consider the subject matter unless there is a strong signal of breach of public policy, in which case the court can consider the matter of the case and evaluate the arbitration agreement in order to preserve public policy; however, it is not wide open (as we shall see in the Chapter 4 - 4.2 Role of the Judge) for the court to go in more detail about the matter of the case.

encourage foreign investment by ensuring the acceptance of foreign arbitration and its implementation within the state. The competent court would also demonstrate the application of a just and fair method of law. This is due to the fact that the enforcement of foreign arbitral awards is an international moral and legal obligation of the state, meaning that states (for all intents and purposes) would have to implement international conventions and also to apply the principle of reciprocity as a matter of a good will between nations.² Therefore, competent courts are formed because states are aiming to show good faith in international transactions (and maintain thereby their reputation at an international level), because when any country ratifies a convention, then it will have the obligation to implement this agreement in good faith. States have also always sought to attract international investment in several ways, and among the most important is the recognition of foreign arbitration. Therefore, the international conventions relating to arbitration require signatory states to appoint a national court to recognise and implement foreign arbitration.

The duty to appoint a national court, therefore, is a duty, an imperative demanded by international conventions (for example, Article 6 of the *UNCITRAL Model Law* on the appointment of a national court). Also the determination by the national court regarding implementation of the provisions of foreign arbitral awards may involve a type of justice where the parties agree to go to arbitration as a means to resolve the conflict, so the laws should respect that wish. The appointment of a state court also ensures that the respective national courts implements arbitral provisions in the context of reciprocity in international law, which guarantees that each state will implement the provisions made by others. For a country to protect its reputation in terms of it having a viable arbitration judicial system, it would automatically become essential for it to have competent national courts that could deal with

² See United Nations, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entry into force 27 January 1980) art 26. For text, see [refworld.org <http://www.refworld.org/docid/3ae6b3a10.html>](http://www.refworld.org/docid/3ae6b3a10.html).

arbitral awards. Domestic courts, however, will follow the procedure in accordance to the domestic laws.

In Saudi Arabia, the Grievances Board is the competent court in enforcing foreign arbitral awards. According to Article 13 of Chapter III ‘Jurisdiction of Courts’ in the current law, the *Saudi Grievances Board System 2007*: ‘Administrative courts shall have jurisdiction to decide the following: ... (g) Requests for execution of foreign judgments and arbitral awards.’ Therefore, the Administrative Court in the Grievances Board is the competent court in this regard.

In Australia, a court cannot deal with every legal dispute; thus, each court has its limited jurisdiction. Such limitation is imposed by the laws which are made by either State or Federal Parliament.³ Accordingly, to clarify this situation, we have to understand the Australian judicial system, where Australia has a federal system with Commonwealth courts and state courts and the Australian courts have jurisdiction according to two elements or criteria, which can be summarised as follows:

1. The value of the award and the procedural rules of the court.
2. The subject matter of the case, very important in determining the courts jurisdictions.⁴

Division II of the *IAA* gives the Federal Court of Australia and the State/Territory Supreme Courts the jurisdiction to implement the *Convention* where the implementation of the *UNCITRAL Model Law* and the *Convention on the Settlement of Investment Disputes between*

³ See Christine Miles and Warwick Dowler, *A Guide to Business Law* (Thomson Reuters, 19th ed, 2011) 49.

⁴ This will be explained in more detail in Chapter 2 (2.2.2 Competent Court in Australia) when explaining the Supreme Court jurisdiction over the implementation of foreign arbitral awards.

States and Nationals of Other States ('*ICSID Convention*') in a State/Territory Supreme Court is under Parts III and IV of the *IAA*.⁵

This means that in New South Wales (NSW) the NSW Supreme Court is the competent court to consider the implementation of foreign arbitration.⁶ Therefore, it is important to understand this aspect of the Australian competent courts in approving foreign arbitral awards (that is, the role of the NSW Supreme Court and the Federal Court of Australia).

Below is an in-depth description of the role of the respective competent courts and an explanation of the judicial system in the two countries. Included will be a discussion on the general jurisdiction of the courts, including jurisdiction over the provisions of arbitration and the process of foreign arbitral award implementation. This will help in the development of an understanding of the powers of the competent court and will facilitate a greater knowledge of the role of the judge and a greater comprehension of the status and duties of the court in the

⁵ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*'). See Commonwealth Attorney-General's Department, Office of International Law, 'Review of the *International Arbitration Act 1974* (Cth)' (Discussion Paper, November 2008) section H. It should be mentioned that the jurisdiction of the Federal Court of Australia exists in the Federal legislation, the *International Arbitration Act 1974* (Cth) ('the *IAA*'), where in section 3(1) "court" means any court in Australia, including, but not limited to, the Federal Court of Australia ...'. This shows the direct authority of the Federal Court in this regard. Regarding the *ICSID Convention*, which is a Schedule of the *IAA*. *IAA* sch 3, art 54(2) states:

A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-general. Each Contracting State shall notify the Secretary-general of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

Thus, section 35 ('Recognition of Awards') in the *IAA* came as an application of Article 54(2) of the *ICSID Convention*, where it states: '(1) The Supreme Court of each state and territory is designated for the purposes of Article 54. [And] (3) The Federal Court of Australia is designated for the purposes of Article 54.' Accordingly, the competent courts in Australia in the recognition and enforcement of foreign arbitral awards under the *ICSID Convention* are, according to the *IAA*, the state Supreme Courts and the Federal Court of Australia.

⁶ The Supreme Court of NSW has been chosen to be the model for the Australian Courts as mentioned in the methodology of this research. Thus, this chapter deals with the Supreme Court of New South Wales as an example of the Australian state Supreme Courts. In addition, it should be noted that most of the cases concerning the implementation of the provisions of foreign arbitration are brought before the state Supreme Courts. For more information, see International Chamber of Commerce, *Country Answers: Australia* (Law as at 18 July 2008) [Material Reproduced from: ICC, *Special Supplement 2008: Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards* (2009) 29 <http://www.iccdri.com/CODE/LevelThree.asp?page=Country%20Answers&Locator=32.2&L1=Country%20Answers&tocxml=ltoc_CountryAnswersAll.xml&contentxml=arbSingle.xml&tocxml=toc.xml&contentxml=CA_SUPP_0021_3.xml&AUTH=&nb=0>.

judicial system in general. This in turn will help understand the role of the judge in dealing with the provisions of foreign arbitral awards.

2.2.1 The Saudi Competent Court

In this section it is important to explain the Saudi legal system in general to further understanding of the position of the competent court in implementing foreign arbitration in Saudi Arabia. Additionally, such discussion is important to explain the effects of *Shari'a* on the court's decisions.

A. Saudi Legal System: Background

In fact, Saudi Arabia has a comprehensive Islamic legal system in which the law of the land is *Shari'a* and judges (trained under *Shari'a* jurisprudence) exercise general jurisdiction. It is important to mention that Article 44 of the Saudi *Basic Law of Governance* ('the *Basic Law*') states that

the authorities of the state consist of: the judicial authority, the executive authority and the regulatory authority. These Authorities will cooperate in the performance of their functions, according to this law or other laws. The King is the ultimate arbiter for these authorities.

Article 67 states that 'the regulatory authority shall be concerned with the making of laws and regulations which will safeguard all interests, and remove evil from the state's affairs, according to *Shari'a*. Its powers shall be exercised according to provisions of this law and the law of the Council of Ministers and the law of the *Shura* Council.' This means that this authority is the Council of Ministers and the *Shura* Council.⁷ Nevertheless, the King has the power to issue decrees after the vote of both councils to adopt laws. Article 46 states that 'the Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than

⁷ This is also stated in Article 20 of the *Saudi Law of the Council of Ministers* which states 'While deferring to Majlis Ash-Shura Law, laws, treaties, international agreements and 'concessions' shall be issued and amended by Royal Decrees after deliberations by the Council of Ministers..

the authority of the Islamic *Shari'a*.' Thus, the *Basic Law* grants independence to the judiciary in Saudi Arabia.

On the other hand, the Australian legal system, as we shall see (2.2.2 Competent Court in Australia), is based on a federal and state jurisdictions where the federal jurisdiction is derived from the *Constitution of the Commonwealth of Australia* ('*Commonwealth Constitution*') and laws passed by both houses of the Federal Parliament and given Royal Assent by the Governor General, while state jurisdiction is derived from State constitutions and laws (in matters not controlled by or reserved to the Federal Parliament under section 51 of the *Constitution*) that have been passed by both houses (a single chamber in Queensland) in the respective state parliament and given Royal Assent by that state's Governor. Additionally, in a common law jurisdiction such as Australia a high court can 'create law' by deciding cases and establishing precedents that must be followed by lower courts of the same hierarchy. This brief description shows the significant difference between the two systems: that of Saudi Arabia and that of Australia.

Thus, an explanation of the structure of the Saudi judicial system will make it easier for the non-Saudi reader and researcher to understand the judicial system in general, which will help in their visualising the process of sentencing. Also it is important to explain the role and the effect of *Shari'a* law on the legal system in Saudi Arabia.

Accordingly, the *Shari'a* law, as already explained in the introduction to this research (1.1 General Background), is the basic law that will be applied in Saudi Arabia, and is the basis of Saudi laws and public policy. Therefore, it is important to know that any provision contrary to Islamic law (that is, a provision that is consequently '*haram*' or 'forbidden') will not be implemented. In addition, any rule of law in any Saudi regime will not be applied by the Saudi public courts or the Grievances Board if it is contrary to Islamic law. This is evident in the Articles 1 and 7 of the Saudi *Basic Law*, which state that the *Qu'rān* and *Sunnah* are the nation's *Constitution* and govern all laws and regulations. This shows the extent of the effect of

Shari'a rules on the Saudi law, which is reflected in the judicial rulings where they can not violate any *Shari'a* 'basics or assets'. This means that any foreign award that conflicts with *Shari'a* law will be rejected by the Grievances Board. This principle, 'the governing role of *Shari'a* law', is not a social custom or a historical basis for the Saudi regime which it is possible to change but it is mostly fixed rules that cannot be adjusted over time and which stems from the principles of Islamic *Shari'a* law. So the *Shari'a* law is the legal basis in Saudi Arabia.⁸

On the other hand, the common law system, as developed in the United Kingdom, forms the basis of Australian jurisprudence and judicial system. It is distinct from the civil law systems that operate in Europe, several Middle Eastern countries, South America and Japan. The chief feature of the common law system is the 'precedent' which means that judges' decisions in pending cases are informed by the decisions of previously settled cases.

It is important to state that *Shari'a* allows other formal laws and the decrees of the Muslim governor (or ruler, in the instance of Saudi Arabia this is the King) to play their role in commercial practice and even to co-exist with it, but it does not allow any direct conflict to the provisions of *Shari'a* from such laws and decrees. Even the King and his Cabinet have no authority to ratify legislation that is against *Shari'a*.⁹

In fact, it is necessary to understand the relationship between the King and the judges. In the Islamic judicial system, Muslim scholars have agreed that the Muslim ruler has the right and the obligation to appoint judges.¹⁰ On the other hand, there are differences between Muslim scholars on the right of the Muslim ruler to dismiss a judge without reason.¹¹ The first view is that the Muslim ruler has the right to dismiss a judge without a reason because of his power in the

⁸ For more information, see Abdulrahman Al Shalhoub, *'Alne zam Aldstorj fy Almamlakah Al'rabi h Als'wdih: byn Ashari'a ū Alqanwn Almuqarn* [The Constitutional System in Saudi Arabia: Between the Sharia and the Comparative Law] (Safir Press, 2nd ed, 2005).

⁹ See Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing, 2010) 18. More details about the Saudi legal system will be discussed in Chapter 2 (2.2.1 The Saudi Competent Court 'Saudi Grievances Board').

¹⁰ Al Shalhoub, above n 8, 327.

¹¹ Ibid; Mahmoud Arnous, *'The History of the Islamic Judicial System'* (Cairo: Egyptian private publisher) 161.

appointment of the judge.¹² The second view is that any decision to dismiss the judge must be based on purely legal grounds, which makes the role of the Muslim ruler logical and in line with the principle of ‘separation of powers’, where judges enjoy immunity.¹³

Currently, according to the Saudi judicial laws, the judges are appointed by the judicial authority represented in the Supreme Judicial Council. Additionally, there is no right for that Council to dismiss any judge except in cases prescribed by the *Saudi Judiciary System 1975*.¹⁴

In fact, Saudi Arabia just like other Arab countries with similar jurisprudential systems has legal and philosophical schools that developed overtime during Islam’s history. One such school is the *Hanbali* Juristic School.¹⁵ This is the most important source of law in Saudi Arabia and the one which has subjected the people of Saudi Arabia and their government to the rule of *Shari’a*.¹⁶ It has guided interpretation of *Qur’ān* and the *Sunnah* which from the Constitution of Saudi Arabia. This is in accordance with the *Basic Law of Governance* (Royal Decree No A / 90 of 1412 H (1992)), which also provides that Saudi Arabia is a monarchy that shall be ruled by the family of King Abdulaziz Ibn Saud; the Kingdom’s founder. It also provides that the Kingdom shall be ruled according to the principles of *Shari’a*.¹⁷

Over time, however, Saudi Arabia has experienced various changes that have affected its development positively. Things like the oil boom, increased business interest from international entities, and global legal changes such as the development of treaties that encourage investment and good relations among nations. These changes have prompted changes in the Saudi legal system. The Kingdom has therefore over the years developed a legal structure with institutions

¹² Ibid.

¹³ Jamal Marsafy, ‘*The Judicial System in Islam*’ (University of Imam Muhammad bin Saud, 1401 /1980) 53.

¹⁴ See Al Shalhoub, above n 8, 344. The author refers to the *Saudi Judiciary System* issued by the Law No M /64 of 14 Rajab 1395 AH 23 July 1975 (‘*Saudi Judiciary System 1975*’).

¹⁵ For more information see, Al Shalhoub, above n 8, 17.

¹⁶ Ibid 339.

¹⁷ See Saudi Arabian General Investment Authority (SAGIA), (nd) The Legal Guide to Investment in Saudi Arabia (SAGIA Circular, June 2012) <http://alandaluslaw.com/library/LegalData2/Additional_Regs/sagiacircular/legal02%20Revised.pdf>.

that Saudi Arabian General Investment Authority (SAGIA) refers to as ‘appearing western and modern’.¹⁸ This gives the impression that they are neither modern, nor western. The issue, however, is not on whether the Saudi legal system is westernised, but rather on the current structure. An examination of the reformed system will increase understanding of the legal processes and practice of Saudi courts and judges.

Specifically, the Saudi legal system has been transformed with the creation of several regulations, laws and decrees; and the development of some judicial bodies to handle future challenges and new requirements or issues. The system does not exactly resemble the civil law or common law systems. This is because the Saudi legal system is based on *Shari’a* principles that are mostly in agreement with what is taught at the *Hanbali* School. It has no codification of laws as is found civil and common law jurisdictions. It has however been influenced by Western legal concepts and laws that have led to a transformation to a system that incorporates modern legal concepts applied in current Saudi Arabian commercial practice. The essential core of the Saudi legal system still remains, and these concepts as applied, are provided by the *Shari’a*, and show similarity or are identical to concepts reached by Western legal system jurists.¹⁹

In fact, Saudi Arabia has adopted a duality in the judicial system that consists of both general (public or *Shari’a*) courts and administrative courts. This duality in the judicial authorities creates the Grievances Board as an administrative court, and the public courts (*Shari’a* courts) which adjudicate the remaining civil disputes, both commercial and criminal. In addition, public courts were given the authority to consider all disputes except those that have been excluded by the relevant law.²⁰ In this respect, it should be noted that the *Commercial Court System 1930* excludes commercial disputes from the *Shari’a* Courts jurisdiction where the proceedings

¹⁸ Ibid.

¹⁹ Ibid; also see the Saudi Ministry of Justice, *The New Reform of the Saudi Judicial System* [Altshkeil Aljadeed Lelmahakem Alqadha Ala’m] (2011) <<http://www.moj.gov.sa/ar-sa/Courts/Pages/StructureCourts.aspx>>. Australia’s system will be covered in 2.2.2 The Competant Courts in Australia.

²⁰ See Article 443 of the *Saudi Commercial Court System*, issued by Royal Decree No 32 of 15/1/1350 AH 1930.

before the Commercial Court will not be accepted unless the case is between merchants and the subject of the case is a purely business matter. According to Article 26 'Jurisdiction of Courts' of the *Saudi Judiciary System 1975*, the *Shari'a Courts*

[s]hall have jurisdiction to decide with respect to all disputes and crimes, except those exempted by law. Rules for the jurisdiction of courts shall be set forth in the Law of *Shari'a Courts Procedure* and Law of Criminal Procedure. Specialised courts may be formed by Royal Order on the recommendation of the Supreme Judicial Council.²¹

Thus, administrative disputes have generally been excluded from the authority of the public (*Shari'a*) courts by the Saudi legislature in Article 1 of the *Grievances Board System 1982* and such matter given to the Grievances Board its consideration.²² In Saudi Arabia's dual judicial system of general and administrative courts, the main difference between these courts is that the public courts or '*Shari'a Courts*' do not have the right to consider any dispute to which the Saudi government is a party. This in turn means that the authority of the Grievances Board is limited to considering disputes where the state is a party. Consequently, it is very important to explain the Saudi legal structure to establish a knowledge base about the Saudi judicial system.

B. *The Saudi Court Structure*

The Saudi public court system is composed of a Supreme Judicial Council, Courts of Appeals and First-Instance Courts (General Courts and Summary Courts). There is also the Grievances Board which is an administrative judicial body. Its judicial role is carried out through the High Administrative Court, the Court of Appeal, and First-Instance Courts (Administrative Courts). Currently, the Saudi Grievances Board includes three types of courts which adjudicate administrative, commercial and some criminal cases and each court has its own relevant law that determines its judicial jurisdiction.

²¹ *Saudi Judiciary System*, issued by the Law No M / 64 of 14 Rajab 1395 AH 23 July 1975 ('*Saudi Judiciary System 1975*').

²² *Saudi Grievances Board System* issued by Royal Decree No M / 51 of 17/07/1402 AH (1982) ('*Saudi Grievances Board System 1982*') art 26.

1. *General Courts (Shari'a Courts)*

a. *Supreme Judicial Council*

Under the 1975 (1395 AH) *Saudi Judiciary System*, the Public or General (*Shari'a*) court system was organised into the Supreme Judicial Council, the Courts of Appeals (Court of Cassation), and the First-Instance Courts (General Courts and Summary Courts (see Figure 1: The Structure of the General (*Shari'a*) Courts). The Supreme Judicial Council was the highest judicial authority (a situation that continued until the issuance of legislation reforming this structure in 2007).²³ The Council had judicial, legislative, consultative, and administrative duties. Its judicial duties involved reviews of judgments involving major crimes and death sentences. Its legislative role included establishing judicial precedents and general principles that were to be followed by lower courts. It also looked into questions on *Shari'a* that required general *Shari'a* principles. The consultative role involved provision of opinions on and reviews of matters referred to it by the Minister of Justice or the King.²⁴

The administrative roles of this council were defined by Article 7 of the *Saudi Judiciary System*. It supervised the judicial system in accordance with the law. It also administered employment related affairs — such as promotion, assignment, transfer, appointment, monitoring of proper discharge of judiciary member duties, secondment, and termination of the judges' services through the inspection division members — for all judiciary members.

b. *Courts of Appeal (Courts of Cassation)*

Currently this court is the second ranked in the judicial system. The court's opinion is generally rendered by a three-judge panel, but in cases of certain major punishments, the court's opinion is rendered by a five-judge panel. The main concern of this court is to review Summary and

²³ See Abdullah F Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (July 2008) Hauser Global Law School Program, New York University School of Law
<http://www.nyulawglobal.org/globalex/saudi_arabia.htm>; also see Al Shalhoub, above n 8, 359.

²⁴ See Al Shalhoub, above n 8, 359.

General Courts' application of the *Shari'a* and the Saudi laws. Because of this, it could produce contradictory opinions. This problem, however, is set to be solved by a General Council of the Court of Appeal, which is to make sure that the conflicts are settled, and the principles applied by the General and Summary courts homogenised. The Courts of Appeal also discuss matters that are to be examined by the Full Court, in accordance with the provisions of the *Saudi Judiciary System 1975* or other laws. It decides whether principles or interpretations are to be abandoned.

Generally, the Appellate Court is allocated the responsibility of monitoring the methods (or ways) of interpretation, and the application of the legal rules and the provisions of regulations by the Summary and General Courts. The main function, however, is to hear or review objections to judgments from the lower courts.²⁵

c. First-Instance Courts

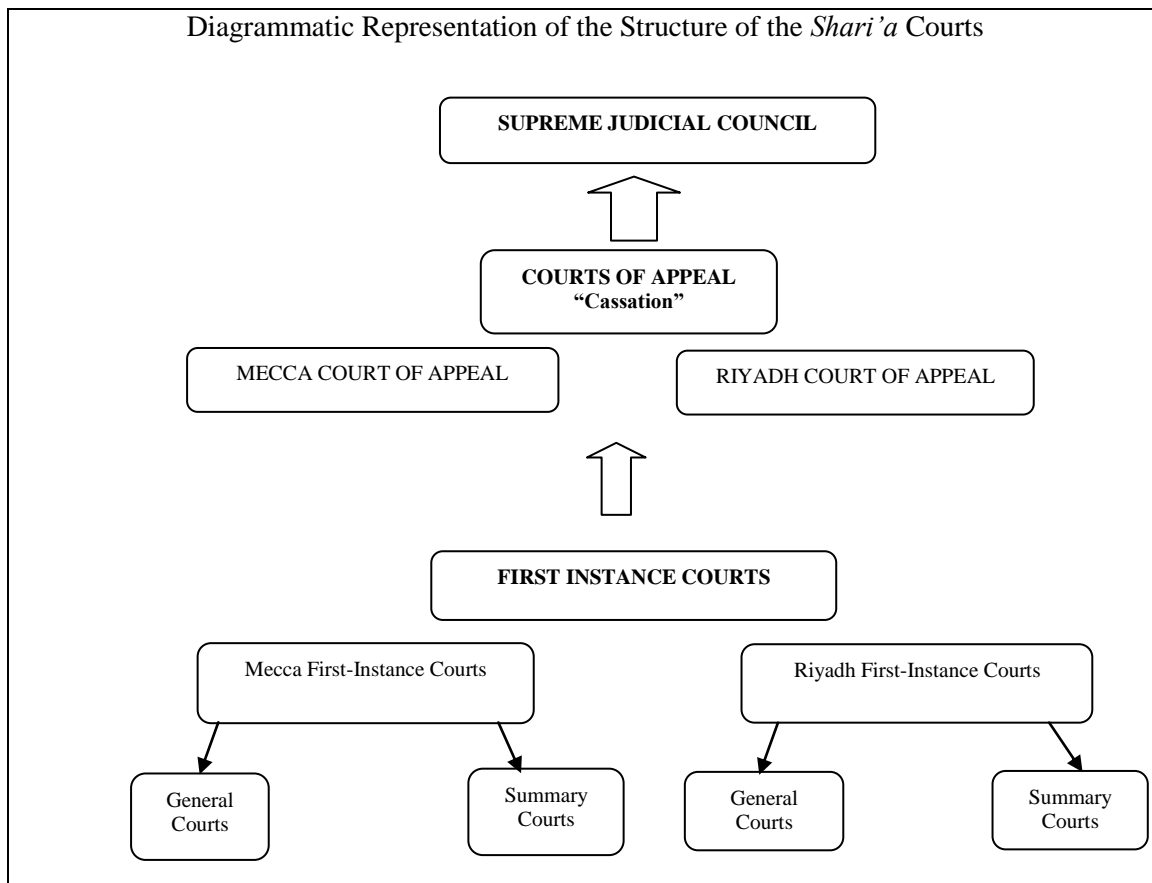
Under this court there are two types: the Summary Courts and the General Courts.

- i. Summary Courts:* according to the *Saudi Judiciary System 1975* these courts had jurisdiction over certain cases, namely the *ta'zir* cases (excluding those excluded by a statutory law), fixed punishment (*Hudūd*) cases, and decisions concerning monetary damages or compensation for crimes that do not exceed one-third of the *diy'ah* (blood money), which corresponds to 20,000 Saudi Riyals ('SAR'). These courts also had jurisdiction civil claims for amounts over SAR 8,000.
- ii. General Courts:* these had jurisdiction over cases involving the possibility of a death sentence as the penalty; or in cases other than those involving the death penalty, the

²⁵ See Ayoub M Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19(1:4) *Arab Law Quarterly* 5, 20; also see Soliman A Solaim, 'Saudi Arabia's Judicial System' (1971) (Summer) 25(3) *Middle East Journal* 403–7; also see *Oxford Analytica*, 'Saudi Arabia: Judicial/Commercial Law Reforms Progress' *Oxford Analytica Daily Brief* (7 March 2008).

retaliatory punishments known as *quyas*. They also had jurisdiction civil claims for amounts over SAR 20,000.

Figure 1: The Structure of the General (*Shari'a*) Courts



General Courts are located in every major centre, province and region of the Kingdom of Saudi Arabia where the jurisdiction was divided geographically (that is, a court would hear cases within not only its area of expertise but also only from a particular geographically determined area). These courts consist of one judge or more, and all cases can be considered by one judge except the *Hudūd* offences which shall be considered by three judges.

It should be noted that the Saudi Grievances Board is the competent court for considering and implementing foreign arbitral awards but a description of the public '*Shari'a*' courts was important to show (and explain) the structure and operations of the general Saudi judicial structure.

2. *The Grievances Board (Diwan al-Mazalem)*

In Saudi Arabia, the Grievances Board was originally a Circuit of the Saudi government in the Council of Ministers which was established by the Royal Decree of 12/7/1373 AH (1954). Article 1 of Royal Decree No 2/13/8759 of 17/09/1374 AH (1955) emphasised the stature of the Grievances Board as an independent court, separating it from the Council. The jurisdiction of the Grievances Board was not specified in the beginning, and its decisions were not considered as 'provisions' in the strict Saudi sense of the term; rather it was considered an advisory body to the competent minister.²⁶

This is the administrative court of Saudi Arabia. It is a body that was derived from the concept of the tradition set out for Islamic rulers who were traditionally able to adjudicate matters that came before them. This court was formed to adjudicate disputes and grievances that came before the King. These included disputes involving government officials. Increased number of disputes between private contractors and government officials led to the formation of the Grievances Board.²⁷ With time, its roles improved expanded to include reception and investigation of complaints, and reporting to the relevant minister and then to the King if the recommendations by the Board were not accepted by the minister in government. The King had the final authority.²⁸ The Board was later given judicial responsibility to deal with matters/disputes of a criminal nature, such as fraud and bribery. In 1967, the Board was then given independent authority from the *Shari'a* Court System. A Royal order declared that no lawsuit against any government agency should be heard by any *Shari'a* Court without prior Royal consent.²⁹

²⁶ For more information about the Saudi Grievances board, see Abdullah Hamad Al-Wahibi, '*Alqwa'd Almonazmh Lel'qwod Aledariah ū Ṭatbiqatha fy Almamlakah Al'rabih Als'wdih* [Rules of Administrative Contracts and Their Applications in Saudi Arabia]' (Al-Humaidhy, 1st ed, 2002), 382.

²⁷ Ibid 380; Al Shalhoub, above n 8, 380.

²⁸ Al-Wahibi, above n 26, 380.

²⁹ Ibid 383.

The nature of the Grievances Board changed in 1982 when a new law established it as an independent judicial body, parallel to the *Shari'a* Courts but directly connected to the King. The Board was composed of the President with one or more Vice-Presidents, assistant Vice-Presidents, and members specialised in the law and *Shari'a*.

The Grievances Board is an administrative judicial board. However, it formerly had the power to pass judgment on commercial and criminal disputes. It also had the sole power over enforcement of foreign arbitration decisions and foreign judgments. In fact, there were four main categories that the Board covered:

1. Disciplinary actions against civil servants
2. Disputes involving the government as a party
3. Disputes involving unethical business practice subject to statutory provisions, and
4. The execution of foreign arbitration and foreign judgments.

The administrative duties of the Board (according to Article 8 of the *Law of the Grievance Board* adopted in 1982) included adjudication of the following disputes:

- (A) Cases related to the rights provided for in the Civil Service and Pension Laws;
- (B) Cases of objection filed by parties concerned against administrative decisions where the reason of such objection is lack of jurisdiction, a deficiency in the form, a violation or erroneous application or interpretation of laws and regulations, or abuse of authority;
- (C) Cases of compensation filed by parties concerned against the government and independent public corporate entities resulting from their actions;
- (D) Cases filed by parties regarding contract-related disputes where the government or an independent public corporate entity is a party;
- (E) Disciplinary cases filed by the Bureau of Control and Investigation;
- (F) Penal cases filed against suspects who have committed crimes of forgery as provided for by law, crimes provided for by the Law of Combating Bribery, crimes provided for by Royal Decree No. 43 dated 29/11/1377H [June 16, 1958], and crimes provided for by the Law of Handling Public Funds issued by Royal Decree No. 77 dated 23/10/1395H [Oct. 29, 1975], and penal cases filed against persons accused of committing crimes and offenses provided for by law, where an order to hear such cases has been issued by the President of the Council of Ministers to the Board;
- (G) Requests for implementation of foreign judgments;
- (H) Cases within the jurisdiction of the Board in accordance with special legal provisions and,
- (I) Requests by foreign courts to carry out precautionary seizure on properties or funds inside the Kingdom.

There were two types of the Grievances Board circuits: Board of Appeal Circuits and First-Instance Circuits (see Figure 2: The Structure of the Old Grievances Board).

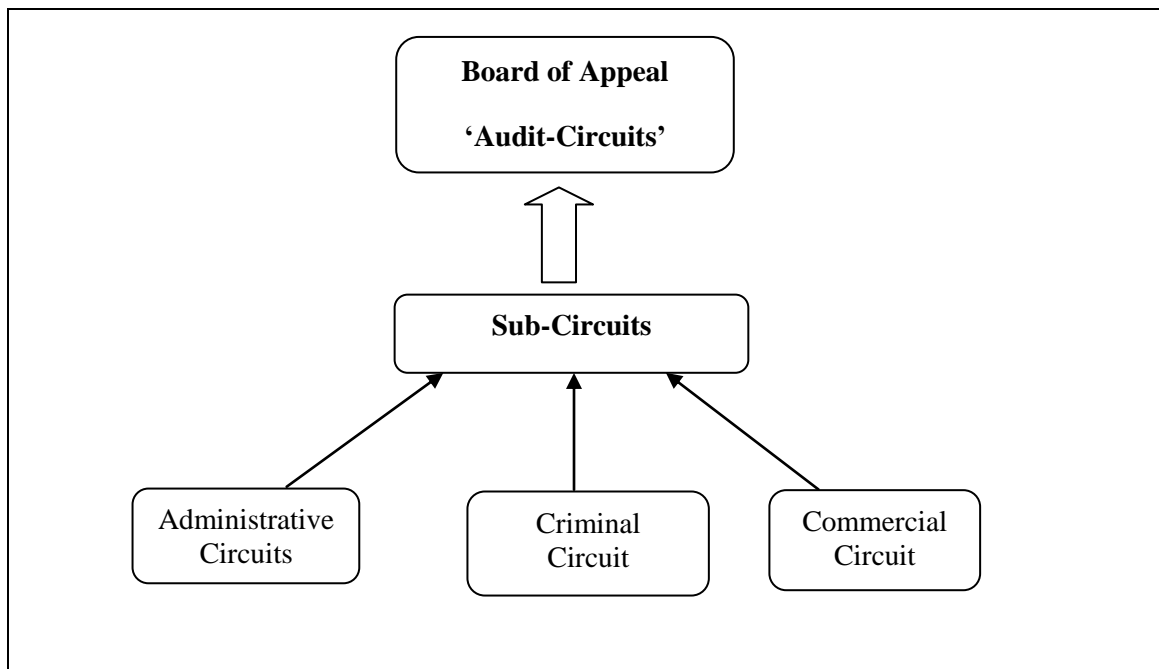
a. Board of Appeal Circuits (Audit-Circuits)

This had the highest authority in the system of the Grievances Board. It decided only on abandonment of principles or interpretations. If, while deciding on a case, the Appeal Circuit thought it necessary to depart from an existing interpretation, it would refer the matter to the president of the Grievances Board. The president then passed it on to the Board of Appeal Circuits. Approval by at least two thirds of the Board members is required to change a principle and adopt a new one. Interpretations from which the Appeal Circuits would depart are those previously adopted by it, previously adopted by another Circuit, or previously adopted by another Circuit and affirmed by the Appeal Circuit.

b. First Instance Circuit (Sub-Circuits):

The First Instance Circuit (Sub-Circuits) occupied the lowest rung in the Grievances Board hierarchy. There were several First Instance Criminal, Administrative, Subsidiary, Disciplinary, and Commercial Circuits (see Figure 2 below). These Circuits are reformed regularly and over 80 have now been formed. These Circuits are composed of three members appointed by the Board's president. The president of the Board also appoints the head of the circuit from one of the three members, and can form a one member First Instance Circuit as an appeal Circuit for minor cases as specified by a regulation. Initiation of an administrative case happens when a plaintiff files it with the President of the Board or his designee, who then refers the case to a competent circuit. Judgment made by the Circuit is final, but parties have a right to appeal. The Structure of the old Saudi Grievances Board:

Figure 2: The Structure of the Old Grievances Board



c. Administrative Committees (Tribunals)

The Saudi Arabian judicial system has several Administrative Committees or Tribunals. These have been created periodically since 1932. They have jurisdiction over commercial, criminal, civil and administrative cases. They also have jurisdiction over ‘disputes arising out of the implementation of several laws and provisions’. Administrative committees include:

- The Fraud, Cheating and Speculation Committee
- The Committees for Penalising Traffic Violations
- The Banking Disputes Settlement Committee
- The Tax Committees
- The Copyright Committee
- The Mining Disputes Committee

In fact, there are nearly 40 such committees or tribunals.³⁰

³⁰ For more information, see Youssef Sabri, ‘*Allijan Shbh Algadaiah* [Quasi-Judicial Bodies]’ (2009/1430) *Centre for Judicial Studies Specialist* <<http://www.cojss.com/article.php?a=5>>; also see

It should be noted that these committees are not recognised as part of the judicial authority by the *Basic Law of Governance*. Therefore, it could be said that all these committees were created to help the Saudi Court System cope with economic development and social requirements of the Kingdom, and also ease the case workload of the Saudi Court System.

C. *Judicial System Reform in 2007: The New Judicial System*

Reforms to the system focused on the establishment of specialised courts for labour (employment law), criminal, commercial, and domestic cases. The reforms ensured that the jurisdiction of the general courts and the specialised courts were defined to avoid conflict. These new reforms were approved in 2007. There are many points that characterise this new system which can be listed as follows:

1. *New Role of the Supreme Judicial Council*

Its rank as the highest court was removed, but it continued to oversee the administrative aspects of the judiciary. Under the new law, the Supreme Judicial Council is guided by Article 6 of the new law in conducting its administrative roles.³¹ These roles include: supervision of judges and *Shari'a* Courts as provided for in the law. In supervising the courts, it will administer employment-related affairs of all judiciary members. The affairs include transfers, promotions, secondments, assignments and training. The Council also has the role of ensuring the independence of the judges in the discharge of the duties of judiciary members, in accordance with established rules and procedures.³²

Osama Bin Salem Tfran, '*Allijan Shbh Algadaiah Fy Almamlakah: Dirasah Tahliliah* [Quasi-Judicial Committees In the Kingdom of Saudi Arabia: an Analytical Study on the Most Important Quasi-Judicial Commissions', (Masters (Research), Naif University for Security Sciences, Riyadh, 1417 AH, 1996).

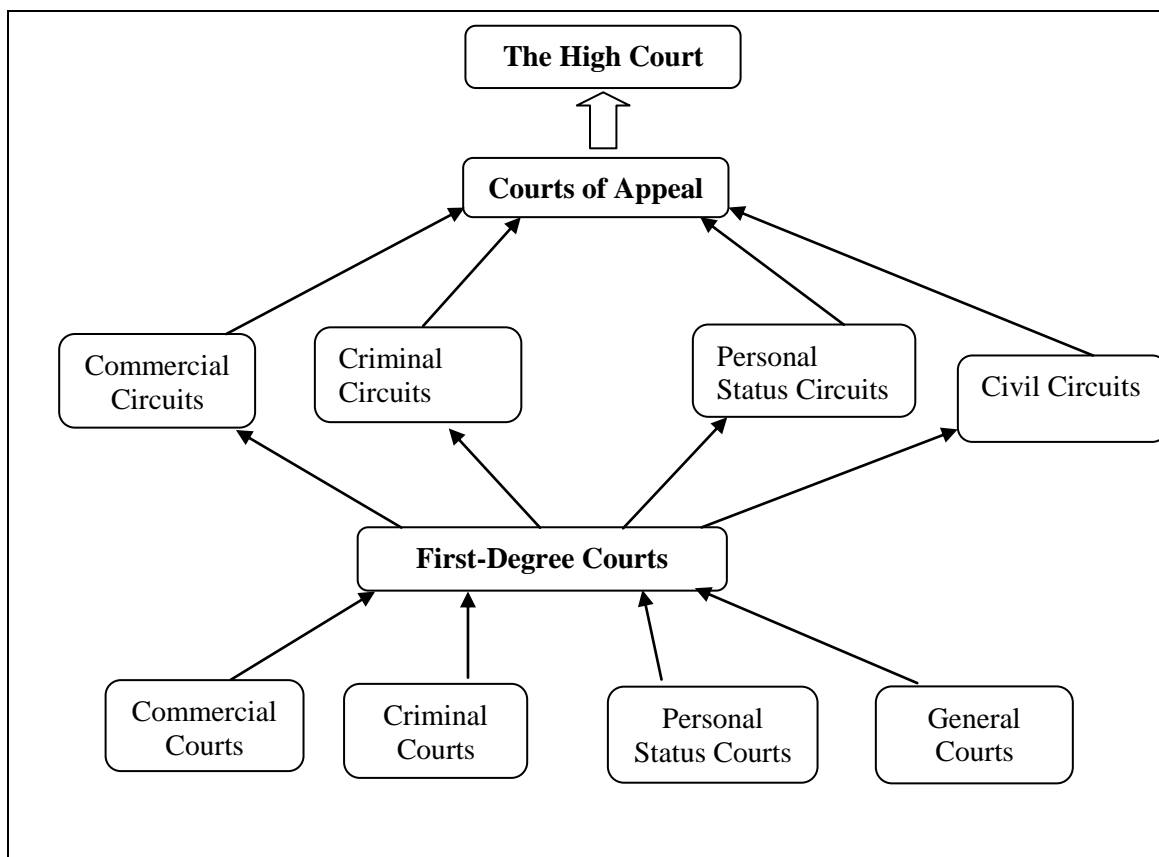
³¹ *Saudi Judicial System 2007*, issued by Royal Decree No M / 78 and 19/9/1428, 2007, *Umm al-Qura Gazette* No 4170 of 30/9/1428 AH 12 October 2007.

³² *Saudi Judicial System 2007*, pt II, art 6.

2. The New General (Shar'a) Courts System

The new court system comprises the following hierarchical structure: the High Court, Courts of Appeals, and First-Degree Courts. The First-Degree courts are composed of; Commercial Circuits, Civil Circuits, Personal Status Circuits, and Criminal Circuits (see Figure 3 which diagrammatically represents the structure of the new courts system after the 2007 reforms).

Figure 3: The New Structure of the General (Shari'a) Courts



The High Court has taken over the responsibility of the previous Supreme Judicial Council. It became the highest authority of the judicial system.

The Courts of Appeal function as a safeguard. They are meant to overturn lower courts' decisions where these are unsafe. The Courts of Appeal are established in the provinces of the Kingdom. After the reforms, the Courts of Appeal have functioned through special circuits with three-judge panels, which review judgments on major crimes. The Court of Appeal consists of

the following circuits: Commercial Circuits, Labour Circuits, Civil Circuits, Personal Status Circuits and Criminal Circuits.

First Degree Courts have been formed on the basis of the needs of the system, and are formed in provinces, counties and districts. The Courts consist of Criminal Courts, General Courts, Commercial Courts, Personal Status Courts, and Labour Courts.

3. *The Reform of the Grievances Board*

The Grievances Board still deals with administrative disputes involving government departments. The Board previously had the power to hear and punish bribery, exploitation of official influence, forgery, violations of human rights or abuse of authority in criminal prosecution proceedings offences. The jurisdiction over criminal offences was, however, handed over to the High Administrative Court in the new Judicial Court System. The Grievances Board also does not hear any requests related to sovereign actions, any decisions issued by the Administrative Judicial Council or Supreme Judicial Council, and decisions issued by legal panels or courts within their jurisdiction. It remains an independent administrative judicial commission that reports directly to the King.³³

The Grievances Board became a parallel court to the Supreme Judicial Council, but with administrative duties. It established an Administrative Judicial Council which performs functions similar to the Supreme Judicial Council, but of an administrative nature (administrative disputes). This Council covers several committees, such as the Judicial Disciplinary Committee, the Jurisdictional Conflict Committee, and the Department for Judicial Inspection. The *Saudi Grievances Board Law* governs the new structure; and the Board comprises the High Administrative Court, Administrative Courts of Appeal, and Administrative Courts.³⁴

³³ For more information, see Al Shalhoub, above n 8, 380.

³⁴ *Saudi Grievances Board System* 2007, issued by the Royal Decree No M / 78, 19/9/1428 AH 2007.

a. High Administrative Court

The High Administrative Court is the highest ranked and exercises its jurisdiction through specialised circuits (see Figure 4: The Structure of the New Grievances Board – ‘The 2007 System’). This Court has a General Council whose decisions are issued on a majority vote. The High Administrative Court Circuits review judgments from different circuits of the same level and lower levels.³⁵

The High Administrative Court has jurisdiction over the review of rulings upheld or issued by the Administrative Court of Appeals in cases where objections to judgments are based on:

(a) Entry of judgment from an incompetent court. b) A violation of the Islamic *Shari’a* provisions or regulations which do not contradict *Shari’a* rules, as well as faults in its implementation or interpretation including violations of judicial principles established by the High Administrative Court. c) Fault in framing the incident or impropriety in its description. d) Entry of judgment from a court not properly constituted as provided by the Grievances Board Law. e) Entry of a judgment contrary to another previous decision issued between the parties to the proceedings. f) Jurisdictional conflict among the board’s courts.³⁶

b. Administrative Courts of Appeal

They hear appeals against decisions from the lower Administrative Courts. Judgments are made after hearing arguments from the litigants, in accordance with the *Law of Criminal Procedure* and *Procedural Law* before *Shari’a* Courts.³⁷

c. Administrative Courts

These also function through specific circuits such as Subsidiary, Employment, Administrative, and Disciplinary Circuits. They have jurisdiction over the following:

³⁵ Ibid ch III art 11.

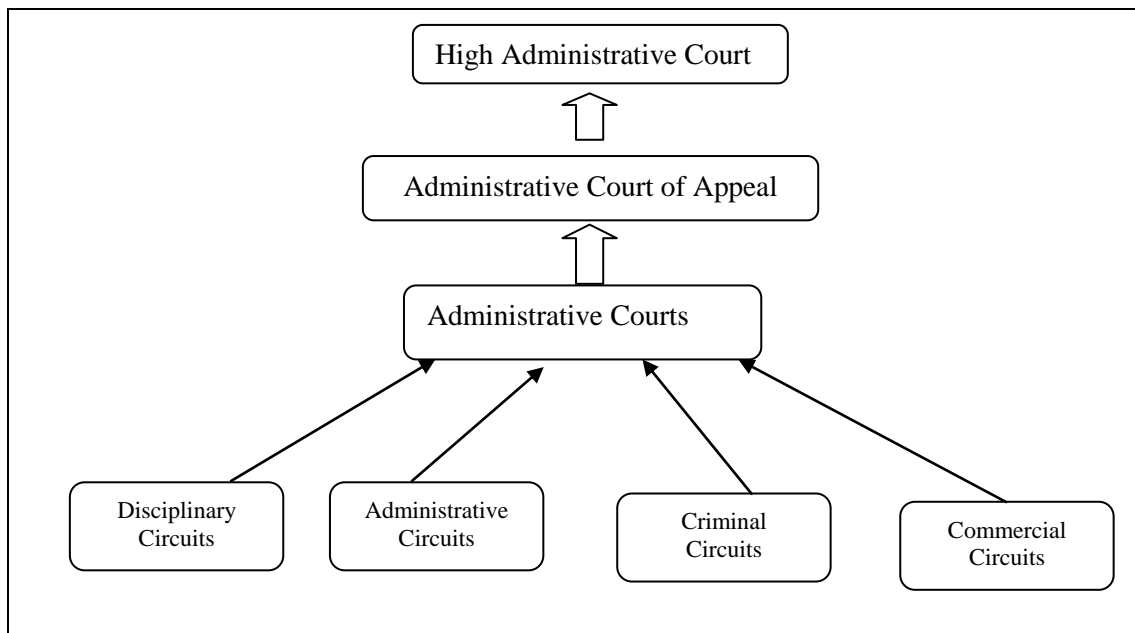
³⁶ Ibid

³⁷ Ibid ch III art 12. See *Law of Procedure before the Saudi Grievances Board*, issued by Resolution of Council of Ministers No 190 of 16/11/1409 AH 1989, *Umm Al-Qura Gazette* No 3266, 12/4/1409 AH 1989.

- i. Cases of compensation filed by the parties concerned against the government and independent public corporate entities for a harm resulting from their actions.
- ii. Requests for implementation of foreign judgments.
- iii. Cases related to the rights provided for in the Civil and Military Service and Pension Laws for government employees and hired hands, and independent public entities and their heirs and claimants.
- iv. Cases of objection filed by the parties concerned in relation to administrative decisions, where the reason for such an objection is lack of jurisdiction, a deficiency in form, a violation or erroneous application or interpretation of laws and regulations, or abuse of authority. The rejection or refusal of an administrative authority to take a decision that it should have taken pursuant to laws and regulations is considered to be an administrative decision.
- v. Cases filed by parties regarding contract-related disputes where the government or an independent public corporate entity is a party and any other Administrative Disputes, and, Disciplinary cases filed by the Bureau of Control and Investigation.
- vi. Implementing foreign judgments and foreign arbitral awards.³⁸

³⁸ *Saudi Grievances Board System* 2007, issued by the Royal Decree No M / 78, 19/9/1428 AH 2007.ch III, Article 13.

Figure 4: The Structure of the New Grievances Board - The 2007 System



Apart from elaborating on the historical development of the Grievances Board, this research will address its establishment, its role in the consideration of administrative disputes as its main jurisdiction, and then address the Court's consideration of foreign arbitral awards.

d. The Grievances Board's Role in Administrative Disputes

The jurisdiction of the Grievances Board remained unclear until Royal Decree No 11166 of 19/6/1387 AH (1968) was issued. Directed to the Chief Justice, it provides that the General Courts (that is, the Public or *Shari'a* Courts) are not to hear such disputes.

This rule has been reiterated in Royal Decree No 20941 of 28/10/1387 AH (1968) which stressed that the General Courts (the Public or *Shari'a* courts) must not consider any dispute against the government without the express permission of the King himself.

With the issuance of the *Grievances Board System* by Royal Decree No M / 51 of 17/07/1402 AH (1982) and also the issuance of the *Law of Procedure before the Saudi Grievances Board*, issued by Resolution of the Council of Ministers Decision No 190 of 16/11/1409 AH (1989), the Grievances Board is an independent court authorised to consider all of the administrative disputes, which is any dispute to which the Saudi government is a party, whether these conflicts

are between the government and its public officials (that is, government employees) or between any governmental entity and another party. That was stated in Article I of the *Grievances Board System 1982*: ‘The Grievances Board is an independent administrative judicial body reporting directly to his Majesty the King ...’. This system and the text of this provision ensure that the Grievances Board is an independent administrative judicial body and directly linked to the monarch.

The pleading according to this 1982 law was on two levels. First was at the Sub-Circuit or *Dawair Farei’h* level, where a single judge was deemed sufficient; and in the second phase, the Audit-Circuits or *Tadgeeg* where three judges functioned as an appeal Circuit.

The independence of the Board, its administrative jurisdiction and its relationship to the monarch is also stated explicitly in the new Grievances Board law (the *Grievances Board System 2007*) which was issued by Royal Decree No M / 78 of 19 Ramadan 1428 AH (1 October 2007). Article 1 states: ‘The Grievances Board is an independent administrative judicial body reporting directly to the King and its seat shall be the City of Riyadh ...’. Also, all of the judgments of this court (the Audit-Circuit/ *Tadgeeg* under the old system or the High Administrative Court under the new system) are final (unlike those taken in the court of first instance from which an appeal can be launched in regard to the same conflict and same parties). The High Administrative Court also has the power (as the final level in the new *Grievances Board System*) to issue principles as judicial precedents which possess *res judicata*, where the Court considers judicial decisions according to Article 1 of this law.

However, under the new law, the litigation before this court will now have a possible three phases or levels, in accordance with Articles 8 and 9 of the *Grievances Board System 2007*: (a) the Administrative Courts as the first level (one judge but it could be three judges); (b) the Administrative Courts of Appeal — *Estinaf* (three judges); and (c) the High Administrative Court (three judges), the highest degree or level of appeal in the Saudi Grievances Board. Thus, all of the former Audit-Circuits became known as ‘courts of appeal’, and in reports of their

Rulings have the abbreviation 'ES' signifying *Estinaf* instead of 'T' which was a reference to *Tadgeeg*, the Audit-Circuit.³⁹

e. The Grievances Board's Consideration of Foreign Arbitration

Regarding the recognition of foreign arbitral awards and their implementation within the Kingdom of Saudi Arabia, the competent authority according to the relevant laws and regulations is the Grievances Board. The text of the Council of Ministers Decision No 251 of 28/12/1379 AH (1960) (which was issued before the Grievances Board became a separate court, that is when it was a circuit of the Council of Ministers) stated that the competent court to implement the provisions of foreign arbitral awards issued in one of the Arab League countries is the Grievances Board. This has also been stated explicitly in the previous and current law related to the independent Grievances Board, namely the *Saudi Grievances Board System 1982* and the *Saudi Grievances Board System 2007* respectively. Article 13 of Chapter III, 'Jurisdiction of Courts' of the current law states: 'Administrative courts shall have jurisdiction to decide the following: ... (g) Requests for execution of foreign judgments and arbitral awards.' Therefore, it is clear that the competent court in considering foreign arbitral awards in Saudi Arabia is the Administrative Court in the Grievances Board.

However, the determination of the competent court is part of the process that facilitates and supports arbitration. Therefore, in Saudi Arabia there is an urgent need to assign the task of implementing foreign arbitration to the court that has originally a jurisdiction in the

³⁹ It should be noted that the case reference or citation in the Kingdom of Saudi Arabia differs from the common law jurisdictions style. The names of the parties are not considered important. Thus, the case citation starts with the decision's number and then the first letter of the name of the court or the circuit that issued this verdict, and then the circuit's number and finally the year of issuance. Therefore, the names of the parties in the case are not important in the citation of the judicial cases where the citation is based on the verdict number. For example, verdict No 1 issued by the Fourth Audit-Circuit Tadgeeg in 1430 AH 2010 will be cited as follows *1 / T / 4 of 1430 AH 2010*. Sub-Circuits of the Grievances Board are indicated by *D Dawair* (Circuit) and *Farei'h* (Sub), thus *D / F* is *Dawair Farei'h* (Sub-Circuit). Finally, in the bibliography the Saudi cases will be listed according to the date of the case. So it is important to explain such a difference at the beginning of this research. Therefore, any letter in any Saudi court ruling indicates the first letter of the circuit or court name, whether it is an appeal court or first circuit. Sub-Circuits of the Grievances Board are indicated by *D Dawair* (Circuit) and *Farei'h* (Sub), thus *D / F* is *Dawair Farei'h* (Sub-Circuit).

consideration of commercial disputes (that is, the Saudi Commercial Court) where the specialisation in the consideration of commercial disputes will help increase understanding of the needs of international trade and facilitate the implementation of the provisions of foreign arbitral awards quickly and easily.

Given that the Saudi Grievances Board is an administrative court and its jurisdiction is to consider conflicts between the government and its public officials or between any governmental entity and another party, the judicial competence of this court must be reconsidered. This court is currently authorised to apply the *Civil Service System, Retirement System for Government Employees (Civilian and Military)* and *Government Procurement System* laws in addition to the principles of administrative contracts, which are the contracts to which any government body is a party.⁴⁰

On the other hand, the Commercial Court is authorised to apply the *Commercial Court System* law (which almost covers all commercial conflicts within Saudi Arabia) and also the *Foreign Investment System* law. Their specialisation in trade disputes gives the judges of the Commercial Court a better view and a greater ability to understand the requirements of international trade, international norms and the principles of international trade in general, far more than would be probable from the judges of the Administrative Courts. In addition, the presence of trained judges with greater understanding of the principles of international trade would ensure the best application of international agreements and ensure the optimal understanding of the international trade and norms.

2.2.2 Competent Courts in Australia

Australian law on arbitration is based on international conventions, legislation (both Federal and State) and common law. The States and Territories of Australia have their own uniform

⁴⁰ In addition, it has jurisdiction to consider any grievances from any verdict issued by any governmental tribunal in Saudi Arabia (quasi-judicial tribunals). These are the most important laws in relation to the jurisdiction of the Saudi Grievances Board.

legislation on arbitration, where each State and Territory's legislation incorporates the identical provisions under their individual Acts, each designed the *Commercial Arbitration Act* (CAA).

Additionally, the Commonwealth IAA contains provisions implementing *the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* ('the Convention') and the *UNCITRAL Model Law*. Moreover, the IAA applies the *ICSID Convention*. Similarly, to the above outline of the competent courts in Saudi Arabia, this section will briefly address the competent courts that are authorised to implement foreign arbitral awards in Australia in general, that are the Federal Court and the NSW Supreme Court as a model for the state courts in Australia as explained in the scope of this study.

A. *The Federal Court of Australia*

The Federal Court of Australia is a superior court of record and a court of law and equity. It started to exercise its jurisdiction on 1 February 1977, when it was created by the *Federal Court of Australia Act 1976* (Cth). Its jurisdiction was 'formerly exercised in part by the High Court of Australia and the whole of the jurisdiction of the Australian Industrial Court and of the Federal Court of Bankruptcy' and encompasses 'almost all civil matters arising under Australian federal law and some summary and indictable criminal matters.'⁴¹ This Court consists of a single judge or a Full Court of three judges. The Full Court hears appeals from decisions of single judges of the Federal Court and from state and territory courts.

It also hears appellate criminal and civil matters from the Supreme Court of Norfolk Island and also it has an appellate jurisdiction on a decision of a Supreme Court of a territory other than the Australian Capital Territory or Northern Territory.⁴²

⁴¹ For more information, see Federal Court of Australia, Court's jurisdiction, ([last update] April 2013) <<http://www.fedcourt.gov.au/about/jurisdiction>>.

⁴² For more information, see Federal Court of Australia, *The Court* ([last updated] 28 April 2011) <<http://www.fedcourt.gov.au/aboutct/aboutct.html>>; see Federal Court of Australia, *Appeals* ([last updated] 18 August 2011) <<http://www.fedcourt.gov.au/litigants/appeals/appeals.html>>.

Section 3(1) of the *IAA* states that “‘court’ means any court in Australia, including, but not limited to, the Federal Court of Australia and a court of a State or Territory.’ This shows the direct authority of the Federal Court in considering the implementation of foreign arbitral awards. Accordingly, it has an original authority by this text.

B. *Supreme Court of New South Wales*

As mentioned in the scope of this study, the Supreme Court of New South Wales will be the model example for the Supreme Courts of the States and Territories of Australia but reference will be made to any other supreme court as necessary. Thus, this section will discuss the establishment of the Supreme Court of New South Wales, the formation of the Supreme Court, and its role as a court in the Australian judicial system in relation to international arbitration.

The NSW Supreme Court has jurisdiction over matters arising under the *International Arbitration Act 1974* (Cth) (*IAA*) (including the enforcement of foreign arbitral awards).⁴³ Section 3 of the *IAA* states that a ‘court means any court in Australia, including, but not limited to, the Federal Court of Australia and a court of a State or Territory,’ while section 8(2) of the *IAA* states that ‘[s]ubject to this part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.’ These texts show that the implementation of the foreign arbitration in Australia is not limited to the Federal Court.

The main role of the state court is to deal with matters within the state’s ‘geographic limits’ and they also can be granted power to hear federal law matters in some cases, such as in the application of the *Family Law Act 1957* (Cth).⁴⁴

Since the *IAA* did not assign the state competent court, which cannot be done by the Federal Parliament through the *IAA* where the establishment of the state’s courts and its jurisdiction is

⁴³ See Gregory Nell, ‘Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia’ (Paper presented at the Fall Meeting of the Maritime Law Associations of the United States, Canada, Australia and New Zealand, Hawaii. December 2011) (‘Recent Developments Paper’) 25.

⁴⁴ See Miles and Dowler, above n 3, 49.

left to the parliaments of the States (in light of the *Commonwealth Constitution* and the federal laws), the state's laws must clarify the jurisdiction of the competent court in implementing foreign arbitration.

Section 6 of the CAA of NSW 6 places the implementation of the arbitration awards under the Supreme Court's jurisdiction unless the arbitration agreement specifically gives jurisdiction to the District Court or Local Court; however, according to Hogan-Doran 'an agreement for foreign arbitration almost certainly would not [give such jurisdiction].'⁴⁵ This could be supported by the fact that the parties may wish to resort to a higher court that can better understand the nature of the dispute (that is, the nature of international trade dispute) and thus enable them to achieve their goals and meet their needs. Additionally, the parties' goal, especially on the part of the plaintiff, is to implement the arbitral award quickly and by resorting to a higher court (the Supreme Court) in order to reduce the number of levels of appeal, this is more likely to be achieved.

Furthermore, regarding the jurisdiction limitation of the courts in Australia, the commercial jurisdiction of the Supreme Court often forces the parties to resort to it. For instance, disputes related to construction or technology matters would be better to be resorted to the Commercial Division in the Supreme Court.⁴⁶

Section 21 of the IAA states that '[i]f the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration,' which gives the parties the freedom to choose the Model Law as a governing law and it will be applied by the Supreme Court of a State or Territory. If there is no Supreme Court established in that Territory, the

⁴⁵ Justin Hogan-Doran, 'Registration, Recognition and Enforcement of Foreign and Interstate Judgments and Foreign Arbitral Awards (Foreign Judgments in New South Wales) (Interstate Judgments in Australia) (NSW Judgments Overseas) (Foreign Arbitral Awards in Australia) Summary Guide and Checklist v 3.0 (1 October 2010) sevenwentworth <http://www.sevenwentworth.com.au/publications/JH-D-Registration-in-NSW-of-Foreign-Judgments.html#_Toc196461794>.

⁴⁶ Ibid.

jurisdiction will be to the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory and in any case the Federal Court of Australia will be the competent court.⁴⁷

Some views about the jurisdiction of Supreme Courts over arbitration of awards show their role in implementing arbitral awards. One of these perspectives is that such Courts' jurisdiction is a disadvantage and should be eliminated to improve arbitration legislation. According to André and Secomb, state courts handle a very limited number of international arbitration cases and this makes it difficult to develop an appropriate level of knowledge of international arbitration. Additionally, parties by resorting to different state courts can slow the arbitration.⁴⁸

Because of this perception, proposals were made to improve arbitration legislation which involved giving exclusive jurisdiction to the Federal Courts, for all matters arising under the IAA to have more consistent precedents in applying the Act.⁴⁹ Major objections that have been identified are constitutional, and this further illustrates the continuing role of state courts in international arbitration in Australia.⁵⁰

In this regard, some believe that major change,⁵¹ would 'entail practical problems of re-educating parties and their legal advisors. However, the major objection ... [Garnett and Nottage] identify is constitutional.'⁵²

⁴⁷ See *International Arbitration Act 1974* (Cth) s 18.

⁴⁸ See Angélica André & Matthew Secomb, 'Australia Moves to improve its Arbitration Legislation' (2010) (Winter) *White & Case International Disputes Quarterly*, <<http://www.whitecase.com/Publications/Detail.aspx?publication=2795>> . Additionally, the possibility of appeal on the Court's decisions on refusing or implementing foreign arbitral awards will be discussed in Chapter 4, where we should see that the multiple levels of litigation may create an obstacle to the implementation of the foreign arbitral awards (4.3 Permissibility of Challenging the Court Judgment).

⁴⁹ See the Commonwealth Attorney General's Department 'Review of the *International Arbitration Act 1974* (Cth)' (Discussion Paper, November 2008) 10 [Question H].

⁵⁰ Ibid.

⁵¹ See Richard Garnett and Luke Nottage, Review of the International Arbitration Act 1974 – Interim Submission to the Attorney-General's Department (AGD) (13 January 2009) Australian Government, Attorney-General's Department, *Review of the International Arbitration Act 1974* (Cth) <<http://www.ag.gov.au/Documents/Submission%20of%20Mr%20Garnett%20and%20Mr%20Nottage.PDF>>.

⁵² Ibid 4.

In fact, the re-education of the parties or their legal advisors does not conflict with a principle of law or any laws. Therefore, it is not a legal problem where there is simply a practical obstacle that can be overcome. Hence such an argument as the presence of ‘practical problems of re-educating parties and their legal advisors’⁵³ cannot be sustained to prevent such change (that is, that the Federal Court shall have exclusive jurisdiction) as would facilitate and speed arbitral implementation. However, there are several points that prevent such change.

First, it is true that there is a constitutional problem regarding the allocation of specific jurisdiction for each court. The process of federation in 1901 produced a Commonwealth Constitution that outlined the role of the Australian or Commonwealth Parliament and those of the State parliaments, including powers in relation to the formation of the judiciary and its jurisdiction. Each of the parliamentary levels of Australia (namely, the Australian Federal Parliament and the State Parliaments) has specific power in creating a court jurisdiction. Hence, a State Parliament cannot enact a Federal court jurisdiction and also the Commonwealth Parliament cannot add a jurisdiction to nor subtract a jurisdiction from a state court. However, the extent of the ability of the two regimes to interact is governed by the *Australian Constitution*, and the interpretation of the relevant clauses has altered over time. The extensive cross-vesting made possible under the Jurisdiction of Courts (*Cross-Vesting*) Act 1987 (Cth) (introduced to reduce parallel actions and jurisdictional disputes) was challenged in *Re Wakim*. It was found that whilst by using the *cross-vesting* mechanism the Commonwealth Parliament can vest the jurisdiction of the Federal Courts in the various supreme courts of states and territories (as authorised under Section 77(iii) of the *Constitution*), the conferral of state and territory jurisdiction on the federal courts by the State Parliament (even with the consent of the Commonwealth Parliament) is not valid.⁵⁴ According to Garnett and Nottage, the Australian High Court in *Re Wakim* ‘held that the conferral of power on federal courts to resolve matters beyond the accrued jurisdiction was unconstitutional. In effect, the pre-1987 position, where the

⁵³ Ibid.

⁵⁴ See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 [172].

Federal Court had limited jurisdiction over state matters, was restored.⁵⁵ Thus a State parliament cannot add a Federal court jurisdiction to its state court system nor can the Commonwealth Parliament add to not subtract a state jurisdiction from a state court, although it can vest a state court with a federal jurisdiction.

It is considered unconstitutional because the Australian legal system is based on a federal jurisdiction and state jurisdiction where the federal jurisdiction is derived from the *Commonwealth Constitution* and laws, while the state jurisdiction is derived from the state constitutions and state laws.⁵⁶ Although jurisdiction is not to be over-reached (as indicated in *Wakim*, above), in fact '[f]ederal jurisdiction is co-extensive with the matters specified in ss 75 and 76 of the *Constitution* in terms of content'.⁵⁷ (Sections 75 and 76 include matters arising under any treaty, matters to which the Commonwealth is party, matter between states or their residents or state and a resident of another state, same subject matter but in different states and so on).

Hence, the claim of breach of contract in breach of an agreement to arbitrate cannot be brought in the Federal Court unless it is attached to a federal claim.⁵⁸ This jurisdictional structure brings its own complexities. For example, in regard to the public policy defence (as we shall see in Chapter 5), each Australian state's court will apply its public policy in refusing foreign arbitral awards but the view of public policy may differ from one state to another.⁵⁹ Their views can also differ from that of the Federal court.

Second, it could be said that arbitration is under the original jurisdiction of the High Court, which can be found in sections 75 and 76 of the *Australian Constitution*, where the High Court

⁵⁵ See Garnett and Nottage, above n 51, 4. The authors refer to *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

⁵⁶ Justice Allsop James, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia' (Paper Given to NSW Bar Association 21 October 2003) (revised 21 October 2003) <http://www.fedcourt.gov.au/pdfsrtfs_a/admiralty_papersandpublications16.pdf> 2 [8].

⁵⁷ Ibid 3 [10]. The matter is further detailed in s 71 on judicial power and the courts.

⁵⁸ See Garnett and Nottage, above n 51, 4.

⁵⁹ More explanation about the court's role in applying its public policy will be presented in Chapter 5 (Judicial Role in Applying Public Policy in their Decisions).

has original jurisdiction and additional jurisdiction which can be created by the Commonwealth Parliament. Therefore, the Federal Court cannot have an exclusive jurisdiction over such claims as the state Supreme Courts (as indicated above) handle some matters and these may yet be appealed to the High Court of Australia as are matters heard by the Federal Court. In Australia the High Court bears the burden of providing more consistent jurisprudence as the ultimate court of appeal which will ensure consistent jurisprudence in this aspect of the law.⁶⁰

Third, giving exclusive jurisdiction to the Federal Court (as some suggest) may not support the Australian position in relation to international arbitration if the domestic arbitration developed in a significantly different manner, as could be possible were the domestic awards to be applied by the Supreme Courts and the foreign awards were to be applied by the Federal Court.⁶¹

Section 8 of the *IAA* confers foreign arbitration powers on both the State and Federal Courts of Australia. This section only covers foreign awards and for other international awards, the force of the law is given to the *UNCITRAL Model Law* through the *IAA*, in regard to international commercial arbitration. It is also under the *Model Law* that functions of certain courts or bodies are specified. The role of the Australian Centre for International Commercial Arbitration (ACICA), for example, is specified in Article 11 of the *Model Law*. State Supreme Courts and the Federal courts perform other functions that have been specified in Article 6 of the *Model Law*.⁶²

Finally, it is important to mention that the Federal Court has adopted a practical approach by establishing in its registry in each State and Territory an Arbitration Coordinating Judge. This judge has general responsibility for the management of proceedings brought before the Court in

⁶⁰ See Nell, Recent Developments Paper, above n 43, 26.

⁶¹ Ibid.

⁶² For more information, see Australasian Forum for International Arbitration (AFIA), *Do Australian Courts Have Jurisdiction to Enforce International Arbitral Awards Made in Australia?* (28 February 2012) <<http://afia.asia/2012/02/28/do-australian-courts-have-jurisdiction-to-enforce-international-arbitral-awards-made-in-australia/>>.

applying the *IAA* where he will coordinate the proceeding to be commenced.⁶³ Additionally, the Federal Court has also distributed a Practice Note in relation to the application of the *IAA*.

Moreover, the Supreme Court of New South Wales and Victorian Supreme Court have lists of a specialist judges for the conduct of proceedings commenced under the *IAA* and the State commercial arbitration legislation.⁶⁴

Such a trend will send reassuring messages to foreign investors as it encourages the implementation of the provisions of foreign arbitral awards in Australia through the clarity in the principles that have been adopted and published by the courts in regard to the implementation process. Therefore, while it can be said that giving the Australian Federal Court an exclusive jurisdiction over the implementation of foreign awards is not possible, the extent of coordination seeks to overcome difficulties that might otherwise exist.

2.3 Conclusion

Regarding *Efficiency*, the Saudi Grievances Board is an administrative court and implementation of foreign arbitral awards can be considered outside the scope of the natural jurisdiction of that court. This matter falls under competency and may contribute to the inefficiency of the courts. In fact, the lack of experience among certain judges, due to the limited number of international arbitration cases before the state's courts, reduces the judges' experience in handling such cases and in turn affects the efficiency in handling them. This could be in terms of decision making, time spent to make such decisions, and competency of the judges.

In Australia, the Supreme Courts of New South Wales and Victoria have the experience of having specialist lists, enabling a specialised judge to play a significant role in improving the efficiency of justice.

⁶³ See Nell, Recent Developments Paper, above n 43, 28.

⁶⁴ Ibid.

Both systems have adopted the principle of separation of powers; however, the separation of powers is clear in the Australian system where it exists more ‘in theory’ in Saudi Arabia, where under the *Shari’a* law all political and judicial authority and the authorities in which this power resides are ultimately in the hands of the King (though he himself is, of course, subject to the demands of *Sharia* law), practically authority is divided and separated by the Saudi regime. For Australia, the separation of powers is a guarantee of the independence of the judiciary which gives judges a freedom from intervention. Regarding the implementation of the provisions of foreign arbitral awards, this principle has contributed to the freedom of decision making (that is, being able to arrive at a decision, without being subject to political or other influence), as we shall see in chapters 4 and 5 where it is observed that the political authorities have had no effect on the judge’s ruling in both countries. Judges administer the law in both countries freely and without intervention from political entities.

It is clear that having all authority in the hands of the King did not affect the implementation of the provisions of foreign arbitral awards. In fact, the *Saudi Judicial System 2007* (Article 1) and the *Grievances Board System 2007* (Article 1) affirm the principle of the independence of the judiciary and we did not find any effect of any other authority on the decisions of the courts with regard to the implementation of the provisions of foreign arbitration. It should be noted that the judges in the Grievances Board apply the decisions of the President of the Grievances Board for the implementation of the provisions of foreign arbitration and the provisions of the foreign courts more than any other law or agreement, as we shall see in chapters 4 and 5 and there was no effect of any of the authorities on the judge’s ruling.

It is also important to note that there is a significant difference in the legal basis of each system. The Saudi judiciary is based on the principles of Islamic law and then on the regulations issued by the Saudi Council of Ministers. In Australia, the judiciary heritage stems from the Common Law and the concept of natural justice. Additionally, judicial precedents are binding on Australian judges, unlike Saudi judges who are not obliged to follow judicial precedents, as we

shall see clearly in Chapter 4. It is also noticeable that ‘public policy’, as we shall see in Chapter 5, varies from place to place and from time to time. However, the *Shari’a* principles stem from religious sources (the *Qur’ān* and *Sunnah*) which are enduring (and static) sources that can not be modified.

In addition, this chapter (Chapter 2) has highlighted the competent court in approving foreign arbitral awards. The interaction between several conflicting meanings of terms used in arbitration has led to disagreement among judges, arbitrators and commentators. According to the need for efficiency of laws that implement the provisions of foreign arbitral awards and to provide justice for the parties to the arbitration, there are a few comments that can be highlighted.

With regard to Australia, the appointment of the Federal Court as the competent court could be received positively, as it helps to understand the needs of the international trade and the need for rapid action on related issues and helps to overcome some obstacles such as the constitutional problem where it relates to the Australian federal system.

However, the fact is that there are states and territories in Australia and the limited number of international arbitration cases before the state’s courts made it difficult for the judges to develop an appropriate level of knowledge of international arbitration. Therefore, the approach of having a specialist list of judges and the distribution of a Practice Note does, without a doubt, help to raise the efficiency of the Court’s role in implementation. Better enforcement of the international commercial arbitration in Australia is also possible due to the direct dissemination of the experience of the Supreme Court of New South Wales and that of Victoria by having a specialist list where the specialised judge can play a significant role in improving the efficiency of justice⁶⁵ (as well as indirectly via the Practice Note).

⁶⁵ For more information, see European Commission for the Efficiency of Justice, *European Judicial Systems: Edition 2008 (Data 2006) Efficiency and Quality of Justice* (Council of Europe Publishing, 2008) 76. According to Anderson, Bernstein and Gray:

This is supported by the fact that there are some countries that have created a specialist judges' list for the arbitration. The High Court of Singapore, for example, has appointed several judges as specialist 'arbitration' judges.⁶⁶ This creates unifying principles in dealing with the provisions of foreign arbitral awards. Thus, the appointment of a specialised court (that is, a court that applies the commercial laws) is one of the most important aspects that help to activate the arbitration system as an alternative method in settling disputes. It also contributes to giving comfort and security to foreign investors, which will in turn help the national economy.

In contrast, in the Kingdom of Saudi Arabia, the Grievances Board — which is essentially an administrative court — is the court system that was selected to consider requests for the implementation of the provisions of foreign arbitral awards, yet this function is outside the natural scope of the court. This is because the judges are often dealing with administrative disputes. Additionally, the Grievances Board is not authorised, unlike the Commercial Court in the General (*Shari'a*) Court System, to consider or apply the commercial or industrial laws and the laws that govern foreign investment.

Therefore, it would be more useful and better to entrust the task of implementing the provisions of foreign arbitral awards in Saudi Arabia to the Commercial Court (rather than the Administrative Audit-Circuits of the old Grievances Board system and the Courts of Appeal of

some countries have taken steps to improve the efficiency of their court system by introducing specialised courts or specialised divisions within courts, revising procedures to reduce opportunities for parties to delay, increasing the ability of judges to control the pace of proceedings, and improving the many non-judicial responsibilities with which many judges are saddled (such as responsibility for registering pledges..)

See James Horton Anderson, David S Bernstein and Cheryl Williamson Gray, *Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future* (International Bank for Reconstruction and Development, 2005) 58; generally see Héctor Fix-Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Oxford and Portland, Oregon, 2003). That shows the relationship between the improvements of the legal text with the efficiency of the judicial work.

⁶⁶ See the Commonwealth Attorney General's Department, 'Review of the *International Arbitration Act 1974* (Cth)' (Discussion Paper, November 2008) 10 [Question H]. This supports the importance of understanding the judge's role in the speed of the trial where the High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 [111] (5 October 2011) states that '[a] commercial trial judge would have ensured more speed and less expense.' And such speed could be achieved by appointing one court in order to reduce the appeal levels within the Federal Court and also to prepare the judges for such issues and so to achieve the objective of the arbitration system in general.

the new Grievances Board system) for many reasons, the most important being specialisation. This high level of relevant experience and expertise might be influential in the recognition and enforcement of foreign arbitral awards in the Kingdom, which may affect the efficiency of arbitration as an alternative system in dispute resolution.

Additionally, it is in the interest of Saudi Arabia to apply the Australian and Singaporean experiences by having a list of experts and distributing a Practice Note in relation to the implementation of foreign arbitral awards. However, one could argue that Australia and Singapore are common law jurisdictions and question whether Saudi Arabia with a different legal system could adopt their experience. In fact, such adoption is not inconsistent with the Saudi legal tradition where it is merely a procedural process which will not affect or breach the Saudi judicial principles or traditions. In reality, such adoption will develop positively the Saudi legal process in implementing foreign arbitral awards by speeding the enforcement process.

3 FOUNDATIONS FOR THE IMPLEMENTATION OF FOREIGN ARBITRAL AWARDS

The previous chapter was clear in its discussion on the competent courts in both countries and discusses the Saudi judicial system, which was explained in general, and the possible effect on the implementation process. It also describes the legal hierarchy in Saudi Arabia.

On the other hand, it is important to show the role of national laws, international conventions and the international norms on the implementation process. In fact there are principles and rules governing the implementation of the provisions of foreign arbitral awards. A court approving an arbitral award under any principles, whether procedural or substantive, must do so by reference to those principles which are considered fundamental within its own legal system rather than any other laws that may govern the contract (such as the law of the place of performance or the law of the seat of the arbitration).¹ Hence, it is necessary to present and discuss all the principles and provisions that affect the implementation process which will help in the analysis of the role of the judge. On the other hand, ambiguity in the principles applied will lead to uncertain results. Therefore, this chapter will deal with the role of legislation (scope of arbitration: ‘*arbitrability*’ and the capacity of parties), formal requirements and national and international legal texts and principles in regard to the implementation of foreign arbitral awards.

In fact, such rules and principles come from domestic legislation in terms of identifying issues that can be arbitrated (that is, arbitrability), the methods of appeal and other general principles for the implementation of foreign arbitral awards in domestic laws, or additionally may rely on conventions, whether international, bilateral or regional. Also, the role of international norms such as the reciprocity principle cannot be overlooked in the admission of foreign arbitral awards and implementation. This chapter will be divided into three main parts:

3.1 Role of Legislation in the Delineation of Arbitration.

¹ Because courts often refer to ‘public policy’ as the basis of the bar. For more information, see Laurence Shore, ‘Defining “Arbitrability”: Recognition and Enforcement of Foreign Arbitral Awards’ (15 June 2009) *New York Law Journal*, Special Section.

3.2 The Role of International and Regional Conventions in Determining the Limits of Arbitration.

3.3 The Role of International Norms in the Admission of Foreign Arbitral Awards and Implementation (Reciprocity Principle).

Each section describes the legislation, conventions and international norms in both countries. An analysis is then done of identified differences. This will contribute to the overall analysis of the laws of both countries by finding out differences in efficiency, social values and justice to the parties involved in arbitration. This contributes to the knowledge of the real impact of these laws and conventions on the role of the national judge in the implementation of the provisions of foreign arbitral awards which will help to examine the effectiveness of such legal rules.

3.1 Role of Legislation in the Delineation of Arbitration

It is true that legislation has an important and central role in determining the scope of arbitration in terms of matters where resort can be made to arbitration ('arbitrability') and the parties who can enter into arbitration agreements. So, because each country has the power to enact its arbitration system, it is necessary to analyse how Saudi and Australian legal systems frame arbitration before deciding whether they comply with their international obligations on arbitration and evaluating which system is more efficient.

Such laws set the formal requirements for arbitration to be met by the parties. Legislation governs the role of the judge in the consideration of arbitral awards. Thus, the judge must first research and ascertain the availability of those laws before he proceeds in the implementation of the arbitral award. Therefore, there are two main axes of the legislation in determining the

arbitration:² namely, the scope of arbitration ‘in terms of the subject matter and parties’ and the formal requirements of enforcement (3.1.1 and 3.1.2 below respectively).

3.1.1 Scope of Arbitration

The scope of the arbitration refers to matters for which it is permissible by law to resort to arbitration and also includes the capacity of parties at the time when the agreement to resort to arbitration was made.

A. *Subject Matter of the Conflict*

The subject matter must be arbitrable in accordance with the law. The term ‘non-arbitrability’ has a general meaning, which can be expressed as specific classes of disputes that are barred from arbitration because of national legislation, international convention or lack of judicial authority; thus, courts often refer to ‘*public policy*’ as the basis of the arbitrability. The subject matter of the arbitration is the main key in determining the arbitrability.³ In fact, most domestic laws clarify all rights and matters that can be arbitrated,⁴ because the origin of the legality of the arbitration processes is that a matter be able to be arbitrated under the law, otherwise, the judiciary will refuse to implement that provision as it violates public policy.

The *Convention* has established this approach in the implementation of foreign arbitral awards, stipulating in Article II that (1) each contracting state shall recognise an arbitration agreement ‘concerning a subject matter capable of settlement by arbitration’ and in Article V(2)(a) provides that an arbitral award may be refused recognition and enforcement if the ‘subject

² It should be noted that these points will deal with all matters relating to the implementation of foreign arbitral award only where it would not include any conditions or requirements for the implementation of the provisions of the national arbitration.

³ For more information, see Shore, above n 1; Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International, 2nd ed, 2001) (‘*International Commercial Arbitration: C & M*’) 243; Steven C Bennett, ‘The Developing American Approach to Arbitrability’ (Feb–Apr 2003) 58 *Dispute Resolution Journal* 1, 8.

⁴ See Walter Mattli, ‘Private Justice in a Global Economy: From Litigation to Arbitration’ (2001) 55(4) *International Organization Journal* 919, 229; see generally Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009).

matter of the difference is not capable of settlement by arbitration under the law of that country.’ Accordingly, the subject matter is the basis of the objective limits of arbitration. Thus, states have the right to exclude certain disputes from arbitration if it conflicts with public policy.

1. *Subject Matter in Saudi Arabia*

According to the *Arab Convention 1952*,⁵ Article III ‘the execution of the provisions’ states that ‘it is possible to refuse the enforcement of the award in the case where the law of the requested state excluded the solution to the issue of the dispute by arbitration.’ This Article shows the possibility of refusing the recognition and the enforcement of foreign arbitral awards, if the subject matter of the conflict is not subject to arbitration (non-arbitrable) according to the law where the award is intended to be implemented.

Additionally, in accordance with the *Saudi Arbitration System 1983*, there are two types of issues that cannot be solved by arbitration. These types that are expressly prohibited by the law can be divided into two sections as follows:

- a. Matters that are expressly prohibited to be solved by arbitration, further fall into two categories
 - i. Article 3 prevents the resort to arbitration by any of the government departments without explicit prior consent by the President of the Council of Ministers of Saudi Arabia. This text made arbitration in disputes with government agencies impermissible in principle, but it is possible and permissible after the authorisation of the Saudi Prime Minister.⁶

⁵ *Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards*, 14 September 1952 (entered into force in 10 November 1952). This applies to all Arab League member states.

⁶ For more information, see Abdulaziz Bin Zaid, ‘*Mdā Jwaz Althkīm fy Al’qwd Aledarīh: Derasah Muqarnh* [The Permissibility of Arbitration in the Government Contract]’ (Masters (Research) Thesis, Faculty of Law, University of Jordan, 2006).

Accordingly, Article 8 of the *Regulations of the Saudi Arbitration System* (No 7 / 2021 / M 1985) states:

In disputes to which a government is a party with others, and this organisation should prepare a note on arbitration in this conflict in recourse to arbitration, explaining the theme and rationale for arbitration and the names of the litigants [parties], to be submitted to the Prime Minister for consideration in the approval of the arbitration. It is also permitted to be a prior determination by the Prime Minister to authorise any government body in a particular contract to terminate a specific dispute by arbitration and in all cases the Council of Ministers should be notified about any judgments that may issue.

This trend came after the case of *Government of Saudi Arabia v Arabian American Oil Co (Aramco)* in the 1970s, which was explained in the introduction of this dissertation,⁷ and it can be said that such a provision can be justified when the government disputes relate to the public wealth so the recourse to arbitration must be carefully considered to maintain the public interest. This does not absolutely mean the refusal of foreign arbitration when the government is a party in the dispute. It means that the recourse to arbitration at the beginning of the dispute or accepting it as a condition in the original contract must be carefully thought out to be considered in the public interest. This principle is not applied in Australia where the Australian judiciary does not distinguish between administrative and commercial disputes. It can be considered that such trend supports the possibility of arbitration in all disputes, which in turn supports facilitating arbitration as a way to resolve disputes peacefully.

- ii. Article II of the *Saudi Arbitration System* states that ‘arbitration in matters wherein conciliation is not permitted shall not be accepted...’,⁸ which means the inadmissibility of arbitration in the conflicts of **personal status** and **criminal**

⁷ For more information on this case, see Walaa Refat, ‘*Alḥkīm Altjarī Alwṭnī ū Aldwālī fī Almmḷaka Al’rbīah Als’wdīah* [International and National Commercial Arbitration in Saudi Arabia]’ (Chamber of Commerce and Industry in Jeddah, 1999); also See Bin Zaid, above n 6, 144.

⁸ The same provision came in the Grievances Board President’s Decision No 116/1428 sub 6(1): ‘[T]he subject matter of the dispute should be susceptible to solution through arbitration’.

matters.⁹ Article 1 of the *Regulations of the Saudi Arbitration System 1983* states: ‘It is not permissible to arbitrate matters that cannot be solved by conciliation such as ‘*Hudūd*’, ‘*Li’aan*’ in disputes between a couple, and all that is related to public policy.’ It should be noted that the ‘*Hudūd*’ provisions are a set of specific offences (such as murder or theft) that have specific penalties in *Shari’a*. The *Li’aan* or ‘oath’ method of advocacy or determination can be implemented in specific situations such as, for example, in the event of a dispute between the spouses. Thus, while divorce in Islam can be arbitrated and under the Saudi laws the court will accept any arbitration within the family issues, there is an exception in regard to a matter where the *Li’aan* which cannot be arbitrated has been applied. For example, in a case relating to a child’s paternity, where a husband claims that a boy is not his son and the wife counter-claims that the husband is a liar, the process of *li’aan* (a solemn oath taking by both parties) is implemented.¹⁰

This definition of ‘matters that cannot be solved by conciliation’ is still wide as there is no mention or exhaustive listing of those matters or topics amenable to ‘conciliation’. It can therefore be said that the Saudi law has left the determination of such matters to the court in each case individually according to *Shari’a*. Thus, saying that the reason for a lack of defined topics for arbitration in the *Saudi Arbitration System* is that this law ‘could settle any disputes at the time of its enactment in 1983 because most of the disputes at that time were simple, minimal,

⁹ For more information, see Mohammed Al-Issa, ‘*Taṭbiq Aḥkam Alḥkīm Alajnabīh fī Almmlaka Al’rbīyah Als’wdīyah* [The Implementation of the Provisions of Foreign Arbitral Awards in Saudi Arabia]’ (Paper presented at the *New York Convention 50 Years: Practical Perspectives on the Recognition and Enforcement of Foreign Arbitral Awards*, Cairo, 10–11 November 2008) 7. However, in Islam it is permissible for the couple (husband and wife) to resort to ‘conciliation or arbitration’ as a special case in the event of family conflict in order to end the dispute and reconcile the couple when they are otherwise going to end it. In this case, they have to appoint two persons, one from each side (for the husband and the wife) to solve the dispute. For more information, see Mahdi Zahraa and Nora A Hak, ‘*Tahkim* (Arbitration) in Islamic Law within the Context of Family Disputes’ (2006) 20 *Arab Law Quarterly* 2.

¹⁰ For more information, see Mahmoud Naguib Hosni, ‘*Mbadc Alqanon Aljnaī Al-Islamī* [Principles of Islamic Criminal Law]’ (2006) 24, 151.

and not complicated’¹¹ is not accurate where the Saudi legislature adopts the *Hanbali* view in general where it allows the arbitration in all matters (except those excluded, see further below).¹² However, it is still broad and undefined where it links arbitrability with conciliation (that is, Article 1 in the *Saudi Arbitration System*). In contrast, Australian laws identified some topics that cannot be arbitrated where the text in some law, as we shall see in the next few lines, has mention the non-arbitrable topics as an exception from the original principle which authorises arbitration in all disputes.

- b. The second section concerns the *Shari’a* law, which excludes some disputes from arbitration, as we shall see in Chapter 5 (5.4.1 the Saudi Grievances Board and the Application of the Public Policy). Actions or commodities that are forbidden (*haram*) cannot be the object of a contract. So a contract involving alcohol or gambling (*maisar*) would be void. The presence of *Gharer* clauses or circumstances (as we shall see in Chapter 5 subsection 5.4.1 The Saudi Grievances Board and the Application of Public Policy ((B) Scope of ‘Violation of Islamic Law’ in the View of the Saudi Grievances Board)) would make an otherwise legal (*halal*) contract into an illegal one, which will make the contract void. For example, certainty as to the identity of a party and ownership of the asset is also required. Hence, generally if a party’s commitments are unclear or not known at the time of signing a contract, that means the contract contains *Gharer* and is invalid. To insist on certainty is to protect both parties. *Ribā* (taking or giving of interest, variously defined) is also forbidden under *Shari’a* law (as explained in detail later in the thesis – Chapter 5

¹¹ See Abdullah Alassaf and Bruno Zeller, ‘The Legal Procedures of Saudi Arbitration Regulations 1983 and 1985’ (2010) 7 *Macquarie Journal of Business Law* 170, 173.

¹² For more information about the arbitration in the *Hanbali* and other Islamic schools, see Kahtan Al-Doari, ‘*Althkīm fy Alfqh ū Alqanwn Alwad’* y [Arbitration Contract in the Fiqh and the Law]’ (Dar Al-Furqan, 2003). This adoption of the *Hanbali* School is based on the decision of King Abdul Aziz (the founder of the Kingdom of Saudi Arabia) where he ordered that the *Hanbali* School be followed by the judiciary because of the ease of comprehension and application this doctrine, as well as easy access to its sources. For more information, see Abdulrahman Al Shalhoub, ‘*Alne zam Aldstori fy Almamlakah Al’rabi h Als’wdih: byn Ashari’a ū Alqanwn Almuqarn* [The Constitutional System in Saudi Arabia: Between the Sharia and the Comparative Law] (Safir Press, 2nd ed, 2005) 339.

subsection 5.4.1). Thus *Ribā* is forbidden under *Shari'a* law and a contract containing it cannot be implemented by the Saudi courts where the rest of the award can be implemented if it severable. Hence it is clear that the implementation of the foreign arbitral award shall not be contrary to *Shari'a*. This principle is not applicable, of course, in Australia, but it could be said that it is very similar to the principle of non-violation of the *Common Law* and the principles of *Natural Justice* as stipulated in the *Convention* as we shall see in Chapter 5 (5.4.2 Australian Courts in Approving Public Policy). However, the nature of the public policy exception under Article V(2)(v) of the *Convention* varies from country to country but reflects the core values of those countries, such as whether an award is incompatible with the public interest or a breach of fundamental law or principles (New Zealand), good morals and social order (Korea), the most basic notions of morality and justice (Hong Kong), or injurious to the public good or contrary to natural justice (UK). In countries where *Shari'a* applies, it shapes public policy and what is perceived as the public good or the public interest.¹³

This means that in Saudi Arabia arbitration is permissible in all disputes except those exempted by *Shari'a* or the Saudi legal text. Hence, if, for example, there is a contract involving a purchase of alcohol, the subject of the contract is prohibited by the Islamic *Shari'a* law, though the arbitration may arise over any aspect of the dispute (such as transport, storage, and so on) related to the proposed implementation of that contract and not about the (prohibited) subject matter of the contract (like the quality of alcohol). In such a case the arbitral award (or severable contrary part if partial award is possible) will not be enforced in the Kingdom of Saudi Arabia,

¹³ Which means that the award should not violate the public policy of *Shari'a*. However, the question is whether these topics or matters in *Shari'a* are subject to negotiation. In other words, are these matters able to be changed from time to time under *Shari'a*? (Such a policy would reflect an acceptance of the notion of developmentability within *Shari'a*.) For more information about a various definitions of public policy by a number of different countries, see generally Anton G Maurer, *The Public Policy Exception under the New York Convention* (Juris Arbitration Law, revised ed, 2013).

because of the breach of *Shari'a*, although it is within the framework of international trade contracts.¹⁴

In fact, the majority of the Muslim scholars believe that each contract has three pillars which are the contractors (the parties) (for example, their capacity, authority), offer and acceptance of the contract (the free will of the parties), and the subject matter of the contract (the legality of the subject matter).¹⁵ Aljarba, for example, believes that the three pillars contained in the arbitration contract are the contractors (the legal capacity of the parties) and the offer and acceptance, which represents consensual aspect of the contract, and the possibility of referring the dispute to arbitration, that is, its '*arbitrability*'.¹⁶ This means that whenever these pillars exist, the arbitration agreement is valid.

2. *Subject Matter in Australia*

The scope of the subject matter exists in Article 5(1)(C) of the *Convention* which states:

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

Additionally, section 8(7) of the *IAA* stresses:

In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that: (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting;

This means that the NSW Supreme Court will implement NSW laws especially the *Commercial Arbitration Act 2010* (NSW) in identifying matters that are capable of being solved by arbitration. In fact, section 1(5) and (6) of this Act reveal that the matters that can be solved by

¹⁴ For more information, see Mohammed A H Aljarba, *Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context* (PhD Thesis, University of Wales, Aberystwyth, 2001) 60.

¹⁵ Ibid 59.

¹⁶ Ibid.

arbitration are not limited where subsection 5 states that '[t]his Act does not affect any other Act by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Act.' This is also clear in subsection 6 which states:

The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.

Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

These texts show the right of the court and the parties to seek to refuse to implement the foreign arbitration on the grounds that the dispute is not subject to arbitration. However, these texts regarding foreign arbitral awards did not specify the exact matters that cannot be submitted to arbitration. Additionally, these texts had left a large portion for the court to determine on these issues.

It should be noted that 'arbitrability' can be measured in according to section 8(5)(b) of the IAA under the applicable law which has been chosen in the contract, but if there is no law specified in the contract, arbitration will be in accordance to the law of the state where the award was made.¹⁷

Also, an arbitral award may be refused if the subject of the dispute is not arbitrable in the country where the parties request the implementation of the arbitral award.¹⁸

¹⁷ *International Arbitration Act 1974* (Cth) (IAA) s 8(5)(b) states that 'the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made.'

¹⁸ See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*' or herein 'the *Convention*') art V(2). It should be noted that section 12(2) of the IAA states that 'nothing in this part affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of this Act'. Therefore, the scope of arbitration does not exceed that stipulated by the *International Arbitration Act* and the *New York Convention* regarding the implementation of the provisions of foreign arbitral awards.

Finally, according to Article II(3) of the *Convention* the court can refuse the award if ‘it finds that the said agreement is null and void, inoperative or incapable of being performed.’ Thus, it can be said that *IAA* did not express what disputes are not ‘capable of settlement by arbitration’ and the public interest (that is, ‘and the public policy’) in various types of situations that differ especially when it comes to determining the extent to which such disputes should be arbitrable.¹⁹

B. *Parties to Arbitration*

First of all, it should be noted that parties to an arbitration agreement shall be treated with equality and each party shall be given a full opportunity to present his/her case.²⁰ This means that the parties shall be treated with equality and that at any stage of the proceedings this depends on the fact that all parties must have a full legal capacity. This section describes laws on parties that can resort to arbitration to settle disputes.

1. *Saudi Arabia*

According to Article 2 of the *Saudi Arbitration System*, an ‘agreement to resort to arbitration shall be accepted only from the authorised persons.’²¹ In addition, according to the regulations for this System in regard to Article 2, it states that ‘it does not fit the agreement to arbitrate *only* those who have *full* capacity to act; thus, it does not fit the guardian of the minor [underage] or guardianship [position] or ‘*Waqf*’ recourse to arbitration unless it is authorised to do so by the

¹⁹ For more information, see Luke Nottage and Richard Garnett, ‘The Top Twenty Things to Change in or around Australia’s *International Arbitration Act*’ Final Submission to [Commonwealth] Attorney-General’s Department, *Review of the International Arbitration Act 1974*, 23 March 2009 <http://sydney.edu.au/law/scil/documents/2009/IntArbitrationAct_Nottage.pdf> 4.

²⁰ This is a natural right for all parties and it has been stated in the *New York Convention* that the arbitral award can be refused implementation if one of the parties has proof that he was unable to present his case: art V(1)(b) of the *Convention*. For more information, see Pieter Sanders, ‘UNCITRAL’s Model Law on International and Commercial Arbitration: Present Situation and Future’ (2005) 12(4) *Arbitration International* 443.

²¹ *Saudi Implementing Rules to the 1983 Arbitration Act*, issued by the Council of Ministers No M / 7 / 2021 of 8/9/1405 AH 1985. It should be noted that the English translation was inappropriate in the *Saudi Arbitration System* (English language version) because it inserts the word ‘authorised person’ instead of ‘the capacity to act’ because it is clear that in the Arabic version meant the ‘capacity to act’.

competent court.’ Such a trend is time consuming, which may conflict with the main goal of arbitration ‘the speed of deciding the dispute’.

Thus, it is clear that capacity for making an arbitration agreement under the *Saudi Arbitration System* is related to the capacity for making a contract. Thus, if any person legally lacking that capacity (for example, a guardian) has resorted to international arbitration without the court’s permission, the arbitral award will not be implemented within the country as it is contrary to public policy. Therefore, Saudi courts will never enforce any foreign arbitral award that has been signed by person lacking legal capacity where such case is contrary to the *Saudi Arbitration System*.

2. *Australia*

Section 8(5)(a) in the *IAA* states that the court may refuse to recognise or enforce the foreign arbitral award if it finds that the party to the agreement (for which the award is sought) was under some incapacity under the law applicable to him when the agreement was made.

Additionally, the same provision exists in Article V(1)(a) of the *Convention* where it states ‘(1) Recognition and enforcement of the award may be refused... [when the party has proof that] (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity.’ Thus, it is clear that Australian courts will never enforce any foreign arbitral award that has been signed by person lacking legal capacity.²² For example, lack of capacity to enter into the arbitration agreement (in one or all of the parties) will force the court to refuse to implement the foreign award as such a case is contrary to the *Convention* and also contrary to the principles of Australian contract law. It is the same result pursued by the Saudi courts.

²² This raises the question about the effectiveness of the existence of such a provision in the international convention, where this matter of the actions of ‘persons lacking [legal] capacity’ is linked to natural justice and the public policy in the country. Thus, we cannot accept such actions according to public policy so it was better not to include such a provision in the *Convention* as it is under the public policy defence.

Finally, it is clear that legislation guiding what subject matter is to be arbitrated in Saudi Arabia stem from the *Saudi Arbitration System 1983*, and *Arab Convention 1952*. If the subject matter is non-arbitrable according to Saudi laws, it will not be recognised and enforced. There are matters that are exclusively prohibited by Saudi laws from being resolved through arbitration. These are: resort to arbitration by any of the government departments without explicit consent by the President of the Council of Ministers of Saudi Arabia, and matters wherein conciliation is not permitted. There are also subject matters that are against *Shari'a* law which also renders an arbitration unable to be implemented.

On the other hand, in Australia, the issue of the scope of the matter is guided by the *Convention*. Under the *Convention*, recognition and implementation of foreign arbitral award based on the subject matter is not permitted when ‘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...’, if the said agreement is null and void, inoperative or incapable of being performed, and if the subject matter is not capable of settlement by arbitration according to the laws of the State or Territory in which the court is sitting. For example, section 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth) or section 43(1) of the *Insurance Contracts Act 1984* (Cth) prohibit the arbitration in certain matters; thus, the arbitration clause will not be valid because it infringes a mandatory statute of the forum making arbitration illegal.

Considering parties involved: in Saudi Arabia, resort to arbitration has to be authorised by a competent court. This is time consuming since the parties wishing to resort to arbitration will have to look for the competent court and seek approval to resort to arbitration. In Australia, foreign awards are not enforced if the court discovers that it has been signed by a person lacking legal capacity (as per section 8(5)(a) of the *IAA*). The *Corporations Act 2001* (Cth) in section 124 gives a company the same legal capacity as ‘an individual’ including the power to enter in a contract. However, section 125 provides that the performance of an act — including entry into

an agreement — by a company will not be invalid merely because it is beyond the power of the company's constitution.

3.1.2 Formal Requirements of Enforcement

The *Convention* has addressed some formal requirements that must be met in the foreign arbitration in order to be accepted by the competent court. These conditions can be found in Article IV:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in Article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

A. Saudi Arabia

The Saudi Grievances Board has applied the same principles and provisions for foreign arbitral awards and foreign court judgments. This is clear in the decisions of the President of the Grievances Board.²³ Additionally, the arbitration system has identified some of these formal requirements. Thus, the party who is seeking to apply the arbitral award must attach the following:

1. A duly authenticated original award or a duly certified copy.
2. Proof of the finality of the award. However, there is still some level of ambiguity in the type of document that should be presented as proof of the finality of the award. The recent Decision No 116 of 2007 (of the President of the Grievances Board) in paragraph 3(2) has tried to avoid that ambiguity by including the clause, '[u]nless it is provided that the

²³ Decision of the President of the Grievances Board No 7 15/8/1405 AH 1985 and Decision of the President of the Grievances Board No 116 of 11/7/1428 AH 2007.

award is final in the award itself.’ In fact this expression still requires the same certificate.²⁴

3. Proof that the party was given proper notice of the appointment of the arbitrator or of the arbitration proceedings. It is enough to include an implementation demand on an official certificate from the competent authorities to indicate that the proper notice was correctly given to the parties. However, if the court seeks to protect the party who was absent in a case where the award had been issued *in absentia*; first, an *in absentia* verdict is applicable within the state. Second, paragraph 4 of the President of the Grievances Board Decision No 116 of 11/7/1428 AH (2007) requires an approval for the proper notice if the judgment *in absentia*.
4. Proof that the award was announced if the judgment was *in absentia*. Despite this, the finality is enough to ensure the application of the award and, also, laws have ensured that the right of the appeal ‘under some conditions’ for anyone and for any verdict if the judgment was *in absentia*.
5. All the papers and documents submitted to apply and implement the foreign arbitral award must be translated into Arabic, which is the official language of Saudi Arabia²⁵ and it is the official language in any court within the state.

It should be noted that the Saudi law is not clear whether the ‘agreement in writing’ is necessary for the convening of the arbitral award or only to prove the existence of the arbitration.²⁶ To

²⁴ Some scholars believe that the Saudi Grievances Board deals with the foreign awards in general as a final provision in line with the legal status of arbitration at the international level. For more information, see Mohammed Al-Mqswdi, ‘*Alshrūṭ Alshkīh ū Almqdūh ltnfith ḥkm Althkīm Alajnby fy Almmllakh* [Substantive and Procedural Requirements to Implement the Provisions of Foreign Arbitral Awards in Saudi Arabia]’ (Al-Dar Alhndsih, 2000) 25. That will be examined in more depth later in this research.

²⁵ *Law of Procedure before the Saudi Grievances Board*, issued by the Resolution of Council of Ministers No 190 of 16/11/1409 AH 1989, *Umm Al-Qura Gazette* No 3266, 12/4/1409 AH 1989, art 13.

²⁶ As the *New York Convention* states. On the other hand, it should be noted that in *Shari’a* writing in the field of trade is at least recommended, if not obligatory; otherwise parties have to have witnesses where the trade requires speed in performance. Therefore, the writing requirement is not clearly addressed in

answer such question, consideration should be made of the general rules to identify the importance of a written document. Such provision is certainly subject to the *Shari'a* law in general. This will be discussed in more detail in Chapter 4.

Finally, paragraph 4 of the new decision — Decision No 116 of 1428 AH (2007) — of the President of the Grievances Board²⁷ stressed that any copies of the documents submitted must be certified by the competent authority. The competent authority here means, ‘the authority that issued the original document’; thus, this authority must certify any copy.

B. Australia

In addition to what the *Convention* states about the formal requirements, there are a few aspects that must be mentioned and clarified. Section 9 of the *IAA* is very clear about the formal requirements where it requires that the person who seeks to enforce a foreign award produce a duly authenticated original award or a duly certified copy and a duly authenticated original of the arbitration agreement or a duly certified copy. Section 9 also explains the meaning of a certified copy, where it considered the document certified if it

purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified [or if it] has been otherwise authenticated or certified to the satisfaction of the court.

Moreover, this Article has identified the quality of the required documents and also set the language in such documents, where all the documents produced must be in English or have been translated into the English language in ‘certified translations’. The translation shall be certified

the Saudi laws regarding the enforcement of foreign arbitral awards. However, it is possible to say that Saudi Arabia has joined the *New York Convention*, which makes this text in force in matters before the Saudi courts. But it can be also said that there is a possibility of proving the arbitration agreement still exists by any means of proof before the Saudi courts. For more information about documentary evidence, see Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3rd ed, 2011) 190.

²⁷ President of the Grievances Board Decision No 116 of 11/7/1428 AH 2007.

by ‘a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.’²⁸

It is clear that the formal requirements of the Australian system are fewer than what exists in Saudi regime. This favours arbitration as a method of solving disputes as the lower number of conditions means an easier mechanism. However, some conditions are needed to protect the parties’ rights or social rights (such as those sought to be protected by the *public policy* defence); hence, it is important to examine each condition to weigh its value as we shall see in Chapter 4.

Finally, the formal requirements in both countries are in accordance with the requirements of the *Convention*. It is clear that there are several differences due to the fact that Saudi judges seem to be more formalistic in regard to the legal requirements. For example, the reciprocity principle has to be proved in Saudi Arabia even in today’s world where this type of issue can be confirmed just by checking online. Although the Australian system is adversarial, judges are more familiar with commercial transactions so they are willing to interpret arbitration in a way that ensures that the original intention of parties to resort to arbitration is fulfilled. Furthermore, common law courts are more disciplined by means of the precedents set by a higher court where the lower court shall follow the higher court.

3.2 Role of International and Regional Conventions in Determining the Limits of the Arbitration

As a result of the importance of arbitration as a means to resolve disputes that arise in the area of international trade, international conventions have played a significant role in the delineation of this mechanism and in the recognition of many binding principles on the implementation of the provisions of foreign arbitral awards.

²⁸ See IAA s 9(1), (2), (3), (4).

This section will address the role of the most important international conventions that relate to this study, namely, the *New York Convention*, the rules of the *UNCITRAL Model Law* and, finally, the *Riyadh Convention*.²⁹ The selection of these agreements is due to the importance of these treaties to the two countries studied in regard to the application of the provisions of foreign arbitral awards. First, the *Convention* is the most important international agreement and has been in force for more than 50 years. Second, the *UNCITRAL Model Law* is considered to have more detailed rules, where it explains several points about the application of the arbitral award. In addition, the adoption of the *Model Law* by the Australian Parliament, where it became a part of the domestic law, made it a very important convention, central to understanding the implementation of foreign arbitral awards in Australia.

The *Riyadh Convention* is considered to be the most important treaty created by the League of Arab States, and governs the recognition and enforcement of any arbitral award between the signatory states. It is the convention that has been applied by the Saudi courts before the country became a signatory to the *Convention* and it is still valid with regard to awards issued in an Arab state that is a *Riyadh Convention* signatory, even if that country is now also a signatory to the *Convention* where the Saudi courts will firstly apply the regional agreement. Moreover, the *Convention* in Article VII states that this convention ‘shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards’.

These international agreements, as will be seen in this chapter and also later in chapters 4 and 5, have a very large impact on the role of the judge in the implementation process, where the *Convention* and the *UNCITRAL Model Law* have become a part of the Australian *International Arbitration Act 1974 (IAA)*, while the Saudi judge contemplates several international and regional agreements that affect his role in the implementing process. Therefore, this section will explore these conventions and provide a simple definition and mention the most important

²⁹ *Convention of the Arab League on Judicial Cooperation between the States of the Arab League*, opened for signature 6 April 1983 (entered into force October 1985) (*‘Riyadh Convention’*).

provisions and reservations to these conventions. It will also highlight the role of such reservations in the definition of arbitration. Additionally, mention will be made of the most important principles contained in those conventions and which show the real purpose of those conventions. It is important to note that these agreements include several rules and principles, but what will be described here are those rules and principles that are related to this research, those which serve the process of implementing foreign arbitral awards. As stated before in the research methodology, comparison and analysis will be addressed in the conclusion of the each chapter, and will include the differences between these international conventions.

3.2.1 New York Convention 1958

A. Historical Context

Before the adoption of the *New York Convention*, there was the *Geneva Protocol* of 1923. This was expanded by the *Geneva Convention* of 1927, and focused on the execution of foreign arbitral awards. This established the framework for the enforcement of international arbitral awards.

In accordance with the *Geneva Convention* local procedural rules guided the enforcement of arbitral awards. This was however only allowed among signatory countries; it was not allowed in non-signatory countries. The *Geneva Convention* did not apply to the enforcement of awards made in non-signatory countries. It, therefore; interfered with international enforcement of awards. There was also the requirement of double exequatur, in which enforcement of an award was only possible after confirmation of the award in the country of origin. This requirement slowed down the process of arbitration and ‘subjected the party to the partiality of the domestic courts of its adversary’.³⁰ Dissatisfaction with the *Geneva Convention* led to the development of the *New York Convention*. The *New York Convention* encourages resolution of international

³⁰ Kenneth R Davis, ‘Unconventional Wisdom: A New Look at Articles V and VII of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*’ (2002) 37(43) *Texas International Law Journal* 55.

disputes through arbitration. It has a set of rules for recognition and enforcement. Application of the *Convention* is only to awards made in countries other than that where recognition and enforcement is sought. It means that the provisions of the *Convention* do not apply in the country where the award was made. This provision is based on an argument that the country in which the award was made, in enforcing or refusing to enforce an award, it will apply its domestic law to annul or confirm an award.³¹

Therefore, it could be said that this convention aims to ensure that foreign arbitral awards are not discriminated against in relation to national decisions, and therefore it commits the signatories to the recognition and implementation of the provisions of foreign arbitral awards. It also aims to bind the courts of the signatory states to the full and absolute recognition of arbitration and not to allow parties to resort to courts if there is an arbitration agreement between the parties.³²

The focus of the *Convention* is on two aspects, namely the recognition of foreign arbitral awards and the enforcement that is a result of that recognition. It should be noted that meeting the formal requirements in a request for the implementation of foreign arbitral awards act as a kind of guarantee in regard to implementation.

Therefore, there are several articles with different provisions concerning the formal requirements. Such articles and provisions will be discussed in detail in Chapter 4. For example, Article II provides for recognition of written arbitration agreements by each signatory State. Article III requires the recognition of the arbitral awards as binding by signatory States, and also requires the enforcement of such awards to be in accordance with national rules of procedure. Article V of the *Convention* provides grounds for refusal to enforce or recognise an award.

³¹ Ibid.

³² It should be noted that Saudi Arabia ratified this convention on 19 April 1994 (entry into force for Saudi Arabia 18 July 1994); Australia ratified this convention on 26 March 1975 (entry into force for Australia 24 June 1975). For more information, see UNCITRAL: United Nations Commission on International Trade Law, *Status: '1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards'* (2 October 2010) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY_Convention_status.html>.

In fact, there was a great debate revolves around the drafting of Article V of this Agreement. In the 1955 draft, Article V(1)(a) did not mention, for example, which law is to be interpreted regarding the incapacity of one or all parties. According to Kronke, New Zealand commented on the draft and suggested that the draft should specify the law by which these criteria are to be interpreted, and that this should be the law of the place where the award was made.³³

The discussions also revolved around the mandatory arbitration provision where the drafters suggested the word ‘*binding*’ instead of ‘*final*’ at the stage of the adoption of the final text. The language of Article V clearly shows that it is intended to facilitate enforcement, and therefore the drafters had ‘accordingly, carefully considered the language used to manifest such intention.’³⁴ According to Alfons, there were fewer discussions about permitting a court to refuse enforcement, while there was extensive debate on the change of terminology from ‘*final*’ to ‘*binding*’, and there is no explanation as to why the final award adopted the phrase ‘**may be refused**’ under certain circumstances at the discretion of the enforcing court — with this being subject to the party against whom the award is invoked having satisfied one or more criteria (Article V(1)–(2), which include incapacity, lack of arbitral validity, lack of proper notice, contrary to public policy and so on (see further below)). This may be to confirm the discretionary power of the court and leave a wider range of discretion for the execution of the award (even if it was contrary to some of these conditions listed in Article V). Indeed Alfons believes that ‘the drafters knew what they intended when they adopted the permissive “may” in the language of Article V(1).’³⁵ This shows that Article V of the *Convention* has a permissive interpretation nature to support and facilitate the implementation process.

³³ See Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 217.

³⁴ See Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation in Case Law and Literature* (Peter Lang, 2010) 78.

³⁵ Ibid 79. For more information, see Jane Jenkins, Simon Stebbings, ‘*International Construction Arbitration Law*’ (Kluwer Law International, 2006) 304; also see Alfons, above n 34, 78.

Thus, it is provided that an award may not be enforced or recognised if there are substantial irregularities found to have occurred in the arbitration proceedings. Both parties for example, are supposed to be aware of the proceeding of arbitration and any intention to award a party. If one party is not informed about the proceedings, if a party is denied a fair hearing, and even if an arbitrator is appointed without adequate notice to one party, the courts are, as directed by the rules of the *Convention*, supposed to refuse recognition and enforcement. A court may also refuse to recognise and enforce an arbitral award if the procedures that the award employed, or the composition of the arbitral authority, violated the arbitration agreement. Incapacity of a party and invalidity of an arbitration agreement are also grounds for refusal to enforce and recognise awards. Other grounds include; when arbitrators decide on issues not submitted to them, when an award is set aside by a competent authority (that is, under the law of the country in which the award was made), if an underlying dispute is not arbitrable according to the national laws of the country, and if enforcing an award would violate the public policy of a country.³⁶

B. *The Most Important Principles in the New York Convention*

The most important principles in the *New York Convention* are:

1. It has adopted the geographical criterion to determine ‘foreign’ arbitral awards, regardless of the nationalities of the parties to the conflict. Additionally, the *Convention* has a new criterion in addition to the geographical criterion. It refers to the application of the *Convention* to an arbitral award which is not considered to be a domestic award in the state where recognition and enforcement are sought.
2. The *Convention* explicitly recognised the provisions of arbitral awards that issued by the centres of international arbitration. This is clear in Article I(2) which states: ‘The term “arbitral awards” shall include not only awards made by arbitrators appointed for each

³⁶ Davis above n 30, 56.

case but also those made by permanent arbitral bodies to which the parties have submitted.’

3. The *Convention* established the scope of application of contractual and non-contractual disputes (Article I(3)). Additionally, it gives states the right to enter reservations and limit application on contractual relationships of a commercial nature.³⁷
4. It has adopted in Article II(2) both forms of arbitration — the arbitration clause in the original contract between the parties and the subsequent arbitration agreement, which comes in the form of a special separate agreement from the original contract between the parties to the conflict.
5. The *Convention* adopted the principle of mutuality or reciprocity in the case of the issuance of an arbitral award in one of its signatory countries. This shows how it supports the application of foreign arbitral awards as far as is possible.
6. Article V states a number of defences ‘the seven defences’ for the refusal to implement the rule of foreign arbitration and these defences were to ensure the maintenance of public policy and national procedural laws. These seven defences came to induce the largest possible number of states to sign the *Convention*. The *Convention* also gives the right to any country to enter some reservations. There are five defences under section 1 and two under section 2. These ‘seven’ defences as stated in the *Convention* can be summed up as follows:

Article V(1) lists five defences or ways to refuse the enforcement of any foreign arbitral awards:

- a. When the parties were suffering some incapacity or the arbitral agreement was invalid ‘under the law applicable to them’.

³⁷ That article permits a state to reserve applicability of the convention in the commercial dealings. See Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Thomson Reuters, 2011) 294.

When the party against whom the award is invoked was not given proper notice of the arbitrator's appointment or the arbitration proceedings or is unable to present his case.³⁸ In fact, according to the case samples obtained for the purposes of this research, this defence (a party was not giving proper notice) is the most formal requirement that has been used before the Grievances Board with respect to the implementation of the provisions of foreign arbitration (as explained in the appendix 'General points regarding to the formal requirements (4)').

- b. Enforcement can be refused when the award decides matters that are not falling within the scope of the arbitration. The ability to separate the award if it contains two parts should be invoked, with the two parts being (i) first the part that cannot be submitted to arbitration, and (ii) the second arbitrable part of the award which contains decisions on matters submitted to arbitration, which part can be recognised and enforced 'if that [is] possible'.³⁹
- c. When the composition of the arbitral tribunal or the procedure used did not accord with the parties' agreement or the law of the country where the arbitration took place.
- d. When the award has not yet become binding or has been set aside or suspended by a competent authority of the country where the award was made.⁴⁰

³⁸ It should be noted that the *Convention* did not specify the law that shows the violation of these rights of defence. Thus, the text of the *Convention* was very wide, trying to cover the most important principles of pleadings and litigation. Thus, the arbitrator/s or the arbitral tribunal should apply the basic principles of litigation. For more information, see Fathi Wali, '*Althkīm fy Alnzrya ū Altaṭbīq* [The Arbitration Law in Theory and Practice]' (Manshat Alma'rf, 2007) 301.

³⁹ The partial enforcement of an arbitral award will be discussed with the role of the court in the application of public policy principle in Chapter 5 (5.4 Judicial Role in Applying Public Policy in their Decisions).

⁴⁰ It should be noted that Article V of the *Convention* did not mention finality as a condition for the implementation of the foreign arbitral award, but it stipulated that the award shall be binding, and binding necessarily means that the award has the force of *res judicata* and becomes binding on the parties. However, Article V of the *Convention* did not provide support for the knowledge of the law which determines the mandatory nature of the award, but that the judiciary in most countries settled the jurisdiction of the law of the country where the arbitral award was issued. See Yahya Al-Samaan, 'Dispute Resolution in Saudi Arabia' in Eugene Cotran (ed), *Yearbook of Islamic and Middle Eastern Law* vol 7 (2000–2001) 35, 35.

Article V(2) of the *Convention* provides two further grounds for refusing to enforce a foreign arbitral awards:

- 1) When the subject matter of the arbitration is non-arbitrable under the law of the country where the award is sought to be enforced.⁴¹
- 2) When the recognition or the enforcement of the award would be in a contrary to public policy.⁴² This is the most objective requirement and one that has been used before the Grievances Board with respect to the implementation of foreign arbitration as we shall see in Chapter 5 (5.4.1 The Saudi Grievances Board and the Application of Public Policy).

3.2.2 The UNCITRAL Model Law

The *UNCITRAL* (United Nations Commission on International Trade Law) is a supplementary body of the General Assembly which had been designed to assist States to develop their legal framework and modernise their laws on arbitral procedure. It provides suggested legislative texts which can be used by states in modernising international trade law as well as by commercial parties in negotiating business dealings.⁴³ Among other issues addressed by *UNCITRAL* legislative texts is international commercial dispute resolution through both arbitration and conciliation, whereby in the non-legislative texts for example, rules of conducts in arbitration and conciliation proceedings are comprehensively addressed.

The *Model Law* was adopted by *UNCITRAL* in June 1985 and it covers all the stages of the international commercial arbitration process right from striking arbitration agreements in the

⁴¹ Non-arbitrability is discussed in Chapter 3 (3.1.1 Scope of Arbitration).

⁴² Chapter 5 will be about the controls on the implementation of foreign arbitral awards (public policy and the limits of *Shari'a*).

⁴³ *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985), annex 1 ('*UNCITRAL Model Law 1985*'); also see UNCITRAL: United Nations Commission on International Trade Law website, above n 32.

country of origin to the all-inclusive recognition and implementation of arbitral awards which are acceptable to the states of the world regardless of their own legal or economic differences.⁴⁴

The main ‘objective of the *UNCITRAL* rules was to create a relatively predictable and stable procedural framework for international arbitration without stifling the informal and flexible character of such dispute resolution mechanisms.’⁴⁵

It should be noted that this law has provisions similar to those of the *New York Convention*. There are several points that must be mentioned in dealing with the enforcement of foreign arbitral award under the *UNCITRAL Model Law*. These can be summarised as follows:

1. This law has clarified two points at the beginning, where it says that the Article headings are for reference purpose only and not for interpretation, and more importantly, it expands the interpretation of the term ‘commercial’ where required. It provides a broad interpretation and it addresses the issue with many examples.⁴⁶
2. The geographical criterion is not an important point in this law as this law distinguishes between international and non-international awards (not ‘foreign’ and ‘domestic’ awards) and thus substitutes a ‘new demarcation line’ on substantive grounds for the previous ‘territorial borders’ which were deemed ‘inappropriate’; instead of the selection of a ‘convenient’ place of arbitration, the same principles were to apply to all international arbitration.⁴⁷

⁴⁴ Some of the procedural aspects have been discussed at the beginning of this chapter (3.1.2 Formal Requirements of Enforcement).

⁴⁵ See Born, *International Commercial Arbitration: C & M*, above n 3, 46.

⁴⁶ See *UNCITRAL Model Law* art 1.

⁴⁷ See ‘Explanatory Note by the UNCITRAL Secretariat on the *Model Law on International Commercial Arbitration*’ UN Doc A/CN.9/264 reproduced in *UNCITRAL Yearbook*, vol XVI, 1. B(8)(a) [46] (under ‘8. Recognition and Enforcement of Awards’).

3. The *Model Law* expressly reiterates Article V of the *Convention* regarding the implementation of the provisions of the arbitration.⁴⁸ Additionally, Article 34 embodies the provision regarding the ‘party under some incapacity’ in the *Convention* but with a slight modification ‘because it viewed [it] as containing an incomplete and potentially misleading conflict rule [however, it adopted the] same approach and wording as this important convention’.⁴⁹ According to Article 34(2) of the *Model Law*, ‘an arbitral award may be set aside by the court specified in Article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity.’
4. Many modifications and additions to this *Model Law* that have taken place since its inception. There have been some amendments undertaken in 2006⁵⁰ and also in 2010; these amendments were supportive of arbitration and the implementation of the provisions of the non-national arbitration.

One of the latest amendments is that of 25 June 2010, where ‘the Commission adopted the report of the Committee [of the United Nations Commission on International Trade Law] of the whole and agreed that it should form part of the present report.’⁵¹ The most important amendments were:

⁴⁸ It should be noted that Garnett and Pryles believe that ‘where both the Convention and the Model Law apply to enforcement of an award, the Convention shall prevail.’ See Richard Garnett and Michael Pryles, ‘Recognition and Enforcement of Foreign Awards under the *New York Convention* in Australia and New Zealand’ (2008) 25 (6) *Journal of International Arbitration* 899, 901.

⁴⁹ See, ‘Explanatory Note by the UNCITRAL Secretariat on the *Model Law on International Commercial Arbitration*’ UN Doc A/CN.9/264, above n 42, 1.B(8)(c).

⁵⁰ For more information about these amendments, see UNCITRAL: United Nations Commission on International Trade Law, 1985 – *UNCITRAL Model Law on International Commercial Arbitration with Amendments as Adopted in 2006* [Text] (18 September 2010) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

⁵¹ For more information, see *United Nations Commission on International Trade Law, Report of the United Nations Commission on International Trade Law: Forty-third Session (21 June – 9 July 2010)*, UN GAOR43rd sess, Supp No 17 UN Doc A/65 /17, 30.

- i. The 1976 *Rules of UNCITRAL* was revised in 2006 in order to improve its performance and suitability for use in national laws and with the updated provisions of the *UNCITRAL Model Law*.
- ii. Articles 2 and 4 clarify the procedure for commencing arbitration (especially by email) and expressly provide that a respondent must file an initial notice of response.
- iii. Article 28(4) authorises the use of technology, such as videoconferencing, for examining witnesses.⁵²

These most important modifications on the *UNCITRAL Model Law* are that related to the implementation of foreign arbitral award. It should be noted that this *Model Law* has been adopted by the Australian Parliament as Schedule 2 *UNCITRAL Model Law* to the *IAA 1974*. On the other hand, Saudi Arabia has not adopted the *Model Law*. Thus, it remains in force in Australia but not in the Kingdom of Saudi Arabia.

3.2.3 Riyadh Convention on Judicial Cooperation

The *Convention of the Arab League on Judicial Cooperation between the States of the Arab League* ('*Riyadh Convention*') was drawn up in April 1983⁵³ to replace the three conventions that had been agreed upon in 1952 under the scope of the Arab League: namely the *Convention on Judicial Notifications and Procurations*, the *Convention on the Enforcement of Judgements and Arbitral Awards*, and the *Arab Convention on Extradition*.

⁵² It should be noted that arbitration through internet or any electronic means lacks the physical presence of the parties and others before the arbitrator/s, which may be viewed as a lack of fulfilment of some of the formal conditions that are to be met under the *New York Convention*. So it is better for national laws to adopt special provisions in their arbitration laws to enforce any electronic arbitral award and to go beyond any formal requirements. For more information, see Bin Zaid, above n 6.

⁵³ *Convention of the Arab League on Judicial Cooperation between the States of the Arab League*, opened for signature 6 April 1983 (entered into force October 1985) ('*Riyadh Convention*').

It should be noted that all Arab League member states signed the *Convention of the League of Arab States on the Enforcement of Judgments and Arbitral Awards*, which entered into force 10 November 1952 (*'Arab Convention 1952'*), but Egypt (a founding member) and the Comoros (which joined the Arab League in 1993) have not yet signed the *Riyadh Convention*; thus, the older conventions are still valid and applicable for the arbitral provisions that are issued in these states.⁵⁴

The most important provisions related to the implementation of foreign arbitral awards in Arab League signatories under the *Riyadh Convention* (which adopts the geographical standard to determine a foreign arbitral award) state in Article 25 that in the application of this section, the term 'provision' means every decision — whatever the name — issued according to a judicial proceedings in or with a mandate from the courts or any competent body of one of the contracting parties (that is, other Arab League signatories).

Additionally, Article 25(b) and Article 31(a) mention that the finality is determined according to the law of the State where the arbitral award has been issued.

Importantly, there is an identical provision in both this and the previous convention, namely 'the execution of the provisions' in regard to arbitration matters to which these provisions apply, that is the arbitrability of the judgment or award. Article 25(b), states:

Subject to the provisions of Article 30 of this convention, each of the contracting parties has to recognise the verdicts of the courts of any another contracting party in civil cases, including the judgments relating to civil rights made by the penal courts, and in trade issues, administrative issues and issues of personal status that has the force of *res judicata* [also] and it shall implement this award [judgment] in its territory in accordance with the procedures concerning the implementation of the provisions stipulated in this section ...⁵⁵

⁵⁴ See the *Riyadh Convention* art 17. I think that the most important reasons for the existence of such regional agreements together with the *New York Convention* is the geographical convergence between the regional countries, the unity of language, and also the unity of religion, which is the legal basis for these countries.

⁵⁵ See the *Riyadh Convention* art 25(b).

However, this convention excludes some matters from arbitration, such as the verdicts against the government of a contracting party (signatory nation) or against one of its employees on the work carried out in the course of their employment. In addition, it excludes verdicts that conflict with the conditions of international treaties and agreements, verdicts that concern temporary and precautionary measures and judgments in cases of bankruptcy, taxes and fees.

On the other hand, this convention gives the right to refuse the implementation in the event of such action violating public policy. This includes if the award is contrary to the provisions of *Shari'a* (for example, in regard to a contract involving alcohol) or the provisions of the country's Constitution or public policy or fundamental conception of morality in the contracting party where the award intended to be recognised and enforced (that is, the subject matter is not arbitrable under the law in that country). Implementation can also be refused if the award was issued in absentia and the other party was not properly notified so that he/she can defend himself. Moreover, if the award does not take into account the rules of the law of the contracting party for legal representation for persons who are incompetent or have a legal incapacity, implementation can also be refused. This is also the case if the dispute has been solved by a judicial ruling in the matter between the litigants themselves and has the *res judicata* in the contracting party where the award is intended to be implemented or in another contracting party or if the dispute is in a case before a court in that country between the litigants themselves in respect to the same right and cause.

Finally, the competent court, which considers the application for enforcement in accordance with the text of this Article, can take into account the legal rules of its country. It should be noted that the text of Article 32 made it explicitly permissible to request the implementation of the arbitral award in whole or in part, if a request to execute the award is capable of being divisible.

It clear that there is a significant difference between the *New York Convention*, the *UNCITRAL Model Law* and the *Riyadh Convention*. The *UNCITRAL Model Law* has the same provisions as

those of the *Convention*. In addition to the *Convention* provisions, the *UNCITRAL Model Law* allows commencement of arbitration through email, where a respondent has to file an initial notice of response, and also authorises the use of technology in its process (specifically videoconferencing) for examining witnesses. These additional provisions are not provided in the *Riyadh Convention*.

The *Riyadh Convention* has clearly described the issues or matters that are to be excluded from arbitration, unlike the *UNCITRAL Model Law*. This specification is also lacking in the *New York Convention*. The *Convention* has only stated that enforcement can be refused when the award decides matters that do not fall within the scope of the arbitration. The *Riyadh Convention* has however specified matters (as explained above) that have been excluded from arbitration.

3.3 Conclusion

In Saudi Arabia, subject matters against *Shari'a* law make arbitration unable to be implemented and may appear to be an element that discourages recourse to arbitration; however, it represents the public policy principle. Nevertheless, the requirement that the competent court has to authorise resort to arbitration is time consuming. Matters that do not fall within the scope of arbitration are not defined or limited in the *IAA* which may affect the efficiency of arbitration. However, the objective of this procedure is the prohibition of certain matters from arbitration to provide protection in some special cases, as has been explained with regard to the eligibility of companies. Hence, it could be said that clear definition of matters excluded from arbitration discourages resort to arbitration in regard to such matters, but also provides important information to those wishing to resort to arbitration.

Regarding the conventions the Saudi judge is confronted by several international and regional agreements that affect his role in the implementing process; thus, in some cases, as we shall see in chapters 4 and 5, the Saudi judge has fallen into an error in the application of the proper convention. This affects the *efficiency* of the role of the court in terms of the error in the

application of the proper legal text which may be considered as rendering an injustice to one of the parties. This in turn affects the justice to the parties in the individual cases. On the other hand, the adoption of the *Convention* in addition to the adoption of *UNCITRAL Model Law* under the *IAA* is a very important step in achieving effectiveness of the role of the judge who will find the text directly without any indecision or lack of clarity, which will lead to the court achieving a high measure of justice in terms of the application of the appropriate legal text. In fact, the *UNCITRAL Model Law* has additional provisions that encourage arbitration: for example adoption of the use of new technology. This may mean that Australian laws are more effective in terms of the availability of texts which cover all probable forms of arbitration.

On the one hand, part of Saudi legislation in regard to the subject matter in the implementation of arbitral awards may be accounted as discouraging the resort to arbitration. On the other hand, Saudi Arabia is a signatory country to the *New York Convention*, yet arbitral awards that are in breach of *Shari'a* and are within the framework of international trade contracts are not applied. The kind of decisions made and the law here affect implementation of foreign arbitral awards as a public policy matter which was adopted in all international conventions as a reason for refusal. Thus, the law does not allow implementation of foreign awards against *Shari'a* law.

In terms of *efficiency*, it means that arbitral proceedings are more highly favoured than judicial proceedings since parties in disagreement can more rapidly obtain a ruling. However, if a court, which is competent, is unable to enforce the final arbitration in a timely and reasonable manner, then the efficiency of the convenience of arbitration is said to have been weakened or frustrated. Therefore, one of the key issues under discussion in international arbitration circles is the efficient enforcement and implementation of foreign arbitral awards. In fact, in every judicial or arbitral proceeding, justice and efficiency are very important. This is due to the fact that inefficient justice, that is, justice which cannot be applied or could scarcely be applied or even delayed justice, is not genuine justice. Thus, judicial efficiency reflects the desire to achieve justice and also respect law.

As a result, there is a clear need for care to be taken in drafting national legislation for the arbitration system. However, it can be seen that the Saudi lawmaker did not identify specifically the matters that may be arbitrable; thus, this identification is left to the competent court. It is the same in Australia where the Australian Parliament in the *IAA* has left the identification of the matters that can be arbitrable to the competent courts. That is also stated by most of the conventions to ensure the highest possible number of signatory states and, most importantly, is due to the fact that some topics are related to the public policy of the state, and so it has been left to the relevant judge to apply. Additionally, there is the pivotal role of domestic legislation in determining the general framework for arbitration in terms of non-arbitrability. For example, arbitration may not be resorted to in regard to some issues in particular, such as government contracts in Saudi Arabia (with the possibility of that as explained earlier) and also in regard to issues that are contrary to public policy. Yet, determining the matters that can be solved by arbitration remains imprecise and too loose. It was noticed that the Australian Parliament has adopted the limits of the public policy in the *Convention* for the arbitrability without any reservations in order to support the implementation of arbitration to the fullest extent; conversely, Saudi Arabia did not. However, it is important to examine that adoption and find out whether it makes public policy clear. This will be discussed in more details later in Chapter 5. Moreover, the legislation of both countries specified formalities and documents required to be submitted in request for the implementation of a foreign arbitral award.

On the other hand, those drafting international agreements have been keen to cover all relevant issues associated with the implementation of foreign arbitral awards and to keep a very large area for national jurisdiction in order to be able to apply the rules of respect for state policies and the principles of justice. It has also been noted that the *UNCITRAL Model Law* is the international format for the convening of an international arbitration. It would have been better for the Kingdom of Saudi Arabia to adopt the *Model Law* for several reasons. The most important reasons are: this instrument is involved in developing the legal framework for global trade through the preparation of legislative and non-legislative texts for use by states in

modernising international trade law; the rules for conducting arbitration and conciliation are addressed comprehensively in this treaty; it expands the interpretation of the term ‘commercial’ which may support the enforcement of foreign arbitration be inclusive of all kind of trade conflicts; it adopts international and non-international awards and that can widen the circle of provisions that can be implemented within the country; and it provides the same seven defences that appear in Article V in the *Convention*. Additionally, this law was amended twice (in 2006 and 2010) which further improved its performance as explained above.

These conventions have approved some restrictions on the implementation of the provisions of foreign arbitral awards, and contain some defences to enable the provisions of foreign arbitration to be set aside or refused implementation. Some of these are specific and clear, such as the defences related to the judicial procedures; and others are loose and broadly defined so as to include many areas, such as public policy, in order to give more space in the relevant convention for the elimination of the possibility of implementing the rule of foreign arbitration. It should be noted that the *Riyadh Convention* has strongly supported the implementation of the provisions of foreign arbitration, where it requires treating the foreign party (who seeks to implement the award) as a citizen requesting the enforcement of the award in the event of filing a lawsuit without the imposition of additional fees, which is taken as a significant benefit of this convention and a support for the implementation of the provisions of arbitration.

Finally, it can be said that the Australian legislation is more effective in these matters by its adoption of the *New York Convention* and the *UNCITRAL Model Law*, because both of them are expanding the provisions that fall within the scope of foreign arbitration and also both of the them have adopted different broad standards in determining the foreign arbitral award, this helps to cover as many as possible of the foreign arbitration provisions, especially there are also few reservations to these conventions. Additionally, clarity in Australian law, as explained, in terms of adopting a unified law (the *IAA*) is seen to better support the implementation of foreign arbitration. In Saudi Arabia the judge deals with the decisions of the President of the Grievances

Board and a number of agreements for the implementation of foreign arbitral award. This can be seen as an implementation obstacle. However, law texts in both countries are not explicit nor do they address the specific matters that cannot be submitted to arbitration; rather, it is left to the court to determine these issues. However, both laws have almost the same formal requirements in regard to what must be submitted to the court in the event of application for enforcement.

4 CONDITIONS OF IMPLEMENTATION AND THE JUDICIAL ROLE IN THE IMPLEMENTATION OF FOREIGN ARBITRAL AWARDS

This is a continuation of an examination of the requirements of arbitration that will help in the analysis of the differences between the two countries to find out any factors that affect arbitration. These requirements and the role of the judge will be analysed based on the chosen criterion to arrive at findings on these factors of arbitration and help contribute to answering the question of which country's arbitration system and judges discourage or encourage arbitration. This chapter will explore the judicial role in implementing the formal and substantive requirements contained in international conventions and domestic laws. Such requirements must be met before the competent courts. These include the type of paperwork required to file a claim before the competent courts, proof of reciprocity and other formalities. Such an analysis will demonstrate the real role of the judge in dealing with the provisions of foreign arbitral awards and the manner of implementation of national and international rules relating to foreign arbitration.

Basically, the court decision for the implementation of foreign awards is just to give executive force to that award.¹ Thus, the *res judicata* and the award should be recognised by the judiciary when the necessary conditions are met. On the other hand, there are some scholars who link the *res judicata* with the executory force, which will be given by the competent court. Accordingly, the arbitral award will not be enforced without an order from the competent court.² This is counterfactual because the execution order is only to give executive power, but arbitration

¹ However, the difference in the cultural systems may affect the real job of the judge. For more information, see Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th ed, 2004) 295.

² See Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 4(12) *Santa Clara Journal of International Law* 169, 185. It should be noted that differences between the countries in terms of legislation regarding the role of the judiciary have produced different types of control by the competent court where some countries' legislation made the external control of the Court 'without the presence of the parties' possible while there are other countries that made it substantive control 'with presence of the parties'. For more information, see Fathi Amer Batayneh, '*Dwr Alqaḍī fī Althkīm Altjarī Aldawfī: Drash Muqarnh* [The Judge's Role in International Commercial Arbitration: A Comparative Study]' (Dar Althaqafah, 2008) 226.

should have such power since it is issued validly and in accordance with the law of the country in which it was issued.³

In fact, there are several countries that have decided on direct implementation for the arbitral award when it was issued validly according to the law, such as in Egypt and Jordan, so there is no need to have a court ruling to implement such award.⁴ However, some countries like Saudi Arabia have decided on a different provision in terms of linking the execution order with the judicial decision of implementation, and that was addressed in Article 20 in the *Saudi Arbitration System 1983*:

The judgment of the arbiters [arbitrators] shall be enforceable when it becomes final by the order of the authority originally responsible for considering the dispute [the court originally competent to consider such dispute] and this order shall be made on the request of any of the parties concerned after ascertaining that there is nothing that prevents its enforcement from the *Shari'a* point of view.

This could be accounted a waste of time and effort on the part of the parties and the arbitral tribunal; also, it ignores the will of the parties to go to arbitration instead of the competent court to resolve the conflict. It is, therefore, important that the arbitral award has full recognition since it was issued validly, and this view is supported by what is stipulated in national laws and international conventions, where the function of the judge is restricted to the verification of the formalities of the award.⁵ Therefore, this chapter will analyse the decisions/rulings of the

³ For more information on these views, see Nabil Zaid Al-Makabla, '*Tatbiq Ahkam Althkīm Alajnaḃīh* [Implement the Provisions of Foreign Arbitral Awards]' (Dar Al-Nahdha, 2006) 50.

⁴ See Article 52 of the *Arbitration Act No 31 / 2001* (Jordan); see also Article 55 of the *Arbitration Law No 27 of 1994* (Egypt). It should be noted that this is what had been adopted in the *UNCITRAL Model Law* in the 1980s.

⁵ The court's powers are much the same in all countries; however, there are some differences depending on the terms of the governing statutes and the decisions of these courts. For more information about the court's actions in such cases, see Markham Ball, 'The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration' (Paper presented at the International Conference on the Active Role of National Jurisdiction in the Arbitration, Sharm El-Sheikh, Egypt, 19–21 November 2007) 1.

Grievances Board and decisions of the Australian Federal Court and also the Supreme Court of NSW with respect to these conditions.⁶

Additionally, it will explore the legal nature of the role of the judge in enforcing jurisdiction issues in order to implement foreign arbitral awards, highlighting his power and role in the consideration of such cases. In addition, it will address the possibility of appeal against the national judge's decisions/rulings and the limits of such an appeal under the general legal rules (legal principles), conventions and domestic laws.

Such analysis will indicate the judge's role and the real application of these conditions. This in turn will make the measurement of the effectiveness of the judge's role in the implementation phase easier and more credible. Moreover, such an analysis which highlights the role of the judge will contribute effectively to the knowledge of the importance of such conditions and method of application, which in turn will contribute to the clarification of the implementation process in both countries.

4.1 Role of the Judge in Implementing the Formal Requirements

At the outset, it is noted that the international conventions have developed some formal requirements that must be met in the request to implement foreign arbitral awards. Moreover, several domestic laws have adopted this approach by stating clearly such terms, and the laws of Saudi Arabia and Australia have these terms. This section will try to show if the formal requirements are mandatory, how they are applied by the courts and whether there are exceptions to their application.

Also, there are some conditions or requirements that were general and not clearly defined, such as the requirement for reciprocity, which require the study and analysis of judicial decisions to

⁶ It should be again mentioned that the Supreme Court decisions of other Australian States will be used if needed to clarify the implementation of such conditions in Australia. Additionally, the Saudi Grievances Board is dealing with the foreign judgments and foreign arbitral awards in the same manner as explained earlier.

determine the meaning of ‘reciprocity’ from the viewpoint of the judiciary and in order to know the limits of this term, and also to recognise the need to demonstrate the existence of any documents required to prove its (reciprocity’s) existence. The inclusion of these requirements for implementation in the national law is one of the rules of private international law.

This section will address the implementation of the formal requirements by the national judge in Saudi Arabia and Australia.

4.1.1 Formal and Substantive Requirements in Saudi Arabia

The formal requirements that have been applied by the Grievances Board can be divided into two parts: first, the conditions in international conventions and national laws; and secondly, the conditions stated in the Decision of the President of the Grievances Board No 116 of 1428 AH (2007). This decision was expressly based on the Royal Decree No 8071/M of 11/11/1427 AH (2007) which has been issued by the Saudi Council of Ministers. This Royal Decree is considered as a delegation from the Saudi Council of Ministers (the Saudi Lawmaker) to the President of the Grievances Board to make the necessary legislation in this matter.

A. *Terms and Conditions in National Laws and International Conventions*

According to the *Saudi Arbitration System 1983*, the decisions of the President of the Grievances Board and the *Arab Convention*, the *Gulf Cooperation Council (GCC) Convention for the Execution of Judgments, Delegations and Judicial Notifications* and international conventions, the party who requested the implementation of a foreign award must provide the following:

1. A duly authenticated original award or a duly certified copy.
2. An official document to prove that the award is final.
3. An official document to prove that the award has been notified to all parties.

4. A certificate indicating that all parties have been properly notified to appear before the arbitrators and whether the decision had been issued *in absentia*.
5. All the documents submitted to apply and implement the foreign arbitral award must be translated to the Arabic language.
6. All documents shall be signed and certified by the Ministry of Foreign Affairs of the State where the arbitral award was issued as well as by the Saudi Foreign Ministry.

At the outset it should be noted that there are several important points affecting the application of the formal requirements before the Grievances Board. These are:

1. The relationship between the first instance Sub-Circuits and Audit-Circuits under the old law in the Saudi Grievances Board. This is quite complicated: the Audit-Circuit discretionary power in reviewing the Sub-Circuit's rulings is not mandatory on the Sub-Circuits, unless the ruling of the Sub-Circuits was overturned based on procedural grounds (such as jurisdiction, acceptance or nonsuit or other action relating to the examination proceedings and adjudication of or related to the fulfilment aspects of the dispute 'proof or denial of the provision'); thus, the Audit-Circuit's verdicts are final and binding on Sub-Circuits regarding these grounds.⁷

But if the rulings of the Audit-Circuit are based on an Islamic jurisprudence opinion (*'fiqh'*) or objective reason/s, then the Sub-Circuit has the choice of adopting the opinion of the Audit-Circuits or insisting on its previous ruling. In the latter case, if an Audit-Circuit is not convinced by the point of view of the Sub-Circuit, it will directly consider the case. In this case, the Audit-Circuit will be changed from the 'Court of Law' (appeal or review) to a normal court. This means that in the Saudi judicial system the role of the Audit-Circuit is basically limited in the examination of the Sub-Circuit's ruling to make

⁷ See Chapter 2 Figure 2: The Structure of the Old Grievances Board; and Figure 4: The Structure of the New Grievances Board '2007 System'.

sure that this court has not infringed the laws and regulations in force in the country in deciding the case without the presence of the parties. But if an Audit-Circuit is not convinced by the point of view of the Sub-Circuit, the Audit-Circuit will be altered to function as a normal court, which means that this court will consider the case with the presence of all parties in a normal trial.

This is demonstrated by *Ruling No 479 / T / 1 of 1411 AH 1991*.⁸ Therefore, all submissions relating to the formal requirements are binding on the Sub-Circuits.⁹

This is not the case in Australia where in a common law jurisdiction a high court ‘creates law’ by deciding cases and establishing precedents that must be followed by lower courts of the same hierarchy. Consequently, it is clear that the Saudi legal system is based on *Shari’a* principles that are mostly in agreement with what is taught at the *Hanbali* School and Australian law is adapted from the British Common Law. In fact (as stated before), in Australia — as a common law jurisdiction — courts must follow the precedents set by superior courts in their hierarchy; and, as we shall see later in this chapter, it is rare that

⁸ However, it should be noted that the judges of the Sub-Circuits for the most part decide what is to be approved by the Audit-Circuits as these are rulings from judges with great experience, and that is what appeared to occur from many of the decisions that were analysed in relation to this research. In fact, this principle or rule is determined by Article 36 of the *Law of Procedure before the Saudi Grievances Board*, issued by Resolution of Council of Ministers No 190 of 16/11/1409 AH 1989, *Umm Al-Qura Gazette* No 3266, 12/4/1409 AH 1989 where it states that

the acceptance of application for appeal [entails] that the competent Audit-Circuit has to support the sentence or set it aside, and if it cancelled the case shall be returned to the Sub-Circuit which rendered it or the Audit-Circuit has to consider the case; if it [is] returned to the Sub-Circuit and the latter insisted on its provision, the verdict shall be returned to the Audit-Circuit to consider the case if it is not satisfied with the Sub-Circuit provision. In all cases [where] the Audit-Circuit reviews the case, the verdict shall be given after hearing the statements of all parties.

This law was issued by the Resolution of Council of Ministers No 190 of 16/11/1409 AH 1989, *Umm Al-Qura Gazette* No 3266, 12/4/1409 AH 1989; and from the practical side that supports this application, which is addressed by the Audit-Circuit in *Ruling No 479 / F / 1 of 1423 AH 2003* and the issuance of *Ruling No 102 / T / 4 of 1424 AH 2004* after a lack of conviction by virtue of the Sub-Circuit with the insistence of the Sub-Circuit on its opinion.

⁹ Therefore, in accordance with the Decision of the President of the Grievances Board No 9 of 13/3/1411 AH 1991, if the provision of the Sub-Circuit is cancelled by the Audit-Circuit to take a particular action in the procedures related to the case, the Sub-Circuit is obliged to take that action and it cannot insist on its own decision. Also, it is obliged to clarify the reasons for that decision and it is obliged to carry out the actions that have been set out in the ruling of the Audit-Circuit.

decisions are overturned by the appellate courts, which tends to indicate a degree of accuracy and reliability in the initial ruling which could tend towards greater efficiency.

2. The role of judicial jurisdiction. Based on what has been established by the Grievances Board provisions and on what is stated in the Decision of the President of the Grievances Board No 2 of 1410 AH 1990, where it stated in Article III that ‘in the case of multiple formal defences the Sub-Circuits shall consider the judicial jurisdiction defence before any other defences’, the ‘lack of jurisdiction’ defence has precedence over other defences before the courts. This is evident in *Ruling No 49 / T / 3 of 1418 AH 1998*, where the Audit-Circuit advised the judge of the Sub-Circuit to ignore all pleas and begin with the judicial jurisdiction defence (that is, the lack of jurisdiction) as an essential defence; then the judge could consider any other defences if it was proved to him that the court had legal jurisdiction in the case. This is logical to make sure the court has jurisdiction in this case according to the law.¹⁰
3. Adherence to proper procedural processes. Administrative courts can overturn a ruling if it violates the procedure of consideration of the case because this is what *Ruling No 273 / T / 1 of 1411 AH 1991* states: ‘[I]f the ruling violates the procedures [then it has an error and] must be annulled.’¹¹ This shows that the award must fulfil all the formal requirements that have been mentioned earlier for the case to be considered. This provision was also confirmed in another case (*Ruling No 63 / T / 4 of 1416 AH 1996*) where the basis of the plea and the starting of any case before the Court is the initial provision to the Court of clear and unambiguous memorandum, where the plaintiffs must submit a detailed complaint that show their requests. Thus, we shall say the court requires a written document to start to consider the case, and the aim of this written document is to outline the plaintiff’s requests, with such requests in the memorandum to be clear and

¹⁰ The lack of jurisdiction was addressed as a defence related to public policy in Chapter 5 (5.4.1 The Saudi Grievances Board and the Application of Public Policy).

¹¹ For more information, see Bakr Abdullatif Alhabob, ‘*Nzryt Albutlan fy Nzam Almorafat* [The Theory of Nullification in the System of Legal Proceedings]’ (1426 AH / 2006) 28 *Majalat Al’dl* 164, 167.

unambiguous. Therefore, if a plaintiff provides an ambiguous document, the court will not accept it. However, if the requests are generally clear and specific but some need to be explained or edited (and even if some points are vague), the court can ask the plaintiff to clarify these points or use an experienced person, such as a legal accountant, to clarify some specific matters.¹² This requirement and other formal requirements are discussed widely in the Appendix to this research.¹³

B. *Terms and Conditions in the Decision of the President of the Saudi Grievances Board No 116 of 1428 AH (2007)*

This decision contains all of the conditions that have been mentioned in national laws and international agreements; moreover, it contains some new conditions and these are:

1. The award must not violate *Shari'a*.¹⁴
2. The award shall be final and enforceable. Also, the dispute can be resolved by arbitration, according to national laws 'arbitrability'.
3. The award shall be issued in a State associated with Saudi Arabia in a convention, whether bilateral, regional or international. Or the application is based on reciprocity.
4. The award shall not be inconsistent with any ruling issued by a national court or inconsistent with a case pending before a national court.

¹² For more information about this principle, see the Saudi Grievances Board, *Commercial Audit-Circuit in the Grievances Board: Guideline Principles and Case Law, from 1407 AH (1987) to 1419 AH (1999)* 84. It should be noted that this document, although written by the Saudi Grievances Board, is not an 'official' publication, but is in the hands of the vast majority of legal practitioners and is widely available on the internet as a doc file on a number of websites. Its original title in Arabic is: [هيئة التدقيق التجاري بديوان المظالم: المبادئ والسوابق القضائية من عام 1407هـ إلى عام 1419هـ].

¹³ See the **Appendix** for more information about the general points regarding to the formal requirements.

¹⁴ This relates to the public policy defence as a substantive defence, which will be discussed in the next chapter (Chapter 5 particularly 5.4.1 The Saudi Grievances Board and the Application of Public Policy).

5. The award shall not be issued against the Saudi government (contested, see further below).
6. The dispute has not been resolved by conciliation before submitting to arbitration.
7. The award shall take into account the rules of the law of the contracting party for legal representation for persons incompetent or incapacitated.
8. The award should not be incompatible with agreements or treaties to which the Kingdom is a party.
9. The arbitral award should be issued pursuant to an arbitration clause in the original contract or according to a valid agreement.
10. Arbitrators should be competent in accordance with the contract or the arbitration clause, or in accordance with the system in which it was made.
11. Court's power should not exceed the merits of the case.¹⁵

These conditions affect the merits of the case or the parties; if one fails, it means refusing to implement the foreign arbitration. This shows the importance of these conditions; thus, they shall be discussed in detail separately.

1. *The Award should not be in Violation of Shari'a*

This is an objective requirement relating to the public policy exception which will be the focus of the discussion in the next chapter.

¹⁵ This requirement will be discussed in detail in the next section of this chapter because of its importance; it relates to the judge's work in the implementation of the rule of foreign arbitration (subsection 4.2).

2. *The Award Shall Be Final, Enforceable and Able To Be Resolved by Arbitration – ‘Arbitrability’*

This condition, in fact, includes three conditions that must be taken into account. First: the court requires that the award be final and also have *res judicata*, according to the provision of Article III(2) of the Decision of the President the Grievances Board No 116 of 1428 AH (2007); secondly, the award should be capable of being performed in the Saudi Arabia; and thirdly, the subject matter of the dispute must be capable of being resolved through arbitration.

First condition — Finality and *res judicata*: In fact, in regard finality and *res judicata*, there are some rulings that dealt with this requirement, such as two notable decisions: *Ruling No 152 / T / 4 of 1426 AH 2006* and *Ruling No 36 / T / 4 of 1425 AH 2005*. The former dealt with implementing a foreign judgment issued by the Court of First Instance in Kuwait, and states that ‘the rule to be implemented, became final and enforceable’, where the court has checked the finality of that award and agreed that it is enforceable within Saudi Arabia. This finality of a ruling must be in accordance with state law where the arbitral award was made. This means that the award shall be final, according to the law where the arbitral award was issued.

The latter decision is *Ruling No 36 / T / 4 of 1425 AH 2005*. This states that ‘the arbitral award had fulfilled the conditions for its implementation set forth in Article V of the *Arab Convention* ..., and the executive form [which is some phrases within the decision that prove the possibility of enforcement] has been appended to that award ...’.¹⁶ This means that the foreign arbitral award to be implemented within Saudi Arabia must be final and have such form, which proves the executory force of that award, otherwise it will be refused. Moreover, based on the *Ruling No 115 / D / E / 15 of 1429 AH 2009* (see further below), which considered that all the formal conditions that have been addressed in the Decision of the President of the Grievances Board No 116 of 2007 (as well as the subject matter of the arbitration) are related to the public policy

¹⁶ This ruling has used the *Arab Convention 1952* because the foreign provision was issued by the Giza Court in Egypt which is a member state to that convention.

defence. Thus, the judge can reject the execution of the award, even if the other party did not request that refusal on the basis of a public policy defence.¹⁷

Moreover, one of the applications of this principle of ‘finality’ was the Fourth Audit-Circuit’s *Ruling No 119 / T / 4 of 1426 AH 2006*. This case involved the application of the South Cairo Court’s judgment, which was supported by the Court of Appeal in the Arab Republic of Egypt. The facts of this case were the claims by an Egyptian woman that she was the widow of the deceased (her Saudi ex-husband) and he the father of her child for whom she requested disbursement of his entitlement from the father’s estate by the Administrative Department in the Emirate of Medina. This included funds for real estate that had been confiscated by the Emirate of Medina for the development of that city’s centre. The case was considered by the Twenty-First Sub-Circuit and the defendant sought the refusal of that provision based on the fact that this provision was not final and was still pending before the Egyptian Court of Cassation. Nevertheless, the Sub-Circuit supported the application of this provision. However, the Audit-Circuit had refused implementation for several reasons, including the fact that the foreign provision was not yet final, because it was still before the Egyptian Court of Cassation and the provision that was presented was from the appeal court. Thus the provision was not yet final.¹⁸

Second condition — Being capable of being performed in Saudi Arabia: From an exploration of the Grievances Board’s provisions, it is noted that the term ‘validity of the ruling for implementation in the Kingdom’ was not frequently contained in the court’s rulings, except where an award is contrary to *Shari’a*, or where there is a no obstacle to implementation. For

¹⁷ In regard to the defence of public policy, the judge is obliged to apply such defences on his own without any need for a special request from any party to do so. This ruling (*No 115 / D / E / 15 of 1429 AH 2009*), which represents a very important judgment in the implementation of foreign arbitral awards, will be discussed in more detail above in the next few lines and also in Chapter 5 (5.4.1 The Saudi Grievances Board and the Application of Public Policy).

¹⁸ As at 1426 AH 2006 (the matter has not been brought after that before the Saudi courts: as at 31 December 2013). It should be noted that the Court of Cassation is at the apex of the judicial system in Egypt where it has the authority to consider all of the sentences passed by the courts of appeal. This court is considered the highest general court (that is, the third level of litigation in Egypt over the Courts of Appeal which are in turn above the Courts of First Instance); only the Supreme Constitutional Court of Egypt is higher.

example, *Ruling No 166 / T / 4 of 1428 AH 2008*¹⁹ states that ‘this provision has met the necessary conditions for its implementation in the territory of the Kingdom...’. The statement is an example of how the court frequently uses very general words in rulings both to accept implementation (as here) or to deny or refuse implementation. Again, the court may reject it for specific procedural reasons without the need to mention the lack of suitability for implementation in the territory of Saudi Arabia (such as where an award is contrary to *Shari’a*, Saudi law principles and peremptory norms). Logically, rejection of an award means certainly that an award is not valid and is incapable of being performed within the country. Therefore, it could be said that this general condition is related to the public policy defence (as a substantive condition) more than any formal requirements where these concern the following of the appropriate (suitable) application procedure and furnishing the appropriate documentation. Thus, rejection of the arbitral award is a result of the application of the conditions that prevent the implementation where the general condition cannot be a reliable independent ground for the rejection of implementing any foreign provision.

Third condition — Arbitrability: The subject matter of the dispute must be capable of being resolved through arbitration (*arbitrability*). Through a perusal of the available decisions and the *Collection of Judicial Principles* which was published by the Grievances Board in 2008, there appear to be no rulings based on this defence (*arbitrability*) in circumstances where the award cannot be settled by arbitration.²⁰ Therefore, and to avoid repetition, the theoretical aspect of such a condition will be discussed in more detail in the next chapter as a matter of public policy defence more than a formal requirement.

¹⁹ This case was earlier explained earlier: *Ruling No 166 / T / 4 of 1428 AH 2008*.

²⁰ *Set of Principles Issued by the Administrative Audit-Circuits in the Saudi Grievances Board for the Year 1427 AH 2008*; and also the unpublished *Commercial Audit-Circuit in the Grievances Board: Guideline Principles and Case Law, from 1407 AH (1987) to 1419 AH (1999)*. It should be noted that the new *Grievances Board System 2007* requires the Board to compile and publish annually the decisions handed down by the Grievances Board.

3. *Reciprocity*

A 'Convention state' here means that this State is linked with Saudi Arabia in a special convention in regard to the implementation of foreign arbitral awards (that is, the *New York Convention*). Otherwise, the application is based on the principle of reciprocity. This condition was mentioned in all the international conventions and the national laws in Saudi Arabia. It is obvious that the Grievances Board has proceeded with this approach, as it requires the existence of an international convention or the existence of reciprocity in order to implement any foreign arbitral award. It is also obvious that the court will verify the existence of any agreement that would affect the application of any foreign award. But the question that was posed in the previous chapter concerns the burden of proof for the reciprocity. Moreover, the documents that may be required to prove the existence of reciprocity between the foreign country and the Kingdom of Saudi Arabia should be detailed.

It should be noted that most of the provisions examined in this study did not address this requirement as a condition separate from the rest of the formal conditions. It always came within the formal requirements in general. A single decision details this requirement, *Ruling No 208 / T / 2 of 1418 AH 1998*. This decision related to the implementation of the rule of foreign arbitration between two companies (the plaintiff from Denmark against a Saudi company). In this case, the plaintiff was obliged to supply and install machinery and operate a plant in Dammam, Saudi Arabia. The contract included an arbitration clause to apply in the event of any future dispute between the parties, in accordance with the rules of International Chamber of Commerce. The plaintiff supplied these machines, but the defendant did not cover the full amount on the basis of a difference in the types of these machines. That prompted the Danish party to resort to arbitration in accordance with the arbitration clause in the agreement between the parties and the suit was filed before the Court of Arbitration of the International Chamber of Commerce, which appointed a sole arbitrator with the approval of the parties.

It should be noted that the arbitrator was in Amman in the Hashemite Kingdom of Jordan and he issued a ruling dated 7 July 1987 requiring the Saudi party to pay an amount of DKK 2,307,697 (with interest) as of 1 September 1980. The award became final upon the approval of the Court of Arbitration of the International Chamber of Commerce in Paris, which sent a notice to the parties about that ruling. The Saudi party did not comply with the arbitral award, thus forcing the plaintiff to apply to the Grievances Board for the implementation of that provision, with the explicit waiving of the interest part in that award (as a violation of *Shari'a*); thus, it limited its requests to the real value of the contract (beside the arbitration expenses), which amounted to USD 11,800. The defendant sought the refusal of the award on the basis that he did not attend the arbitral tribunal and that the award was made *in absentia*; however, he could not deny knowledge of the notices to attend meetings nor that he had received a copy of the ruling.²¹

Thus, the arbitral award was issued by the Court of Arbitration of the International Chamber of Commerce in Paris by a Jordanian arbitrator when he was in the Hashemite Kingdom of Jordan. So, the Sub-Circuit decided to apply the *Convention* to that award as France is a party to this convention; however, as the award is considered to be Jordanian as it was issued in Jordan, the *Riyadh Convention* was to be applied to this award. Thus, the Circuit considered this as a proof of the existence of the principle of reciprocity. There are two points that need to be clarified here; first, the Circuit here is confirming the adoption of the geographical standard for the award to be considered as being foreign, as the award was issued in Jordan although the arbitrator is actually under the Court of Arbitration in the Chamber of Commerce in Paris. Second, the Circuit has considered that proof of the existence of an international convention in that matter is proof of the principle of reciprocity.

This represents a serious confusion and integration of the two criteria. The basic principle is that if there is an agreement between the two countries or a convention governing arbitral relations

²¹ The plaintiff was seeking implementation in accordance with *New York Convention* and the *Riyadh Convention*. He also submitted a certificate that was provided by the Jordanian Minister of Justice, which states that the award became final, enforceable and has the *res judicata*, proving the possibility of its application within the country (Jordan).

between them, this means that there is no need for the reciprocity principle; but, if there is no such agreement, this means there is a need for the principle of reciprocity to be demonstrated, which is the second option to cover this shortfall. Thus, the existence of a relevant convention (to which the country where the award is made and the country in which it is sought to be implemented are signatories) obviates the demand for proof of reciprocity, but the lack of such an agreement or convention means that this principle is the second option where foreign arbitration is attempted to be applied.²²

With regard to the *reciprocity* principle and the documents required to be submitted to prove the existence of reciprocity, the Grievances Board has acknowledged some provisions that can be described as follows:

- a. *The reciprocity principle and the burden of proof:* The burden of proving the existence of reciprocity is, as explained before, on the party who requests the implementation of foreign arbitral award in the Kingdom. This is a natural and logical requirement. This is evident in the first decision released by the President of the Saudi Grievances Board in that regard (Decision No 7 of 8.15.1405 AH 1985), where it states in paragraph IV that in instances where there is no agreement between the Kingdom of Saudi Arabia and the other state where the award was issued, the party who seeks implementation must prove the principle of reciprocity; thus, he or she has the burden of proving that the state is applying the provisions that were issued in the Kingdom according to the principle of reciprocity.

²² The consideration of an agreement as demonstrating reciprocity is a major misunderstanding in regard to this condition contained in all of the international conventions and the decision of the President of the Grievances Board, because the conventions and also the resolution differed between these two options (the existence of the agreement and the reciprocity). Also, according to the *Saudi Basic Law* when any international convention is ratified by the Saudi Council of Ministers this convention becomes binding; thus, there is no need to prove the principle of reciprocity. See Article 20 of the *Saudi Council of Ministers System*, issued by Royal Decree No A / 13 of 3/3/1414 AH 1994 and dissemination in *Umm Al-Qura Gazette* No 3468, 10/3/1414 AH 1994.

This paragraph was repeated literally in some of the Grievances Board rulings.²³ In another clear ruling (*No 97 / T / 3 of 1411 AH 1991*),²⁴ the Audit-Circuit declared that the implementation of a foreign award in the Kingdom depends on the presence of the reciprocity and that the plaintiff bears the burden of proof as the seeker of implementation.

- b. *The documents required to prove reciprocity:* The Articles of the *Saudi Arbitration System* and also the Decision (above) of the President of the Grievances Board did not specifically mention the documents required for proof of reciprocity. Therefore, the party who seeks to implement the foreign arbitral award will resort to the general rules of evidence and proof. Accordingly, the circuits have decided on more than one method in some rulings about what is acceptable regarding the types of such documents. For example, in *Ruling No 102 / T / 4 of 1429 AH 2009*, the Twentieth Sub-Circuit reports that the plaintiff did not prove legally or practically that the provisions issued in the Kingdom of Saudi Arabia could be carried out in the United States of America.²⁵ Thus, the principle of reciprocity was not demonstrated.²⁶ It should be noted that the term ‘legally’ here means that the party who made the request to enforce the foreign award did

²³ For example, see *Ruling No 102 / T / 4 of 1429 AH 2009*.

²⁴ In this case, the provision was released in the UK, pre-accession to the *New York Convention*, and requested the submission of proof of reciprocity according to *Ruling No 97 / T / 3 of 1411 AH 1991*; but after accession, such a requirement cannot exist because England is now one of the signatory countries to the *Convention*.

²⁵ This case was a request to implement a foreign judgment issued by the District Court of Columbia in the United States. In fact, this case is to complete *Ruling No 103 / T / 4 of 1425 AH 2005*, as the old judgment requested that the plaintiff ratify the document presented (as explained before). After the ratification, the case was considered by the Twentieth Sub-Circuit for enforcement. The plaintiff also presented other documents as evidence to prove reciprocity. However, the Sub-Circuit again refused to implement that provision on the basis of the lack of proof of reciprocity. Again, it is an application of a foreign judgment, not an arbitral award; however, it is very important to analyse this ruling to illustrate the Grievances Board’s path in any documents submitted to prove the reciprocity, since the Court is dealing with both the provisions of Arbitration and the provisions of foreign courts in the same manner and applying the same principles. Once again, this shows the powers of Audit-Circuit on the Sub-Circuit’s provision where the Audit-Circuit reverses the decisions of Sub-Circuits and returns the provision to the Sub-Circuits to determine its provision in light of the Audit-Circuit notice.

²⁶ This ruling is similar to a ruling issued before joining the *New York Convention*, that is, *Ruling No 57 / T / 3 of 1411 AH 1991*, where it is judged that the plaintiff did not prove the existence of reciprocity between the Kingdom of Saudi Arabia and France in the implementation of the verdicts with the use of the same principles.

not provide the legal texts of foreign law which would have demonstrated the possibility of applying the Saudi provisions in that country. The word ‘practically’ means that there are no judicial precedents to prove the application of a Saudi provision. However, this circuit ignored some documents that had been submitted:

1. There were some letters written by a judge in the US District Court of Columbia, wherein it is explained that the US courts will implement any foreign judgments, that according to the principle of courtesy in public law (as a basis for dealing with one another) and under the law of the recognition of foreign funds under ‘*District of Columbia Code* No. 15-381’; thus, the courts in that District are applying the principle of reciprocity. So it can be said that this certificate includes two things, namely, a proof of the legal text and judicial approval.
2. A certificate from the Saudi ambassador to the United States explaining that the provisions of US laws permit the enforcement of foreign judgments.
3. The plaintiff had provided an old American case, where a US court in New York had rejected the implementation of a Saudi ruling according to the limitation of the right to file a suit and the expiration of the period allowed for starting the case. So, the rejection of the Saudi verdict was not based on the lack of reciprocity. Additionally, the US court declared that final and definitive foreign judgments are binding before the Court of New York and can be implemented and also it considered them binding on the two parties. This may prove the possibility of the application if the suit was filed in a timely manner. Surprisingly, the Sub-Circuit judge did not take these documents as a proof for the principle of reciprocity.
4. However, the Audit-Circuit annulled that verdict and recognised these documents and stated that the *Saudi Arbitration System* did not specify the documents required to prove the existence of the implementation of the reciprocity principle. As a

result, there is no text that limits the principle of reciprocity to the application of a Saudi judicial ruling in other states to implement or accept the foreign provision. Therefore, the request to prove an existing judicial precedent is not according to the law. Moreover, the conduct of the US court means that there is a possibility of the application of the Saudi provisions, as the refusal was based on procedural and formal grounds. Thus, it is obvious that under the US laws there is a possibility to implement foreign judgments. This requires the Saudi court to apply the principle of reciprocity and apply that judgment. Furthermore, this provision did not violate the public policy in Saudi Arabia; hence, it has to be implemented.²⁷

In the same context (that is, methods of proof of reciprocity), there is a ruling that was issued before Saudi Arabia joined the *Convention 1958*, namely, *Ruling No 97 / T / 3 of 1411 AH 1991*. In this ruling the court refused to implement a provision issued in the United Kingdom based on the absence of proof of reciprocity between the two countries; and there was no agreement linking the two countries for the implementation of such provisions.

The plaintiff had submitted a certificate issued by the Office of the Ministry of Justice in England showing that there was a possibility of implementation of any foreign judgment, including the Saudi judgments, within the United Kingdom. Also, he provided a written certificate by a British lawyer working in the Kingdom of Saudi Arabia, explaining the possibility of the enforcement of foreign judgments in the United Kingdom. The plaintiff also submitted a copy of the British *Civil Procedural Rule*, which refers to the possibility of enforcement of foreign judgments.

²⁷ It should be noted that the Audit-Circuit did not address the testimony of the Saudi ambassador; thus, it is not sure that such document can prove the principle of reciprocity. In fact, this certificate was not issued by an official authority in a foreign country where it is a certificate from a national department that has no authority over national courts; however, it could represent the existence of the principle of reciprocity where it is similar to an expert's testimony; however, in my opinion, it is not binding on the national judge.

The Audit-Circuit refused the implementation of that provision due to the lack of proof of reciprocity and commented on those documents as follows:

1. The certificate issued by the Office of the Ministry of Justice in United Kingdom does not prove exactly the existence of reciprocity between the two countries.
2. The certificate submitted by the British lawyer is not valid, because he is an ordinary citizen and does not act on behalf an official department.
3. The submission of a copy of Article 14 of the British procedural rule is not enough because the plaintiff has to provide a copy of the intire *British Civil Procedural Rule* to enable the Circuit to evaluate that defence according to British law.

This may mean that each certificate must be specified, unequivocal, issued by an official department or a court in the foreign country and decisive in regard to the possibility of the implementation of foreign arbitral awards.

Returning to *Ruling No 208 / T / 2 of 1418 AH 1998*, which was actually handed down in Jordan in 1991 by an arbitrator belonging to the International Court of Arbitration under the Chamber of Commerce of Paris, this is, in fact, a strange ruling, as this award was diverted from other circuits for lack of jurisdiction according to the changes that took place at that time in the Grievances Board. As a result, the verdict was not issued until 1998, after accession of the Saudi Arabia to the *Convention* in 1414 AH (1994).

Consequently, the defendant asked that the *Convention* not to be applied because the ruling was issued in 1991 before Saudi Arabia's accession to that convention. The response of the Audit-Circuit was that the award is applicable under both the *Convention* and the *Arab Convention 1952*. Additionally, the certificate that was provided by the Jordanian Minister of Justice records

that the award was final, enforceable and had the *res judicata* and thus proved the possibility of its application in the Kingdom of Jordan.²⁸

These rulings demonstrate that the burden of proof for the existence of reciprocity before the court rests with the plaintiff; and this reciprocity could be proved by:

- i. Proving the existence of an agreement or treaty between the two countries.
- ii. Proving the existence of the implementation of a Saudi provision in that foreign state.
- iii. A certificate from a court of the country that issued the ruling, or by the Ministry of Justice of that country, which contains evidence that the provision is final and enforceable in the same country if there is any convention between Saudi Arabia and that country (as in Jordan where the award was capable of being performed in the two countries under the *Arab Convention 1952*).
- iv. Finally, it is possible to accept the provisions of the foreign arbitral award if an approved translation of the full text of the foreign law supports the implementation of the provisions of foreign arbitration, but the text must be clear and explicit. The clarity in the text is, in my opinion, necessary and imperative, so that the national judge does not have to interpret the foreign law. The reason is that interpretation may create a difference in the understanding of the foreign law or an error in the application of certain principles due to a variation in the judicial principles from one country to another.

4. *The Foreign Award Shall Not Be Inconsistent with a National Court Judgment or a Case Pending before a National Court*

There is a single provision released by the Twenty-First Sub-Circuit when implementing a foreign rule; and there is also a domestic ruling issued by a Saudi public court (the Court of

²⁸ Again, Jordan is a signatory to the *Riyadh Convention* so it was better to refer to this convention than to any other convention, because it is the direct convention in this regard and also the plaintiff mentioned this convention in his defence.

Jeddah). This case, which was referred to earlier, is *Ruling No 119 / T / 4 of 1426 AH 2006*. It was a request to implement a foreign judgment released by the Giza Court of First Instance, between an Egyptian woman against the heirs of her Saudi ex-husband. It should be noted that the Sub-Circuit did not discuss the existence of that Saudi national ruling (*Ruling No 146/384/41 of 28/6/1418 AH 1997* issued by the *Shari'a* Court in Jedda) and its finality! Surprisingly, it gives the foreign provision force, which means the foreign provision is binding and enforceable. However, the Fourth Audit-Circuit annulled this verdict for several reasons relating to the formal requirements, which included failure to provide proof of finality for the foreign provision,²⁹ as the case was still before the Egyptian Court of Cassation and the presented provision was from the Egyptian Appeal Court (a court lower than the Court of Cassation). Also, it is inconsistent with a national provision issued by a Saudi court (the Court of Jeddah), which produced results and an ending of the conflict according to the Saudi laws. Thus, the foreign rule requires verification in terms of being final and not contrary to a national court ruling in any aspect. Thus, the Audit-Circuit has directed the Sub-Circuit to consider these reasons in order to give the correct judgment.³⁰

This may raise a number of issues about the violation or contravention of any national judgment by the foreign award.³¹ One is whether this contravention would need to be clear and involve 'the whole case', that is, with like parties and like subject of the dispute; or whether it would be sufficient for a contravention to exist in some respects only. Logically, the conflict, which can be the basis for the rejection of the foreign rule, must be contrary as a whole, or substantially to

²⁹ It should be again noted that this is a family case and, as explained before, the Saudi Grievances Board is dealing with foreign judgments and foreign arbitral award in the same manner; thus, such a case will show the court's trend in applying the formal requirements in applying foreign judgments or foreign arbitral awards.

³⁰ It should be noted that this provision did not discuss this issue deeply (that is, the existence of a national ruling) but merely made reference to the ruling of the national court as one of the reasons that prevent the implementation of this provision, and relied more on other reasons. For more details about this provision, see *Ruling No 119 / T / 4 of 1426 AH 2006*.

³¹ This situation may be similar to the violation of public policy where the violation of public policy is either violating a general legal principle or violating a legal text. But the violation of a court ruling may conflict with the *res judicata* principle, which may fall under the public policy defence or it could be counted as an independent substantive requirement where it only concerns the violation of the national judgments.

the national judgment. But, if the award is partially contrary to a national judgment, we can apply the proper part and refuse to implement the contrary part. This can only be in case where the contrary part in the foreign award is able to be severed from the rest of the award and a partial award implemented (as is possible under the *Convention*).

This result can be deduced by comparison to the possibility of severability of the foreign award in regard to its application, if it partly contrary to the public policy which will be explained in the next chapter. In the absence of the severability (the possibility of separating the award into sections able to be implemented and those unable to be implemented), the judge is obliged to reject the execution of the award as a whole. This trend may be logical in comparison with what is contained in Article V of the *Convention*; thus, it can be regarded that in relation to the *res judicata* in the national judgments, it is a matter of public policy to be able to apply the possibility of severability. It should be noted that this remains a wide standard; also, it is subject to the judge's discretion in determining the fundamental breach of the national judgment and to determine the possibility of the severability of the application of foreign award.

5. *The Award Shall Not Be Issued against the Saudi Government*

In fact, there is no ruling presented to the Grievances Board about arbitration between the Saudi government and any other party. However, it should be noted that this is a strange or unexpected condition, or it can be said that this appears contrary to what was stated in the *Saudi Arbitration System 1983* and the *Saudi Grievances Board System 1982*, where Article 3 of the *Saudi Arbitration System 1983* admits the possibility of arbitral awards where it states: 'Government departments may not resort to arbitration to settle their disputes with their parties *except after approval* of the President of the Council of Ministers. This provision may be amended by a resolution from the Council of Ministers.' (emphasis added)

This indicates that once approval is secured from the President of the Council of Ministers, the government department is allowed to resort to the arbitration. Thus, the arbitral award is under the jurisdiction of the Grievances Board in accordance with the Article 3 of the Saudi

Arbitration System 1983 and also according to paragraphs (d) and (g) of Article 13 of the Grievances Board's new governing legislation, which was issued by Royal Decree No M / 78 dated 19/9/1428 AH (2007), where paragraph (d) gives the Grievances Board the authority to consider any claims relating to contracts to which the administrative departments are party, while paragraph (g) gives the Grievances Board the authority to consider any foreign arbitral award. Such jurisdiction cannot be taken from the Grievances Board except by law.

The above analysis of the President of the Grievances Board Decision No 116 of 1428 AH (2007), which relies on a legal mandate from the Council of Ministers, shows that with regard to this paragraph, that decision may exceed its true function (that is, the foundation of controls to implement any foreign arbitral award) and that adoption is beyond the issues of authorisation issued by the Council of Ministers, which violates a high and explicit legal provisions.³²

Therefore, any departure from the mandate can be considered as null and void. But the question remains whether this court will apply this condition or will apply the principles of law regarding the mandate and its limits to eliminate such requirement. In fact, such cases are very few, such as the case of *Aramco*, which is one of the most important cases in the area of international trade. Such cases often end peacefully, as happened in this instance, with each party implementing their part without any need for the appeal against the arbitral award.³³

Furthermore, according to the above, and also to the Articles of the *Saudi Grievances Board System 2007*, it is stated that the administrative court shall — as the competent court — undertake the examination of all applications for the implementation of the provisions of foreign arbitral awards. Also the Articles of the same legislation give the Grievances Board the

³² It is well known that the legal nature of the decision of the President of the Grievances Board is a regulatory decision issued in according to a mandate from the Saudi legislature, but the above provisions were contained in a legal texts (the *Saudi Arbitration System* and in the *Saudi Grievances Board System*) which are higher than such a regulatory decision. Therefore, according to the principle of legality, any legal rule must not contravene a higher legal rule or it will be abolished.

³³ For more information about this case see Ahmed El Kosheri, 'International Arbitration and Petroleum Contracts, in *Encyclopaedia of Hydrocarbons*' vol IV, *Hydrocarbons: Economics, Policies and Legislation* (Istituto Della Enciclopedia Italiana, Fondata da Giovanni Treccani, 2007) 879.

authority to consider all of the administrative disputes to which any government body is a party. It did not specify a particular kind of issue, so the text is very general, and includes any government body and any disputes, in accordance with Article 13(d) of the *Saudi Grievances Board System 2007* as stated above.³⁴ Finally, it could be said that this condition is still mandatory until any party to any future case appeals on it to see the trend of the Grievances Board.

6. *Dispute Was Not Resolved by Conciliation before Submission to Arbitration*

It should be noted that this condition is not mentioned in any of the conventions or agreements that the Kingdom has joined and also this condition did not exist in the older decision by the President of the Grievances Board, that is, Decision No 7 of 1405 AH (1985), but has been added in the new decision — Decision No 116 of 1428 AH (2007) — which deals with the conditions of implementation of the provisions of foreign arbitral awards.

According to the sample cases that have been examined in this research and listed in the bibliography, there is a single provision in this regard that was issued before the issuance of the new decision — Decision No 116 of 1428 AH (2007), that is, *Ruling No 187 / T / 4 of 1426 AH 2006*.

This case was a request to implement a foreign judgment released by the Court of the Sultanate of Oman. This case was raised before the Fifth Sub-Circuit, and then cancelled because of the absence of the plaintiff's lawyers. Also, the parties had made a settlement agreement outside the court in 2004. Then the case was again submitted in the same year to the court because the defendant did not comply with the conciliation agreement. The plaintiff, therefore, called for the execution of the foreign provision. The Sub-Circuit refused to implement that decision on the

³⁴ For more information, see Abdulaziz Bin Zaid, '*Mdā Jwaz Althkīm fy Al'qwd Alcdarīh: Derasah Muqarnh* [The Permissibility of Arbitration in the Government Contract]' (Masters (Research) Thesis, Faculty of Law, University of Jordan, 2006) 19. It should be noted that the *Aramco* case may be the reason for such an Article, that is, to ensure that government departments have done some research before rushing to resort to arbitration to preserve the national wealth.

basis that the conciliation had replaced the foreign decision. Also, the conciliation contract had ensured in one of its articles that this conciliation would end all disputes between the parties and be binding on them all. So if the parties have any dispute regarding that contract, they must go to the competent court (the *Shari'a* court).

The Sub-Circuit claimed that the Grievances Board courts may consider a foreign judgment *if* the conciliation has been annulled or revoked by the competent court for considering conciliation contracts as a civil contract, which here is the *Shari'a* court. Therefore, Grievances Board courts are not competent to consider conciliation claims. The plaintiff had appealed against that ruling, asking for annulment on the basis that the Sub-Circuit had discussed the merits of the case and entered into the details of the contract, when it had no right to do so according to the Decision of the President of the Grievances Board No 7 of 1405 AH 1985 and any international convention that Saudi Arabia has ratified. However, the Fourth Audit-Circuit had supported the ruling of the Sub-Circuit on the grounds that the judge did not elaborate on the merits, but stressed that the conciliation agreement had replaced the foreign judgment, meaning that the conciliation has settled the rights of the parties. Additionally, the conciliation agreement itself did not stipulate the invalidity of that agreement in the event of breach of its implementation, but, it decided that the party who breached the implementation of this agreement was obliged to compensate the other party. Then the Audit-Circuit ended its ruling by saying when the case had ended, that the Audit-Circuit supported the Sub-Circuit in its ruling. Therefore, the Audit-Circuit considered the case to be terminated because of the existence of conciliation.

Several points in this ruling should be noted:

- a. The long procedures (starting with the dates for suing and then the cancellation of the case and then the re-opening of the case) raises a question about the Audit-Circuit's function and not commenting on such lengthy procedures, which inevitably affect the course of justice, is impossible. There are two possible causes in such an instance: first,

the re-consideration of this case may mean that the plaintiff has performed all the procedures pursuant to the law and within the legal time limit before the Sub-Circuit, and thus, this circuit has accepted consideration of the case for the second time. Alternatively, the plaintiff did not perform all the legal procedures or did so but exceeded the legal limit, so the request in this case shall be refused where the Audit-Circuit had erred by disregarding such violations.

- b. According to the conventions and laws in force at that time, the existence of the conciliation contract is not a reason to reject the enforcement of such decisions (either a foreign judgment or a foreign arbitral award). The judge was applying the general provisions of law and *Shari'a* about the conciliation as a mean of ending the dispute. However, it should be noted that the two circuits did not refer to public policy as a reason to reject the case where the conflict, according to public policy in the Kingdom, is terminated because of conciliation between the parties.
- c. If this was the case before the Decision of the President of the Grievances Board No 116 of 1428 AH (2007), currently the ruling would produce the same results and the foreign award would be rejected, and that is not due to the expiration of the lawsuit, but to the following:

 - i. For violation of public policy. It is important to take into account the fact that the condition is contained in the Decision of the President of the Grievances Board No 116 of 1426 AH 2006 and that all such conditions may relate to public policy according to the Fifteenth Sub-Circuit's *Ruling No 115 / D / E / 15 of 1429 AH 2009*. As explained, this was where the Sub-Circuit considered all the requirements (that is, both the substantive and formal) as public policy defences and there was no comment from the Audit-Circuit on this outcome. Therefore, the existence of the conciliation contract before the suit prevents the court from considering the case.

- ii. If we look at the second part of this requirement, namely that ‘the case should not have been reconciled before submission to the application for enforcement’, in this instance the application for enforcement came first and then the case had been cancelled and then reopened again. Thus, one could ask whether it is right for a judge to refuse to consider the foreign judgment according to the existence of the conciliation between the parties.
- iii. In this particular case, the conciliation had been held and agreed between the parties outside the court, so that is the reason that the plaintiff did not attend the court, thus causing the cancellation of the case. Therefore, the existence of the conciliation prevents the court from considering that case as an implementation of that new agreement. Thus, any consideration of the case after that cancellation needs to be as a new case. It is not clear when the parties had asked the judge to stay the proceedings of the case because of the existence of the new agreement or ‘conciliation’, and after the conciliation the parties have to return to raise the issue before the same judge for any reason. In this case, the judge is obliged to resume the case, where the conciliation was an option for the disputants, and under the authority of the judge.

7. *Parties to the Conflict Shall Not Be under Any Incapacity*

For this condition, there is no case relation to this matter in the research sample and also by the extrapolation from the set of principles issued by the Grievances Board in the year 1427 AH (2008); however, it is not difficult to predict the court role in the future if it faces such a situation. The court will deal with it on the ground of public policy to protect the rights of incapacitated persons as one of the conditions that was received in the Decision of the Grievances Board (as explained previously) in *Ruling No 115 / D / E / 15 of 1429 AH 2009* where all of these conditions are considered to be a public policy defence as explained earlier.

8. *The Award Should Not Be Incompatible with Agreements or Treaties to Which the Kingdom Is a Party*

There are many provisions that have been discussed in regard to the obligation to adhere to certain formal requirements in some international agreements. Therefore and to avoid repetition, the Grievances Board, in many of these provisions, may refuse to implement some foreign awards or implement others on the basis of whether those provisions violate the formal terms and conditions of a specific agreement, particularly the 1952 *Arab Convention* and *GCC Convention*, or not. But for substantive requirements that have been mentioned in the conventions to which the Kingdom is a party, there is no award that has been refused implementation due to a violation of any certain convention, whether the convention relates to the implementation of foreign judgments and arbitral awards or any other convention. Hence, the Saudi Grievances Board has been applying the formal requirements contained in international agreements (especially the regional agreements) but where there is no provision that violates any other convention. One could imagine some of the irregularities of some international agreements if the arbitral award is contrary to regional or international agreement on ways to transfer money and the foreign award required the conversion of certain amounts from one country to another. In such cases the parties must follow the provisions in that convention in regard to any payment, or they might be in contravention of the national law according to a signed international agreement.

9. *The Award Should Be Issued Pursuant to an Arbitration Clause or According to a Valid Agreement*

This was included in the *Convention* in Article 2(3), but there is no decision from the Grievances Board about this condition. However, it should be noted that there is a general well-known rule in *Shari'a* governing such situations, namely, 'That which is built on falsehood is false'. Therefore, any arbitral award that has been obtained by a false or void clause or agreement is an invalid award, making it unable to be implemented in the Kingdom. Hence, an

arbitration provision would be null and void for violating *Shari'a*, 'the public policy in the Saudi Arabia'. Moreover, the arbitration award will be null and void because it is contrary to the conditions that have been stated in the President of the Grievances Board's decision, in which all of these conditions are considered (by the Sub-Circuit) as a public policy defence according to the *Ruling No 115 / D / E / 15 of 1429 AH 2009* as explained before.³⁵

However, the critical question here revolves around the authority of the court in the case of *absence* of an arbitration clause or agreement, which would open the field to asking about the possibility of considering the case and starting the proceedings. That was clarified in *Ruling No 99 / T / 4 of 1415 AH 1995*, where it stated that the lack of an arbitration document (clause or agreement) is a contravention of the arbitration system and the award that is issued by the Sub-Circuit had been issued contrary to the provisions of the law. As a result, the parties had to prepare an arbitration document. It should be noted that, this ruling was about a domestic arbitral award. However, this does raise the same question about the foreign arbitral award.

First of all, it is hard to imagine that the parties to a dispute about an international contract would resort to arbitration without an arbitration clause in the contract or an arbitration agreement issued after the emergence of the dispute; it is almost impossible and unlikely. However, it is important to have a real case in that regard in order to explore the role of the Grievances Board in an instance where an arbitration clause or agreement is absent.

I believe that the court can refuse to consider such an award due to a violation of public policy because, first, it violates the texts of the *Saudi Arbitration System*, which requires the existence of an arbitration agreement, whether as a clause in the original contract or in the form of an agreement. It also violates the *Convention*, where it stipulated in Article I(2) that the arbitral awards include not only awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted, and under Article II(2)

³⁵ This case will be discussed in more detail in the next chapter where it is related to the public policy defence more than any other defence, but it is important to mention it here in regard to this condition.

the term ‘agreement in writing’ includes an arbitral clause in a contract or arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. Therefore, there must be written documents to prove the existence of an arbitration agreement (or clause).

10. *The Authority of the Arbitrators*

Arbitrators should be authorised in accordance with the contract or the arbitration clause or in accordance with the system applicable where it was made. In fact, and according to the sample that has been taken for the application of this research, there is no ruling about the arbitral award that has been released or issued by a non-authorised arbitrator (according to the law of the state where the award was issued). But it is clear that the court would reject any award if it is proved that the arbitrators were not authorised in accordance with the arbitration clause/agreement. The critical question that could be raised here is limited to the criteria that will be used to determine the authority of the arbitrators. It is obvious that it is useful for the judge to resolve such practical problems by the analysis of the provisions of foreign law with the analysis of the provisions of the arbitration clause or arbitration agreement to reach the intention of the parties. Thus, there is a need for a real case to be considered to determine the path of the court and its powers to determine the arbitrator’s authority for us to be able to discuss the many topics arising from this situation.

However, another situation should be noted in this regard, which is instances of lack of jurisdiction, where the arbitrators exceeded the terms of the arbitration agreement. For example, if the conflict was about applying the penalty clause related to a delay in the payment of a debt but the arbitrator ruled that one party had to pay the full amount of the debt; the rule would be invalid because it exceeded the limits of the arbitration agreement between the parties, which was about the application of the penalty clause not the whole debt.

The court will apply the part that corresponds to the arbitration agreement, while the other part, which is exceeded, will be refused. This was the decision of the Audit-Circuit in *Ruling No 33 / T / 4 of 1414 AH 1994*, where it stressed that the arbitrators are obliged to the subject of the

claim, and it was agreed by the parties to resort to arbitration. Therefore, any request that is different from the original claim should be annulled.³⁶ This situation may arise with respect not to the arbitration agreement, but in regard to the arbitration clause, which came within the original contract terms. In fact, before the emergence of any conflict, it is hard to imagine that the parties can specify the type of any future conflict.³⁷

11. *Court's Power Should Not Exceed the Merits of the Case*

This requirement will be discussed in detail in the next section of this chapter because of its importance and its relation to the judge's work regarding the implementation of foreign arbitral awards.

These are the formal conditions that have been mentioned in the decision of the President of the Grievances Board which contained ten formal conditions as discussed starting with the proof of the finality of the award and 'arbitrability' (Decision No 7 of 1405 AH 1985), also the issuance place (that is, in a Convention State), or the application is based on reciprocity. Additionally, the award shall not be inconsistent with any ruling issued by a national court or inconsistent with a case pending before a national court.

Moreover, Decision No 116 that the award shall not be issued against the Saudi government **should be read in the context of a legislation that reads** 'without prior permission' to resort to arbitration as the arbitration process would be invalid from the beginning before the issuance of the award which makes the award invalid. (Hence if a department had entered into arbitration without permission, any award secured could not be implemented because of the invalidity of the arbitration process.) In addition, the dispute must not have been resolved by the conciliation before submission to arbitration, or the award will not be implemented.

³⁶ See the *Commercial Audit-Circuit in the Grievances Board: Guideline Principles and Case Law, from 1407 AH (1987) to 1419 AH (1999) Ruling No 33 / T / 4 of 1414 AH 1994.*

³⁷ It should be noted that through the exploration of many of the Grievances Board cases, the circuits do not require a particular formulation for the arbitration clause, so they will accept the general formulation of the arbitration clause as proof of the existence of arbitration.

Furthermore, the award shall take into account the rules of the law of the contracting party for legal representation for incompetent or incapacitated persons. The award should also not be incompatible with agreements or treaties to which the Kingdom is a party. Additionally, the arbitral award should be issued pursuant to an arbitration clause in the original contract or according to a valid agreement, and the arbitrators should be competent in accordance with that clause or agreement, or in accordance with the system under which it was made. Finally, the court's power should not exceed the merits of the case.

4.1.2 Formal and Substantive Requirements in Australia

Article II of *New York Convention* requires that, '[e]ach contracting state shall recognise an agreement in writing ...' and Article III states that the contracting states 'shall recognise and enforce' foreign arbitral awards in accordance with the rules of procedure law applying in the state where the award is to be applied (and under the conditions set out in the Articles of the *Convention*). Conditions imposed are not to be 'substantially more onerous' than those applying to that state's domestic awards.³⁸ Article IV prescribes the documentation that must be produced to enable the foreign arbitral award to be enforced, namely, the supply of the duly authenticated original award or a duly certified copy thereof, the original agreement (referred to in Article II) or a duly certified copy thereof, and a translation of the foreign award certified by an official or sworn translator (or diplomatic or consular agent) if the award or agreement is not in the language of the country where the award is sought to be enforced.

These requirements are, in fact, reflected in section 9 of the *IAA*, where it states:

- (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this part, he or she shall produce to the court:
 - (a) The duly authenticated original award or a duly certified copy; and
 - (b) The original arbitration agreement under which the award purports to have been made or a duly certified copy.
- (2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly

³⁸ Additionally, *IAA* s 8(2) provides that 'a foreign award may be enforced in a court of a state or territory as if the award were a judgment or order of that court.'

certified, if: (a) It purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or (b) It has been otherwise authenticated or certified to the satisfaction of the court.

(3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.

(4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.

(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.

Such conditions must be met in order to have an enforceable arbitration award. Additionally, in Australia it is necessary to follow the court's procedures for the enforcement of the foreign award. In this regard, it should be noted that section 8(3A) of the *IAA* has limited the judge powers in refusing to implement the rule of foreign arbitration, where the text states that 'the court may *only* refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7)'.³⁹ This limitation frequently appears in the application of the formal requirements where section 7(A) gives the judge wide discretion in the public policy defence (as we shall see in the public policy chapter).

³⁹ It should be mentioned that subsections 5, 6, and 7 state:

(5) Subject to subsection (6) in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that: (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made; (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made; (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings; (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; (e) 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 (f) the award has not yet become binding on the parties to the arbitration agreement 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. (6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced. (7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that: (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or (b) to enforce the award would be contrary to public policy.

Therefore, it can be said that according to the *Convention* and the *IAA*, the power of the judge is to ensure that the arbitration satisfies the formal requirements without going into the merits of the case. These formal requirements before the Australian courts can be discussed as follows:

1. The arbitration clause/agreement must be in a written document: that is, a clause in a contract or a written arbitration agreement.
2. Formal requirements include the need to submit the original arbitral award or a certified copy, with a translation for any document submitted in a language other than English.
3. Parties to the conflict shall not be under some incapacity.
4. The arbitration agreement should be valid under the law expressed in the agreement or where no law is so expressed to be applicable under the law of the country where the award was made.
5. A party must have been given proper notice of the appointment of the arbitrator or of the arbitration proceedings.
6. Arbitrators must not exceed the powers granted them by the agreement or clause of arbitration.
7. The composition of the arbitral authority or the arbitral procedure must be in accordance with the agreement of the parties or, failing such agreement, in accordance with the law of the country where the arbitration took place.
8. The award must have become binding.
9. The award has been issued in a *Convention* country or the enforcement will be in accordance with the reciprocity.

These are the formal requirements that have been required by the *Convention*, the *IAA* and required by some Australian state and territory courts as we shall see. It is obvious that these

requirements to some extent match the formal requirements mentioned in the decision of the President of the Saudi Grievances Board. As Saudi Arabia has become a signatory to the *Convention*, these conditions can be applied before the Saudi courts on the international arbitral awards which are required to be implemented in accordance to the *Convention*. In this section, each requirement will be discussed separately.

1. *The Arbitration Clause/Agreement Must Be a Written Document*

The term ‘agreement in writing’ has the same meaning before the Australian courts as in the *Convention*. It is defined in section 3(2) of the *IAA* as ‘a clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams’.⁴⁰ Thus, the Australian judge will check the existence of such a written document before proceeding in the case.⁴¹ In a contrast, there is no such clear and direct requirement concerning the implementation of foreign arbitral awards in Saudi Arabia.

This written document is proof of the existence of the arbitration, because the courts are the competent authority to consider any disputes between the parties, and while the law gives the right to the parties to resort to arbitration as an alternative route and parallel to judiciary, this right must be clear and specific and shown to be the will of the parties to the exclusion of the judiciary.

⁴⁰ See *FG Hemisphere Associates Llc v Democratic Republic of Congo* [2010] NSWSC 1394, where Hammerschlag J addresses these formal requirements. Also, concerning the agreement of the written documents and the process of international arbitration governed by the *International Arbitration Act 1974* (Cth), see His Honour Justice Barrett in *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894. For more information about this case, see New South Wales Supreme Court website, *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894 (2 February 2009) <<http://www.lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf/ae73009028d6777ca25673900081e8d/1af2ab9a91f29757ca2574b3000ca90b?OpenDocument>>.

⁴¹ It should be noted that in Australia, as we shall see, Kirby J in *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310, at G, 313 observed: ‘It is the fundamental rule that a Court should give the words of a written agreement [which has been addressed in the *IAA* and the *Convention*] the natural meaning that they bear.’

Judge Einstein has summarised the purposes for requiring the written agreement in three points in his judgment in *HIH Casualty and General Insurance Limited v R J Wallace sued (HIH)*,⁴² where he stated:

The policy underlying the definition in Article II(2) and the requirement that an agreement be “in writing” is to ensure that [1-] The arbitration agreement was actually consented to and concluded ... [2-] The formal requirements also serve the purpose of ensuring that the terms of the arbitration are clear and susceptible of proof ... [3-] The Requirement of a Written Form ... was included in the Convention with the intention of overcoming the divergence of national laws in favour of a uniform rule as to formal validity ...⁴³

In *HIH*, Einstein J held that the service of suit clause offered *HIH* a contractual option to either litigate or to arbitrate disputes arising under the contract where *HIH* exercised its right to litigate. Hence, there is no arbitration clause in force where ‘the arbitration agreement contained in Article XIX of the policies would not be operative because of the exercise by *HIH* of the option contractually reserved to it.’⁴⁴ As a result, the *IAA* is not applicable. This shows the role of the competent courts in the examination of the words ‘written agreement’ where it should give it the natural meaning that they bear.⁴⁵ However, it is a delicate problem that may be seen as an issue in applying arbitration and that is due to the authority of the court and its interpretation of the arbitration clause/agreement.⁴⁶

⁴² See *HIH Casualty and General Insurance Limited (in liquidation) v R J Wallace*, [2006] NSWSC 1150 (3 November 2006) (*HIH*) at 135(i). Wallace sued on his own behalf and on behalf of all other members of Syndicate No 683 at Lloyd’s of London in regard to the 1993 Underwriting Account. Einstein J stressed that the signatures of all parties to an agreement or arbitration clause are required.

⁴³ For the same meaning, see *Pan Australia Shipping Pty Ltd v The Ship ‘Comandate’ (No 2)* [2006] FCA 1112.

⁴⁴ *HIH* [2006] NSWSC 1150, at 123 (Einstein J).

⁴⁵ See *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310, G, 313 (Kirby J).

⁴⁶ It should be noted that the judge in this case attempted to define each word contained in the *Convention* on the written agreement, where the word ‘include’ in his view is exhaustive all of the documents between the parties and the word ‘exchange’ ‘means that there must be a mutual transfer of documents [thus] The mere transmission of a document by one party to the other cannot linguistically satisfy the requirement of “exchange”.’ It is worth mentioning that this case was about a party seeking a stay of proceedings pursuant to the *IAA* rather than the implementation of foreign award. However, it shows how the court defines the term ‘agreement in writing’, which also defines the existence of arbitration clause/agreement. In the same direction, see *Parharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2007] WASC 234, where the court found that the clause in the basic contract was wide; however, it should be characterised as an ‘arbitration agreement’ for the purposes of s 7(2).

Most importantly, the Federal Court of Australia, in a Full Court Decision, has considered that the term ‘written clause in a valid agreement’ includes the term ‘exchange of letters or telegrams’ in the *Convention*. It stated in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, at paragraph 149 that:

Article II does not say that the only agreement to which it refers is one which was formed or concluded by the act of signing or by the dispatch or receipt of a letter or telegram. What is required is that there is more than a unilateral statement in writing of the arbitration clause or arbitration agreement. The bilateral recognition of the clause or arbitration agreement will be achieved if the arbitral clause is in a contract, or if the arbitration agreement is signed by the parties, or if the arbitral clause is in a contract, or if the arbitration agreement is contained in an exchange of letters or telegrams.⁴⁷

In this case there was no signing of any such document. But, in fact, there was an exchange of letters or telegrams. Thus, even if there was not an arbitration clause or a separate arbitration agreement, once the contract exists, the arbitral clause or the arbitration agreement can be seen to be contained in the exchange of letters or telegrams.

This illustrates the broad interpretation of the *Convention* in order to adapt to the requirements of international commercial arbitration, and also demonstrates the requirement of the existence of the agreement in writing in accordance with the IAA.⁴⁸ But, again, it is not expected by the parties to a conflict in international commercial contracts to resort to arbitration without a written agreement. This is due to the fact that each party wants to fully ensure his/her rights. It

⁴⁷ It is a very important judgment where it is discussed in detail the binding nature of an arbitration agreement. See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192. In another case (*APC Logistics Pty Ltd v CJ Nutracon Pty Ltd* [2007] FCA 136), Kiefel J found:

The first draft of an agreement to arbitrate was sent by the first respondent to the second respondent, combined, and the first respondent accepted, mediation and arbitration. At the point when the second respondent’s lawyers recommended the two methods of dispute resolution be split, and the focus put on an outcome from mediation, the second respondent had not committed to the terms of an agreement to arbitrate.

Therefore, the stay of the proceedings and referral of the parties to arbitration are dismissed because of the absence of the agreement on that clause between the parties.

⁴⁸ It should be noted that, according to Crawford, the requirement for an ‘agreement in writing’ has been eliminated from the revised *UNCITRAL Model Law 2006* due to the fact that ‘domestic legislation on the subject varies, and many states do not require [an] arbitration agreement to be in writing ... the requirement of writing was not a formal one’ and it ‘might be separated from the question of the validity of the arbitration agreement ... or from the question of enforcement under the New York Convention’. See James Crawford, ‘Developments in International Commercial Arbitration: The Regulatory Framework’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 253, 260.

is, in fact, the basic principle in such transactions: even if there is a clause in the contract, the parties are expected to write a special arbitration agreement, which specifies the arbitrators and the relevant law. It can be said that this condition of a ‘written document’ is basic in relation to several other conditions, such as the powers of the arbitrators in the arbitration agreement, ‘arbitrability’ that determines whether the subject matter of the conflict is such that it is permissible to resort to arbitration, and as a proof of the existence of the arbitration as a whole.

2. *The Award Shall Be the Original Award or an Authenticated, Certified and Translated Copy*

The power of the court in applying these formal requirements is described in section 9 of the IAA as a procedural provision in many respects, where the principal provision in section 9(1) provides:

In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court: (a) The duly authenticated original award or a duly certified copy; and (b) The original arbitration agreement under which the award purports to have been made or a duly certified copy.

Additionally, section 9(2) is about the authentication or certification of an award or copies of the award, respectively, but that sub-section (3) and (4) relate to the certification of any translation of the award. This may show that the court’s undertaking to ensure the satisfaction of the formal requirements is a routine task, which does not require the court to enumerate all of these requirements separately. Hence the court will refer generally to all of these conditions. In fact, this condition here is only about how binding the presentation of such documents is.⁴⁹ Thus, the court will accept any documents submitted on the basis that it is genuine and valid which is necessary for the conduct of the proceedings.⁵⁰

⁴⁹ Thus, it could be said that the ‘written agreement’ condition is to consider whether an arbitration agreement exists for the purpose of s 8 and whether this matter falls under the enforcing court’s jurisdiction. In addition, the *Authenticated, Certified and Translated* condition is to show the binding nature of such documents.

⁵⁰ This may explain the court’s role in the application of such formal requirements.

The Supreme Court of NSW clarified these conditions, by confirming that the provision of appropriately certified identical copies (as per section 9 of the *IAA*) was equally acceptable, where Hall J in *Transpac* stated:

40. At the hearing, counsel for the plaintiff provided to this Court a copy of the foreign award, certified by a Singaporean public notary as a true and identical copy, as well as copies of the two agreements, certified by the same Singaporean public notary. Accordingly, I find that the plaintiff has met the formal conditions imposed by ss.9(1)(a) and (b) of the Act, as facilitated by s.9(2)(b).

41. Consequently, these documents – the Award and the two agreements – form prima facie evidence of the matters to which they relate: s.9(5), *International Arbitration Act*.⁵¹

Regarding the translation requirement, a recent judgment has been released of White J in the Supreme Court of New South Wales in *Yang v S & L Consulting*.⁵² The application was for a foreign arbitral award made in China under the *IAA*. The defendants had submitted an English translation of the award, which had been certified by the First Secretary of the Consular Department of the Ministry of Foreign Affairs in China but was not certified by a diplomatic or consular agent in Australia.⁵³ However, the Court noted that these documents had also been translated by an accredited translator and interpreter in Australia. This translator had identified some mistakes in the certified English translation; none were significant, except a misstatement of the daily percentage rate of interest. The Court also noted that the translation made by the Australian translator was not in dispute and was a translation to the satisfaction of the court within section 9(4) of the *IAA*.

The important point is that the Court recognised that the translation was not disputed by the parties in this case and the court was satisfied with the translation within the meaning of section 9(4) of the *IAA* (that is, ‘to the satisfaction of the court’). That Article was very clear, where it required either full certification for all of the documents presented or that the court was satisfied with what had been translated. This was done by the court, where it referred to the lack of

⁵¹ See *Transpac Capital PTE Limited v Buntoro* [2008] NSWSC 671, at [40]–[41].

⁵² See *Yang v S & L Consulting* [2009] NSWSC 223.

⁵³ As required by s 10 of the *IAA*.

certification, but at the same time stated that it was not considered a problem requiring rejection of the documents because the translation had satisfied the court.

It should be noted that the adoption of the *Convention* within the *IAA* enables the Australian courts to implement the *Convention* as a national law. It also facilitates the Australian courts' role by allowing referral to one uniform legislation (*IAA*), which in turn facilitates the application of such conditions.

3. *Parties to the Conflict Shall Not Be under Some Incapacity*

Article V(1)(a) of the *Convention* states:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity...

This has also been adopted by Article 34(a)(i) of the *UNCITRAL Model Law*, where it states that refusal can derive from 'a party to the arbitration agreement referred to in Article 7 [being] under some incapacity ...'. Born believes that the requirement for legal capacity 'to enter into a binding arbitration agreement is often little different from the role of capacity in other areas of law ... [however, generally] going to capacity such as incompetence, minority and the like' in the context of arbitration agreement will be applied as it is in any branch of law.⁵⁴ However, various national laws have adopted special cases regarding the incapacity of parties to resort to arbitration, such as restricting the power of government related entities to resort to arbitration in certain disputes.⁵⁵

It should be noted that some Australian court judgments numbered the formal requirements according to the *Convention*. This, in turn, is a declaration of the implementation of such requirements; however, there is no case where the appeal from any party has been rejected

⁵⁴ See Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International, 2nd ed, 2001) 231.

⁵⁵ *Ibid.*

because one of the parties was under some incapacity.⁵⁶ Conversely, it should be also noted that this incapacity is measured according to the law applicable to the arbitration agreement but, if there is not any particular law, the law should be applied in accordance with Article V(1)(a) of the *Convention* in the law of the state where the arbitration was made. This requires the judge to know the law applicable to the dispute.

4. *The Arbitration Agreement Must Be Valid*

The less commonly invoked exception to enforcement of foreign arbitration by parties seeking to avoid the effect of an agreement to arbitrate is that the agreement is null and void.⁵⁷ In fact, there are a few Australian cases in that regard.⁵⁸ However, it can be said that the cases that can clarify the standard of the validity of arbitration agreement is that the original contract breaches public policy, as is stated in section 7(5) of the *IAA*: ‘A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed’.⁵⁹ As a result, any contravention of the arbitration agreement to public policy, such as denial of a legitimate defence, can cause the invalidity of the arbitration agreement.

For example, in *Hi-Fert v Kiukiang Maritime Carriers*,⁶⁰ the Federal Court mentions that any general claim without any proof, such that the enforcement of the arbitration agreement would

⁵⁶ See *Yang v S & L Consulting* [2009] NSWSC 223.

⁵⁷ For more information about the defence that the agreement is null and void, see Mary Keyes, ‘Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice’ (2009) 5(2) *Journal of Private International Law* 181, 188.

⁵⁸ There is no case presented before the Saudi Grievances Board in that regard.

⁵⁹ This Article is a counterpart to s 8(5)(B) of the *IAA* and also to *UNCITRAL Model Law* art 36(1)(a)(i) which states that enforcement may be refused where ‘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.’

⁶⁰ In this case *Hi-Fert Pty Ltd* was the first plaintiff and the second plaintiff was *Cargill Fertilizer Inc* (a US corporation and the consignor of the damaged cargo). *KMC* was the defendant. The claims against *KMC* can be summarised as follows: by three bills of lading issued in Tampa, Florida on 24 March 1996, *KMC* was alleged to have acknowledged shipment, on board the vessel, of the cargo in apparent good order and condition for carriage to Australian ports for delivery in the same good order and condition as when shipped. *KMC* breached the duty of care in the contract by failing to carry and deliver the cargo in good order and condition. The cargo became contaminated with a quarantineable fungal disease, namely ‘karnal bunt’, and the vessel was prevented from discharging at Newcastle in

result in one party being deprived of the ability to claim under the *Trade Practices Act 1974* (Cth), results in the refusal of such claim.⁶¹ Thus, a general attack on the validity of the arbitration agreement/clause may not be heard and may not make an arbitration agreement null and void where any defence or claim on the validity of the arbitration agreement/clause must be valuable and worthy to be examined by the court.⁶²

In another case, that of *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1,⁶³ the plaintiff was claiming that the arbitration agreement was not valid under Queensland law, which is the applicable law on the arbitration agreement, whereas the second defendant claimed that the arbitral tribunal failed to properly determine the issue according to and applying the law of Queensland. As is stated in the case:

[I]t was said that the submission by the second defendant ... that there is an initial onus on the plaintiff under sub-s 8(1) of the IAA to prove the validity of the arbitration agreement has been consistently rejected by courts in various jurisdictions. Further, it was submitted that there is abundance of authority which confirms that the onus is on the award debtor to make out or prove any of the limited defences or grounds available to it under the New York Convention for resisting enforcement. It would follow that this applies to the provisions of sub-ss (5) and (7) of the IAA insofar as those provisions reflect the defences or grounds provided for under Article V of the New York Convention for resisting enforcement.⁶⁴

The court also considered whether an award debtor was estopped from raising a claim on the enforcement and if it had failed, or had unsuccessfully attempted, to raise the issues before the arbitral tribunal or the supervisory court. Here, the evidence was that the courts of Mongolia, a

Australia so that the cargo was not delivered. Thus, it was claimed that the loss and damage in the goods were caused by the negligence of KMC in breach of its duty as carrier. For more information about this case (*Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* [1996] 71 FCR 172), see Keyes, above n 57, 188.

⁶¹ For more information, see Ricky H Diwan 'Problems Associated with the Enforcement of Arbitral Awards Revisited: Australian Consumer Protection; Conflict of Laws; An English Law Perspective' (2003) 19(1) *Arbitration International* 55, 55.

⁶² See Keyes, above n 57, 194. In addition, in the case of *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820 (which will be discussed later for another reason), the defendant claimed that to enforce the award all parties had to be correctly *named* whereas he had been misnamed in the award so he maintained that the award was not valid against him. The court stressed that any minor typographical or transcription errors were not accepted as a ground to refuse implementation. For more information, see Richard Garnett and Michael Pryles, 'Recognition and Enforcement of Foreign Awards under the *New York Convention* in Australia and New Zealand' (2008) 25(6) *Journal of International Arbitration* 899, 906–907.

⁶³ See *Altain Khuder LLC v IMC Mining Inc* (No 2) [2011] VSC 12.

⁶⁴ *Ibid* [45].

civil law country, would, if asked to do so, review the award and would satisfy themselves by proper inquiry that the requirement of the Mongolian civil code had been made. The evidence was that the Mongolian courts had verified the award and the findings of the arbitral tribunal and it was concluded that ‘it was a legitimate award under Mongolian law and is capable of being enforced in accordance with the *New York Convention*.’⁶⁵

The Queensland Supreme Court concluded that, with respect to the issue of the parties to the arbitration agreement, the second defendant had failed to resist the enforcement, and discharge the onus of establishing that an exception to enforcement applied.⁶⁶ This shows some points, which are:

- a. The court stated that the submission by the second defendant had been consistently rejected by courts in various jurisdictions. However, the legal nature of that rejection is not clear. Hence, the court could consider that as conclusive evidence on the validity of the arbitration agreement or as a legal presumption which is not binding on the court.
- b. It is also clear from this judgment that the court assumes that the arbitral award is valid and anyone who claims its invalidity must prove it, so the burden of proof is shifted to the party resisting the enforcement of the award.
- c. The court considers that the defendant had the opportunity to raise the invalidity of the arbitration agreement before the arbitral tribunal or the court overseeing the arbitration procedures prior to sentencing.

⁶⁵ Ibid [91].

⁶⁶ It should be noted that this defence is not the only one that deals with the validity of the arbitration clause or the agreement, as there is another instance where the case has already started before the court and before the arbitration process has started. In this case the plaintiff claims that the arbitration agreement/clause is invalid in order to avoid the arbitration process and let the court proceed in the case. Although the number of such cases is small, the court explicitly adopted a liberal approach to interpretation of the arbitration clause where it accepts the general phrase for the scope of the arbitration clause. Accordingly, Austin J suggests that ‘while Australian courts are not constrained by considerations of public policy to adopt a “liberal” construction of arbitration clauses, reflection on the likely intention of the parties will steer them away from any narrow construction.’ For more information, see Keyes, above n 57, 187. That is due to the fact that when the parties to a commercial contract have agreed at the time of making the contract (and before any disputes) to resort to arbitration, their agreement should be respected and not be narrowly interpreted.

For the last point it could be said that the appeal against the invalidity of the arbitration agreement is relative and not absolute, where the losing party must raise that claim at the beginning of consideration of the conflict before the arbitrators. Thus, accepting an appearance before the arbitrators appointed under the arbitration agreement would mean surrendering the upholding of this invalidity. Consequently, in instances where the losing party did not undertake such a procedure, it means that they are satisfied with the arbitration agreement and there is no objection to the validity of that agreement. But if the losing party has proved such a challenge and the court of arbitration has rejected the appeal for invalidity of the arbitration agreement, then the Australian court will accept that provision and then it will become ‘in effect’ before the Australian courts. However, the critical point is when the court of arbitration did not respond to that claim of ‘invalidity’. In such a case I think the Australian courts must address such claims first and then consider whether to accept or reject implementation.

As a result, it can be said that the general rule in the case of invalidity of the arbitral award due to the invalidity of the arbitration agreement is that the invalidity of the arbitration agreement is due to the fact that the conflict is not permitted to be resolved through arbitration (‘arbitrability’ as we shall see in the next chapter is a public policy defence), but if the invalidity of the arbitration agreement is due to other reasons, it is not permissible for it to be raised before the court of enforcement before it has been raised before the Arbitration tribunal.

Finally, it should be noted that ‘a court which refuses to annul an award may grant enforcement of that award.’⁶⁷ This may be a natural result to confirm the validity of the arbitration, but must take into account the reminder of the defences contained in the IAA. Thus, confirming the validity does not mean the award is directly capable of being performed. That is due to the need for the presence of the rest of the conditions having been met.

⁶⁷ See Winnie (Jo-Mei) Ma, *Public Policy in the Judicial Enforcement of Arbitral Award: Lessons for and from Australia* (Thesis of Doctor of Legal Science (SJD), Bond University, December 2005) 23.

However, in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, the plaintiff appealed Justice Croft's decision concerning the enforceability of the arbitral award (the validity of the award).⁶⁸ The Court of Appeal stated:

In our opinion, at stage one, the award creditor must satisfy the Court, on a prima facie basis, of the following matters before the Court may make an order enforcing the award:
(a) an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;
(b) the award was made pursuant to an arbitration agreement;
(c) the award creditor and the award debtor are parties to the arbitration agreement.⁶⁹

Therefore, the Court of Appeal found that Croft J erred in enforcing the award against IMC where it was not apparent that IMC was a party to the arbitration agreement and he did not receive notice of *Altain Khuder's* application for enforcement of the award and that the application should have been heard inter partes. Thus the Appeal Court stated:

Where the contents of the arbitration agreement and the award do not provide prima facie evidence of the matters ... the Court, rather than proceeding ex parte, should require the award creditor to give notice of the proceeding to the award debtor and the proceeding should continue on an inter partes basis.⁷⁰

Therefore, an award creditor must establish on a prima facie basis that the award was made pursuant to an arbitration agreement, where the award creditor and the award debtor are parties to the arbitration agreement.

The Court of Appeal found that *Altain Khuder* had not discharged their burden of proof and could not show prima facie that IMC was a party.

In this decision the Court of Appeal has adopted the approach of deciding whether an award debtor is a party to an agreement. Therefore, the burden of proof of validity is again shifted again to the party seeking the enforcement of the award.

⁶⁸ See *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 (22 August 2011).

⁶⁹ Ibid [135].

⁷⁰ Ibid [140].

5. *Proper Notice Must Be Given*

It should be noted that the defence for those opposing implementation of award includes two important areas, these being where the party is not given proper notice of the appointment of the arbitrator, or where she or he is otherwise unable to present his or her case in the arbitration proceedings.⁷¹ This requirement lies on fairness ground where the ‘violation of the requirement for natural justice [is] in the procedure adopted by the arbitral tribunal.’⁷²

In *LKT v Chun*,⁷³ the defendant in this complex and lengthy case claimed that he did not receive any proper notice of the appointment of the arbitrator or a notice of the arbitration proceedings so he was not able to present his case in the arbitration proceedings. It is noticeable here that the judge summoned the defendant to question him about several things; through this questioning, the judge made some very important points which are:

- i. Mr Chun argued that his English language was poor and he needed an interpreter; however, the judge found that Mr Chun’s understanding of English was sufficient for him to understand the notice if he had received it. That was clear from his responses to some questions before they were translated.
- ii. Mr Chun denied receipt of mail addressed through a courier company (DHL) at his residence in Sydney and claimed that he was outside Australia at that time. However, the judge explored and brought the sub-directors of the company (DHL) to testify on its way of delivering packages. The judge considered the methods of delivery and the electronic process and came to the conclusion that Mr Chun must have received the package, perhaps via his wife or his son. The judge discussed the system of the building security,

⁷¹ *Convention* art 5(1)(b) provides that a party may resist recognition or enforcement of an award on the basis that the party: (i) was not given proper notice of the appointment of the arbitrator; or of the arbitration proceedings; or (ii) was unable otherwise to present his case. For more information and explanation about this requirement: see Batayneh, above n 2, 164.

⁷² Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Thomson Reuters, 2011) 303.

⁷³ *LKT Industrial Berhad (Malaysia) v Chun* [2004] NSWSC 820.

where there was no access by anyone to the apartment without permission from the owners; this showed that the postman had received a reply from one of the residents.

- iii.* The judge also discussed another method, which is facsimile transmission, where the defendant had received faxes at his headquarters in Hong Kong; he tried to deny receipt of these messages and to prove that he had had some technical problems that caused non-receipt of these faxes during that period of time. However, these reasons did not convince the judge because he believed that the defendant or any one of his family members could have received them and let Mr Chun know.

Through lengthy discussions of these defences, with attempts to prove the arrival of mail messages and fax, the judge reached the conclusion that the defendant was evading the receiving of the notice to the appointment of arbitrators and times of meetings. Hence the judge said (in the paragraphs numbered below):

74. [I] find that Mr. Chun was given notice of the arbitration proceedings against him. Although he was misnamed in the letter and notice (and other correspondence) that he received, I find that he would have understood the documents that he received as relating to him, and that they identified him as a party to the arbitration proceedings.

75. Mr. Chun did not [make his case, which] means ... the principal ground of defence fails, there is no reason for finding that he was unable to present a case in the arbitration proceedings.

76. I therefore conclude that enforcement of the award should not be refused on the ground set out in s 8(5)(c) of the Act.

This shows the significance role of such a defence, which must be real. This explains why the judge discussed the details of ways of receiving notices. Most importantly, there is a significant and fixed role of the court in such defences, where the judge has the power to determine the validity of the notifications and the legality and power of those means.

It also shows that if one of the parties did not receive any proper notice,⁷⁴ that means he would be unable to present his case. However, if both parties are well aware of the nature and progress of the arbitration proceedings, they are able to present their case in the arbitration proceedings.

It, in fact, is under the Court's discretion to weigh evidence and examine the facts to ascertain whether the parties have given proper notice or not. In addition, it shows the importance of the availability of proper notices to the parties so that the judge can consider the case. Finally, it can be said that the requirement to prove that someone is a party to the arbitration agreement comes before the proof of notification of the arbitral process.⁷⁵

On the other hand, the court can refuse the implementation if the party was not able to present his or her case in the arbitration proceedings. In fact this is a natural right for all parties and it has been stated in the *Convention* that the arbitral award can be refused implementation if one of the parties has proof that he was unable to present his case (that is, Article V(1)(b)).⁷⁶

6. *Arbitrators Must Not Exceed the Powers Granted Them by the Agreement or Clause of Arbitration*

This condition reflects Article V(1)(c) of the *Convention* and is also mentioned in section 8(5)(d) of the *IAA*, where it states:

[T]he court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that: (d) the award deals with a difference not contemplated by, or not falling within the terms of; the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration.⁷⁷

⁷⁴ Proper notice should be for the location, timing of arbitration and the commencement of arbitration proceedings and finally a proper notice of the final decision.

⁷⁵ In fact, it is a logical situation where anyone should be a party to the arbitration process so he can seek the refusal of the enforcement on the grounds that he did not receive a proper notice.

⁷⁶ For more information, see Pieter Sanders, 'UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future' (2005) 12(4) *Arbitration International* 443. This was explained in section 3.1.1 Scope of Arbitration (Subject Matter of the Conflict).

⁷⁷ For the application of this requirement under the *Commercial Arbitration Act* 1985, see *Pindan Pty Ltd v Uniseal Pty Ltd* [2003] WASC 168.

It should be noted that according to that Article, the defence that an arbitrator exceeded his/her power should be raised by one of the parties in accordance with the provisions of the *Convention* and according to the provisions of the *IAA*. Therefore, the court cannot raise it of its own volition.

It should be also noted that the legal nature of arbitration affects the work of the arbitrators and their decisions. Thus, if it is of a judicial nature, the award that has been issued is binding on both parties as a judgment; but if it is of contractual nature, the decision becomes binding on the parties according to their will, and the contractual principles will be applied. These differences in the legal nature certainly lead to differences in the types of defences before the competent court.⁷⁸ However, most laws have made arbitration binding by enacting a special arbitration law and joining some international treaties in enforcing arbitral awards; anyway, the arbitrator's decision is, in fact, creating a right or duty for the parties.⁷⁹

On one hand, the arbitrator has the authority to determine the validity of the original contract before the arbitration proceedings and also the validity of the arbitration agreement. This power is through the original contract and the arbitration agreement as determined by the parties.⁸⁰ But if the underlying contract is invalid, this may raise questions about the impact of that invalidity on the validity of the arbitration clause/agreement.

⁷⁸ It should be noted that arbitration has a binding nature in Western countries while in the Middle East its legal nature still debatable. This 'binding nature' has been affected by some theories which characterise the nature of commercial arbitration (such as in contractual theory where it depends on the parties' selection of and 'will' in regard to arbitration). For more information, see Hong-Lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) *Contemporary Asia Arbitration Journal* 255, 265.

⁷⁹ For more information, see Jesse Kennedy, 'Arbitrate This! Enforcing Foreign Arbitral Awards and Chapter III of the *Constitution*' (2010) 34(2) *Melbourne University Law Review* 558; also see Mohammed A H Aljarba, *Commercial Arbitration in Islamic Jurisprudence: A Study of Its Role in the Saudi Arabia Context* (PhD Thesis, University of Wales, Aberystwyth, 2001) 234.

⁸⁰ Additionally, an arbitrator is permitted to rule on his or her own jurisdiction according to Article 16 of the *Model Law* that incorporates the principle of competence, which allows arbitrators to rule on their own jurisdiction.

The Federal Court of Australia in *QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd* was concerned with a domestic arbitration agreement,⁸¹ but the principles are logically applicable to an international agreement subject to the *Convention*. Thus, the court considered a situation where the party who was resisting the arbitration process claimed that the original contract was void according to the *Trade Practices Act 1974* (Cth) and hence the arbitration process was invalid, and accordingly, the arbitrator was without jurisdiction. The court, however, held that the arbitral clause could be severed from the original agreement or principal contract (with the result that an arbitrator could exercise power under an arbitration agreement to declare the contract void (without destroying his own power to act)). Thus the original contract cannot have any effect on the arbitration agreement. Therefore, it can be said that the arbitration clause has progressively received more liberal interpretation before the Australian courts in determining its validity.⁸²

On the other hand, one might wonder about what the court's decision might be if the arbitral tribunal has exceeded the authority or the power that has been set in the arbitration clause or arbitration agreement.

⁸¹ See, *Re QH Tours Limited and Szalo Pty Ltd v Ship Design and Management (Aust) Pty Ltd and Charles Russel Gibbons* [1991] FCA 637. The judge said:

I am not satisfied that there is any rule of law which prohibits the empowering of an arbitrator to decide the initial validity of the contract containing the arbitration clause. With respect to those who hold a different view, I do not consider that there is any "received doctrine" to this effect. Moreover, having regard to the specific nature of an arbitration clause, as discussed by Lord Wright in *Heyman*, I consider that, generally speaking, it can be regarded as severable from the main contract with the result that, logically, an arbitrator, if otherwise empowered to do so, can declare the main contract void *ab initio* without at the same time destroying the basis of his power to do so.

For more information, see Peter Gillies, 'Enforcement of International Commercial Arbitration Awards – The *New York Convention*' (2004) 9 *International Trade and Business Law Review* 19.

⁸² This shows the adoption by the Australian courts of the principle of the independence of the arbitration clause from the original contract. See also *Qantas Airways Limited v Dillingham Corporation* (1985) 4 NSWLR 113. This severance of provisions of an award is permitted by the common law, see *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* [1995] 128 FLR 458.

This situation is challenged when, after the arbitration process has been concluded and an award made, one of the parties claims that the arbitrators have no powers to decide the dispute, and thus, it is beyond the limits of their mandate.⁸³

For example, in *LKT v Chun*, the defendant claimed that ‘it was not open to the arbitrator in the final award to determine joint and several liabilities’.⁸⁴ However, the judge, after reading and evaluating the arbitration agreement, decided to refuse such submission. He noted: ‘It is clear, from the relevant paragraphs of the partial award, that the arbitrator was making a finding of liability in terms of cl. 11.1 of the agreement.’⁸⁵ In this case, the court’s had the authority to gauge the authority of the arbitrator by reading and analysing the arbitration agreement. Therefore, Austin J has stated: ‘Any limitation on the scope of the contentions agreed to be arbitrated is to be found in the contractual wording ...’⁸⁶

This analysis cannot be considered as extending into examining the merits of the case or the original contract; the only and the proper way for the court to determine the arbitrator’s authority is in accordance to the arbitration agreement or clause.

In such cases, where the arbitrators have exceeded their authority according to the arbitration clause or agreement, a distinction must be taken into account about two hypotheses which are:

- i. When the award contained an unlawful but severable provision (for example, a violation of public policy), the court will grant severance and implement the part that is lawful.

⁸³ However, is there any impact of the existence of such a defence before the arbitrators before the verdict or not. The court here is deciding the power of such a defence. For more information, see Ball, above n 5, 11.

⁸⁴ *LKT v Chun* [2004] NSWSC 820, [82].

⁸⁵ *Ibid* [83].

⁸⁶ See Austin J in *ACD Tridon v Tridon Australia* [2002] NSWSC 896. In *Reinsurance Australia Corporation Ltd v Members of Lloyd’s Syndicate 1027* [2001] FCA 1426 (Unreported Judgments Federal Court of Australia) Stone J stated:

[A]t the risk of oversimplification, the submission was that the arbitrators in London do not have jurisdiction to deal with the claims made under the *Trade Practices Act*. It was submitted, first, that the arbitration clauses do not, on their true interpretation, purport to give that power and second, that any attempt to do so would be void as an attempt to contract out of the *Trade Practices Act*. In the alternative it was submitted that if the effect of s7 of the *International Arbitration Act* 1974 (Cth) is to require a stay of these proceedings then the section does not fall within s76 and s77 of the *Constitution* and for that reason is invalid.

However, severance of an award will not be granted where the remainder of the award is affected by the part of the award rejected.⁸⁷

- ii. Where an award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration, the court will refuse to implement it according to section 8 (6) of the IAA.⁸⁸

7. *Composition of the Arbitral Authority and the Arbitral Procedure Must Not Violate Law or Arbitration Agreement*

This condition, according to section 8(5)(e) of the IAA, contains three parts, namely, the composition of the arbitral authority or the arbitration procedure is not in accordance with the parties' agreement; the non-existence of the arbitration agreement; and the composition of the arbitral tribunal is not in accordance with the law of the country where the arbitration was made. This brings us back again to point out that Australian courts take the theory of the independence of the arbitration clause from the original agreement as stated previously.⁸⁹

⁸⁷ For more information, see International Chamber of Commerce, *Country Answers: Australia* (Law as at 18 July 2008) [Material Reproduced from: ICC, *Special Supplement 2008: Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards* (2009) 29] <http://www.iccdri.com/CODE/LevelThree.asp?page=Country%20Answers&Locator=32.2&L1=Country%20Answers&tocxml=ltoc_CountryAnswersAll.xml&contentxml=arbSingle.xml&tocxml=toc.xml&contentxml=CA_SUPP_0021_3.xml&AUTH=&nb=0>, where it explains the enforcement of foreign arbitral awards in Australia and provides some examples and some cases, such as *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31, Supreme Court of Victoria.

⁸⁸ See *HIH* [2006] NSWSC 1150, where the parties have to refer to arbitration directly in clear language. Additionally, in *Resort Condominiums International Inc v Bolwell* (1993) 118 ALR 655, the Supreme Court of Queensland has held that 'a decision must determine finally "at least some of the matters in dispute before the parties" before it will be considered an award within the meaning of the *New York Convention*'. See International Chamber of Commerce, *Country Answers: Australia* (Law as at 18 July 2008) ICC website, above n 87.

⁸⁹ See *Enterra Pty Limited v ADI Limited* [2002] NSWSC 700. This also may be related to the natural requirements of impartiality and independence of the arbitrators, and also it relates to the good faith principle where parties have to follow a high degree of good conduct in their dealings.

Justice Einstein's decision⁹⁰ confirmed and commented that the words 'to deal with the particular dispute' applied only to what the parties have agreed upon.⁹¹ But, saying that the arbitrator is unsuitable due to his lack of availability until May the following year (approximately 8 months later) did not mean that a satisfactory arbitration could not be reached at a later date.

More clear is a recent case dealing with the arbitrator's authority, namely *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131. In this case the contract was governed by Ugandan laws. The defendant (Hi-Tech) submitted that clause 14.2 of their agreement was uncertain and thus void because it failed to address certain issues. These were: the seat of arbitration, the service of documents by which the arbitration was initiated, the number of arbitrators, the manner in which any dispute concerning the appointment of the arbitrator(s) was to be resolved, the identity of the arbitrator(s), and the rules that were to apply to the arbitration. The defendant also submitted that the clause was uncertain because it did not specify the law governing arbitration.

The judge, however, stated that the meaning of the clause was clear. But the question that was to be raised in the situation at the time was whether some of the matters submitted by Hi-Tech were not covered by clause 14.2 and the *Uganda Arbitration Act 2000*, and if they were not covered, were the omissions sufficiently serious for the clause to be considered void due to uncertainty as claimed by Hi-Tech? Consequently, after reviewing the provisions of the *Uganda*

⁹⁰ It should be noted that the plaintiff was seeking to apply s 44(c) of the *Commercial Arbitration Act 1984* (NSW) for the removal of the arbitrator appointed to arbitrate a dispute concerning an agreement between the parties.

⁹¹ In the same meaning, see a very important British case where Colman J (in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*) has reported the effect of his authorities by saying that '[t]he effect of the authorities is in my judgment as follows: ... (iv) When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question.' See *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 76. For more information, see Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2006*, vol XXX (Kluwer Law International, 2006) 410–15. It should be noted that this case was cited in a number of Australian cases. It is an important case that helps in understanding the implementation of foreign arbitral awards in general and in understanding this condition in particular.

Arbitration Act 2000 (Uganda) (*UAA*) regarding the definition of the arbitration agreement, and also with regard to the determination of the arbitral tribunal, Foster J found that the arbitration agreement was domestic arbitration according to the *UAA*. He also found that the appointment of the arbitrators was in accordance with that law. Therefore, he gave his judgment in favour of the arbitration clause in the original contract, as it was not ambiguous or uncertain. Additionally, the judge found that all that Hi-Tech submitted were omitted from clause 14.2 were covered in detail and adequately by the *UAA*, that the arbitrator/s were validly appointed pursuant to that Act, including the procedures followed, that the arbitration was within the scope of clause 14.2, and that clause 14.2 was not void due to uncertainty. Thus, Hi-Tech's submissions were rejected. This reveals several points, which are:

- i. Under this condition the judge has the right to interpret and evaluate the provisions of Ugandan law with respect to the point raised.
- ii. The judge always looks to match the arbitration clause with the law of the country where the arbitration was held (Uganda) in order to judge the correctness and clarity of the arbitration clause.
- iii. It is clear that any challenge based on this condition should be based on one of two things (or both): the first is uncertainty; the second is ambiguity in determining the resort to arbitration or the appointing of the arbitrators. Additionally, the challenge to the arbitration clause must be for violating the law of the country where the award was held or for violating the arbitration agreement concluded between the parties.⁹²

⁹² It should be noted that, according to Statham, this is the first decision that applies the new amendments (2010) to the *IAA*. For more information, see Kimberly Statham, 'Testing the Enforceability of an International Arbitration Award in Australia' [Law Society of NSW Young Lawyers] *Civil Litigation Committee Newsletter* No 2, 30 March 2011, 2. Therefore, Foster J in the Federal Court found that Ugandan law was the law of the arbitration and that the arbitral award was not void for uncertainty under that law and he rejected an argument that 'public policy' included an error of law by the tribunal. This shows that the court in this case upheld the international standard for public policy. Finally, Foster J confirms that there is no general discretion for the court to refuse to enforce a foreign award.

8. *The Award Must Have Become Binding*

As stipulated in Article III of the *Convention* which is Schedule 1 of the *IAA*, ‘Each contracting state shall recognise arbitral awards as binding and enforce them ...’ (as also stated in section 8(1) of the *IAA*).

The word ‘binding’ in these texts means that the arbitral award must be performed within the country as a mandatory rule on the parties to the conflict. Hence, these texts are concerned with the enforcement of valid foreign arbitral awards within the country as explained before. However, regarding the words ‘become binding’, the meaning of the word ‘binding’ must be established. That the award has become ‘binding’ is seen as a condition for implementation of a foreign arbitral award.

According to many Australian law texts, there seems to be some variation in meaning or goal for the word ‘binding’ when dealing with foreign arbitral awards (for example, in terms of what is included in the legislation of Australia and the United States). Article V(1)(e) of the *Convention* which states that a defence for those opposing implementation of a foreign arbitral award is that ‘[t]he 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’ is echoed in Article 36(1)(a)(v) of the *Model Law* which also states that ‘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’. These terms are also embodied in the *IAA* at section 8(5)(f) as well as appended in the Schedules to the Act (Schedule 1 being the *Convention*, and Schedule 2 being the *UNCITRAL Model Law*). Section 8(5)(f) states that ‘the award has not yet become binding on the parties to the arbitration agreement 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’.

However, there are different applications for the term ‘binding’, where in the United States,

[A]n arbitral award becomes binding when the arbitration panel has resolved all the issues before it, and no further recourse to another arbitration panel exists. This does not mean, however, that the parties must exhaust all remedies in the awarding country before the award is binding. Unlike the United States, England requires the award to be binding and final before a court will enforce it.⁹³

That condition is also mentioned in some European laws.⁹⁴ These differences in the interpretation may affect the implementation of foreign arbitral awards where each contracting state has its own interpretation for the ‘binding nature’ which may disrupt or at least delay the implementation process.

Thus, it could be said that the ‘binding’ in the Australian legal texts means that the foreign award must be final for both parties and is binding according to the law in the country where the award was issued. Section 39(2) of the *IAA* also supports this meaning where it states under ‘Matters to which court must have regard’ that ‘the court or authority must’ when considering exercising or exercising enforcement of a foreign arbitral award or refusing (under section 8 (public policy) or 16(1) (public policy) and other applicable sections detailed in section 39(1)), have regard to the objects of the Act and ‘the fact that (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes ... [and] (ii) awards are intended to provide certainty and finality.’

According to Pierre Lalive ‘most, if not all, arbitration regulations (in particular in the case of “institutional arbitration” [that is, arbitration issued by an arbitration centre such as the ICC]) say that the arbitration award is ‘final and binding’.⁹⁵ That facilitates the role of the court in this regard.

⁹³ See May Lu, ‘The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England’ (2006) 23(3) *Arizona Journal of International and Comparative Law* 747, 760.

⁹⁴ For more information, see European Commission for the Efficiency of Justice, *European Judicial Systems: Edition 2008 (Data 2006): Efficiency and Quality of Justice* (Council of Europe Publishing, 2008) 105; generally see Lu, above n 93, 760.

⁹⁵ See Pierre Lalive, ‘Absolute Finality of Arbitral Awards?’ in *Revista Internacional de Arbitragem e Conciliação-Año1-2008* (Associação Portuguesa de Arbitragem ed, 2009) 109 reproduced at ICCA

First of all, it is well known that the national courts have supervisory authority over arbitration proceedings from their inception until the decision.⁹⁶ In regard to giving judgment, laws provide several grounds to appeal the ruling to the competent courts. If there is a court challenge on the arbitration ruling before the courts (in the country where the arbitral award was issued), this award is still not final. Also, there are some situations or cases where the award is not final, such as where the foreign award has not been ratified by the authorities concerned in that country, where this certification means that all procedures complied with the law. Failure to demonstrate certification or ratification in the country of origin means the existence of uncertainty as to the finality of the award. Additionally, the meaning of ‘uncertainty’ may also refer to the existence of ambiguity or uncertainty in the award itself (in terms of its language) as a reason that makes the award not binding (for example, the lack of definitive phrasing regarding the contract, such as ‘may’ have to pay and so on). This can be linked with the case of *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, where the Supreme Court of Queensland considered the uncertainty as a matter of public policy defence and refused to implement the foreign award on that ground.⁹⁷

However, the *Convention* has made a significant provision which is that once an award becomes binding, it is enforceable (but no documents are specified as needed to be provided).⁹⁸ Therefore, this condition raises the questions about the two possibilities. First, an important question revolves around the role of the court in the arbitral award when it has not yet become final for any reason (lack of the necessary approvals, the period of appeal in the country where the award was made is still valid or if the validity is related to the law of that country ‘public

‘International Council for Commercial Arbitration’ (22 January 2010) <<http://www.arbitration-icca.org/articles.html>>.

⁹⁶ See Ball, above n 5, 11.

⁹⁷ This case will be explained as a public policy defence in the next chapter; however, this highlights the question about whether there may be any possibility that the Australian court would consider the uncertain award as not binding.

⁹⁸ However, such a request for ‘proof [of] the binding nature of the foreign award’ is a domestic requirement (for example, in the Kingdom) to ensure that the award that has been presented is valid and binding according to the law of the country where it was made. By contrast, the party who seeks to invoke or is seeking to ask the court to refuse implementation bears the burden to prove to demonstrate that the award is not binding or not yet final and not binding: art V(1)(e).

policy’). Second, it is important to know the attitude of the court if the arbitral award was null and void according to the law under which it was made. In both these instances (lack of finality in the country in which it was created and null and void where it was made), the award is not binding under that law. The answer to such questions must be addressed in the following points:

- i. The existence of formalities, as we saw in the first condition, is necessary to make sure that the award was issued in the context of a particular law. On the other hand, there is no time limitation for the enforcement of an award under the *Model Law*, but the award may be subject to domestic limitation periods.⁹⁹ Therefore, the estimate of the finality is at the Court’s discretion.¹⁰⁰ In *Hallen v Angledal*, Rolfe J refused to adjourn the proceedings according to section 8(8). This foreign award was issued in Sweden. The defendant claimed that the award was not final and that the NSW Supreme Court should adjourn the proceeding in pursuant to section 8 where ‘the proceedings be adjourned pursuant to section 8(8) [IAA] pending the final determination of the Swedish Court proceedings referred to in the affidavit of the second defendant sworn on 2 June 1999.’¹⁰¹ However, according to the arbitration agreement, the plaintiff claimed that the defendant did not prove that this Swedish court was a competent authority to consider this award. Rolfe J stated: ‘The absence of any such evidence is critical to the operation of sub-s.(8), as there must be an application to a competent authority before reliance can be placed on it.’ This shows the court’s discretion in evaluating the finality of the award. Additionally, it shows that if the award is not final in the country where it was made, the court will refuse or at least adjourn the proceedings until it becomes final. Finally, the party who seeks the enforcement of the award has the onus to prove the finality of that award in any way.

⁹⁹ See John Trone and Gabriel Moens, ‘The *International Arbitration Act 1974* (Cth) as a Foundation for International Commercial Arbitration in Australia’ (2007) 4 *Macquarie Journal of Business Law* 295, 311.

¹⁰⁰ See *Hallen v Angledal* [1999] NSWSC 552 (10 June 1999).

¹⁰¹ *Ibid.*

- ii. It is very clear that the Australian courts will refuse any award that is not final. For instance, in *Altain Khuder LLC v IMC Mining Inc* where the arbitration proceedings were administered by the Mongolian National Arbitration Centre at the Mongolian National Chamber of Commerce and Industry and the dispute had been resolved according to Mongolian law, the Supreme Court of Victoria recognised the award as final and binding under Mongolian law which in turn made it capable of being enforced in Victoria under the *Convention*.¹⁰² Also, in such a case there is no need for the court's discretionary power where, in fact, there is a clear and direct text in the *IAA* gives the court the power to refuse the enforcement if 'the arbitration agreement is not valid under the law ... of the country where the award was made.'¹⁰³

Most importantly, the award had been raised before Mongolian court and this court had exercised a civil law jurisdiction and then accepted that award because it is complied with the *Mongolian Civil Code*. As a result, the award is binding and final before the Victorian court. This shows the other possibility, that is, if the court finds that an award is not final or has been annulled or set aside, it would refuse to enforce it for that reason.¹⁰⁴

9. *Reciprocity*

This requirement has been cited in section 3(1) of the *IAA* which states: "‘Convention country’ means a country (other than Australia) that is a contracting state within the meaning of the Convention’. As discussed in Chapter 3, there are no reservations that have been made by Australia to the *Convention* under Article I(3) of the *Convention*. Thus, Australia will apply the *Convention*, on the basis of reciprocity. However, this must be read in accordance with the definition of the foreign award in sections 3(1) ('Interpretation') and 8(4). The latter is differentiates Convention and non-Convention member countries in regard to recognition when

¹⁰² See *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1.

¹⁰³ See *IAA* s 8(5)(b).

¹⁰⁴ Taking into account the possibility of the independence of the arbitration clause from the original contract.

under: ‘Recognition of foreign awards’ it states that a foreign arbitral award may be refused to be enforced ‘Where (a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and (b) the country in which the award was made is not, at that time, a Convention country’.

This requirement also has been cited in sections 7 and 8 of the *IAA* and in fact, it is a logical requirement, where it requires the application of any award issued in a signatory state to the convention, or where the foreign party is a resident in a state that had joined the *Convention*, and finally it applies the principle of reciprocity.¹⁰⁵ In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*, the Federal Court had stated that, ‘For the purposes of s.7(1)(d), Pan [the defendant] was at the time of the agreement ordinarily resident in a Convention country’.¹⁰⁶ This shows that the court directly referred to the law, but it did not show how this court checked the *Convention* status of the country.¹⁰⁷ (It should be noted that such information now is very easily available online and clearly published on the UN website).

In this regard, we cannot ignore what is stated in section 10 of the *IAA*, where it requires issuance of a certificate by the Secretary of the Foreign Affairs Department ‘stating that a country specified in the certificate is, or was at a time so specified, a Convention country’ with such a certificate being ‘receivable in any proceedings as prima facie evidence of that fact’. This may clarify the matter. This also indicates the *Convention* status at time of initial arbitration is a consideration. Additionally, Article XIV of the *Convention* states that, ‘[a] contracting State shall not be entitled to avail itself of the present Convention against other contracting States except to the extent that it is “itself” bound to apply the Convention.’ This supports the reciprocity for each contracting State.

¹⁰⁵ The principle of reciprocity exists also in the Memorandum, International Arbitration Amendment Bill 2009 (Cth) in regard to these requirements.

¹⁰⁶ See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.

¹⁰⁷ Similarly in the *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* [1998] FCA 558 judgment, where the judges had only mentioned the text of Article 7 without any explanations. Also, that is clear in some judgments, where the defendants were absent and the courts had dealt with these requirements without any request from any party (which we will deal with in the next few lines (above)).

Finally, it is important to mention that section 8(4)(b) determines the time of the issuance of the award is crucial in determining the applicability of a foreign country's accession to the *Convention* and in the determination of reciprocity.¹⁰⁸

In addition to these formal requirements, it is worth mentioning that the Australian Federal Court and the NSW Supreme Court undertake some defences by their own 'court's discretion' and enforced three cases in different courts where the defendants did not appear before the court at the enforcement application (namely, *Transpac (FCA)*, *China Sichuan Changhong Electric Co Ltd (NSWSC)*, and *Xiaodong Yang (NSWSC)*).¹⁰⁹ However, it is important to highlight some points in these cases, which are:

- i. The court had exercised its discretionary powers in the examination of the papers presented and stressed that there was no reason or any violation mentioned in section 8 of the *IAA*, which may have called for rejection of the implementation of the foreign award.

In *Transpac*, Hall J states:

11. There is no reason discernable from the material relied upon why this Court should not enforce the award.

12. By the operation of s.8(2) of the *International Arbitration Act* and also of s.33 of the *Commercial Arbitration Act* the plaintiff accordingly requires, and in the present circumstances is entitled to, leave of the Court to enforce the award. I now grant such leave.¹¹⁰

It is noted here that the court had expressly stipulated the terms of section 8 because it contains the most formal and substantive defences to reject or accept the implementation of the rule of foreign arbitration.

- ii. The courts, as demonstrated in the three cases cited, have agreed that the evidence submitted by the plaintiff satisfied the requirements for enforcement as a 'foreign award'

¹⁰⁸ This differs from what the Saudi Grievances Board has adopted, as we have seen previously; the time when the lawsuit is raised before the court for the implementation is checked against the *Convention* access status of the foreign State.

¹⁰⁹ See *China Sichuan Changhong Electric Co Ltd v CTA International Pty Ltd* [2009] FCA 397, *Transpac Capital Pte Limited v Buntoro* [2008] NSWSC 671 and *Xiaodong Yang v S&L Consulting Pty Ltd* [2008] NSWSC 1051.

¹¹⁰ *Transpac Capital PTE Limited v Buntoro* [2008] NSWSC 671, [11]–[12].

under the Act, which means that the court itself has confirmed the presence of all formal and substantive requirements to implement the foreign arbitral awards.

- iii. The last observation may relate to Australian court procedures, where the courts emphasise that the defendants had received a legal notice about the dates of court hearings, but they had not attended.¹¹¹ This is certainly a guarantee of the right of the parties (or their legal representatives) to attend and defend themselves.

4.2 Role of the Judge under International Conventions and National Laws in Considering Foreign Arbitral Awards

This section focuses on the role of the judge in the consideration of foreign arbitration, which includes the discussion of the case merits, the nature of the judge's judgment and the legal effect and force of that judgment. Thus, it is an advantage in some provisions to know the judge's authority to consider the case, the nature of what he/she will issue in the implementation of the rule of foreign arbitration, and also the legal effect of the judge's decision according to the domestic laws and international conventions.

4.2.1 Role of the Judge in the Consideration of Foreign Arbitral Awards

First of all, the judge is obliged to apply the national laws and also to maintain public policy in the country of the enforcement court. However, there is an urgent need for the judge to cooperate in the implementation of the provisions of foreign arbitral awards pursuant to the will of the parties, as far as is possible. This favours the principle of the 'law of the will', which governs actions in the field of international trade and also with respect to the nature of arbitration where the arbitration process depends on the will of the parties.

¹¹¹ Where Hammerschlag J in *Xiaodong Yang* states: 'The evidence establishes that the defendants are aware of today's motion. They were called this morning when the matter commenced before Bergin J and did not appear. Her Honour then referred the matter to me for disposition. The evidence also indicates that the defendants did not intend to appear today.' See *Xiaodong Yang v S&L Consulting Pty Ltd & Anor* [2008] NSWSC 1051 [7]–[8].

Therefore, it can be said that in the judge's role there is a natural obligation to respect the parties' will, as long as they do not violate national public policy. The judge's role shall be in accordance with the national laws and international conventions where the judge at the same time monitors public policy. This requires that the parties have to implement the arbitral award 'in a good faith'. This 'good faith' principle is a moral obligation where the parties have to follow a high degree of good conduct in their dealings. This principle supports the need for the obligations between the parties to be observed with respect for their will. Thus, it is clear that '[t]he aim of the *Convention* is to accord respect and recognition to the autonomy of the parties in the choice of arbitration'.¹¹² Moreover, the Australian courts have shown full respect to the parties' will. For example, the Federal Court of Australia in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* has stated that '[i]f the plaintiff chooses not to refer the dispute to arbitration, the claim could not otherwise be pursued'.¹¹³

Moreover, the judge must give his/her decision in such a manner as not to turn the advantages of arbitration into disadvantages. The parties have resorted to the arbitration because of its benefits, the most important of which is the reduced time taken to resolve the dispute. In order to achieve this goal, it is most important that the judge be more lenient in the application of formal requirements, because the general rule in the proceedings is the need to fulfil the purpose of the procedure itself, even if the parties did not fulfil that procedure.

Saudi Arabia: It is noted that all the international agreements (the *Arab*, *GCC*, and *New York* conventions) have emphasised the inadmissibility of considering the merits of the case.¹¹⁴

¹¹² See *Rares J in Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, [237].

¹¹³ See [1998] FCA 558 (at 9). For more information about the good faith in the *Shari'a* law, see Abdul-Halim Alqony, (Ḥusn Alnīh ū Tathyrh '*la Alslwk fy Alfqh Alislamī ū Alqanon Almdnī: Derash Moqarnh*') '[Good Faith and its Impact on Behavior in the Islamic Jurisprudence and Civil Law: A Comparative Study]' (PhD thesis, Faculty of Law, Menofia University, Egypt, 1997); also see Nudrat Majeed, 'Good Faith and Due Process: Lessons from the *Shari'a*' (2004) 20(1) *Arbitration International* 97

¹¹⁴ See *Riyadh Convention* art 32; *Arab Convention* art 2. *Convention on the Execution of the Delegations and Judicial Notifications in the Gulf Cooperation Council for Arab Gulf States* (1996) ('*GCC Convention*'); *New York Convention* art 3. All have obliged each contracting state to recognise any foreign arbitral award as binding under the conditions mentioned in the conventions, and they did not

Moreover, the decisions of the President of the Grievances Board (both former and current boards) have also confirmed this condition. This illustrates the extent of support for the provisions of foreign arbitral awards and the real intention to facilitate the recognition and implementation of such provisions.

In practice, there are several decisions from the Grievances Board where the judges have applied that condition (inadmissibility of considering the merits of the case except on grounds of public policy) by limiting the consideration to the fulfilment of the formal requirements. For example, *Ruling No 102 / T / 4 of 1424 AH 2004*¹¹⁵ where the text explicitly expresses this requirement where it states: ‘The Article No 32 of the *Riyadh Convention on Judicial Cooperation between the Arab States* has stated that [the role of the judge is] to verify whether the foreign provision has met all the formal conditions set forth in this Agreement, without any exposure to the subject matter of the case.’

Also, *Ruling No 187 / T / 4 of 1426 AH 2006*¹¹⁶ has explained the meaning of ‘not to dwell on the merits of the case’, where it limits ‘the merits’ to the basis of the contract between the parties to the conflict.¹¹⁷ In fact, the discussion of the merits of the case by the judge is prohibited, because it can be considered, in one way or another, as a reconsideration of the main case, that is of ‘the conflict’ itself.¹¹⁸ This indeed eliminates the usefulness of arbitration, where the parties resort to an arbitrator in order to avoid the judicial path but, if we say that the judge has the authority to consider the merits of the case, such a view may lead to a further review of

give the national court the jurisdiction of reconsidering the subject matter of the case. For more information, see the public policy chapter (Chapter 5 5.4 Judicial Role in Applying Public Policy) for an instance of where the national judge gave himself the authority to evaluate the subject matter of the case just to preserve the public policy and to determine whether there was a violation of the public policy.

¹¹⁵ This ruling, was issued by the Court of Personal Status in Kuwait, and supported by the Kuwaiti Court of Appeal. For more information, see the last chapter and also the beginning of this chapter.

¹¹⁶ This case, as explained before, was an implementation of foreign judgment issued by the Court of the Sultanate of Oman.

¹¹⁷ Additionally, there are many decisions support this rule which will be detailed in the next chapter (Chapter 5) which will be about the public policy, in addition to what was dealt with at the beginning of this chapter.

¹¹⁸ This was confirmed by *Ruling No 139 / T / 4 of 1416 AH 1996*.

the case. This is absolutely unacceptable because it makes the whole arbitration process useless and a waste of time and money.

Therefore, there are many provisions confirming this principle as a rule that cannot be exceeded. Thus, according to the analysis of some provisions in this regard, the ‘merits of the case’ means or may include the following:

- A. *Any Defences Related to the Original Contract:* hence, the judge is prevented from hearing any arguments on those defences, as all parties had their chance to express their views during proceedings before the arbitrators. However, there are few exceptional cases where the judge can consider some of these defences, that is, if the original contract (whole or in part) is contrary to the public policy. In Saudi Arabia public policy comprises ‘Islamic law’ or *Shari’a*.¹¹⁹
- B. *Any Substantive Defences* (Sub-Circuits referred to them as ‘substantive issues’) concerning the merits of the case, which are under the jurisdiction of the court that issued the verdict. Thus, any substantive defence raised before the arbitral tribunal (before the issuance of the arbitral award) cannot be raised before the court, as it is beyond the scope of its competence. Therefore, in the instance of a final foreign arbitral award, the court will not consider such defences (substantive defences), for to do otherwise would be to consider a matter that goes to the merits of the case. This was confirmed by *Ruling No 102 / T / 4 of 1424 AH 2004*. *Ruling No 208 / T / 2 of 1417 AH 1997* also confirmed that the court does not reconsider the case or discuss its merits, but has a limited role in monitoring the fulfilment of the formal conditions in any foreign award so as to accept its

¹¹⁹ A contract concluded between the parties is not subject to a hearing before the court in such cases except in cases where the original contract is based on a prohibited transaction. For example, if the original contract was a purchase of alcohol. In this instance, the court will refuse implementation as the arbitration award violates public policy in the Kingdom. This is shown in *Ruling No 189 / T / 4 of 1427 AH 2007* which has been expounded in the chapter with regard to public policy.

implementation in the territory of the Kingdom in accordance with the rules set by the decisions of the President of the Grievances Board.¹²⁰

This was also confirmed by the court *Ruling No 36 / T / 4 of 1425 AH 2005* where the court accepted the implementation of a foreign award without paying attention to the plaintiff's claims, where he was claiming that the arbitrator had erred in applying the proper law; that is, the arbitrator had applied the Egyptian law and did not apply the Saudi law. The court considers that a substantive defence, where the plaintiff was able to use it before the arbitral tribunal or before the court that was controlling the arbitration process. Hence, the court could not apply Article V(1)(d) of the *Convention* and consider that the arbitrators had exceeded their powers in the case or had made a mistake in the application of the law.

The reason here is that the parties did not specify a particular law applying to the dispute. Therefore, the arbitral tribunal applied the law of the country where it was held as the applicable law. It should be noted that the defendant claimed that the Saudi law was the applicable law because of the fact that the contract would be executed in Saudi Arabia, but the arbitral tribunal considers the application of the law of the country where the arbitration was held and the court did not object to that application.

- C. *The Discussion of the Performance* or implementation of the right that has been decided by the arbitral award is not a discussion of the merits of the case. This is approved by *Ruling No 143 / T / 2 of 1413 AH 1993*,¹²¹ in that the calling of witnesses to prove the fact

¹²⁰ Additionally, there are a number of rulings on the inadmissibility of the discussion of the merits, such as *Ruling No 235 / T / 2 of 1415 AH 1995*.

¹²¹ This case was an application for a foreign judgment raised by a wife against her ex-husband to get the nape of dowry after their divorce; the husband claimed that he paid that amount of money before the start of this case. Thus, such a defence is not related to the subject matter of the original case where he (the husband) tried to avoid the double implementation of that provision. [Note: The 'nape of the dowry' is an amount of money that is given to the wife by the husband (her dowry to legalise the marriage) in an agreement prior to marriage but she can ask to take some at the beginning of the marriage and the rest of it due (a) if the husband dies before her so she will take it from her husband's heritage beside her share in the inheritance or (b) in the event of divorce.]

that the defendant has fulfilled his obligation according to the arbitral award can not be considered as a discussion of the merits of the case, but is, in fact, considered a new case, as it depended on an independent incident that existed after the issuance of the award to avoid the repetition of the implementation of that foreign arbitral award.

Australia: The role of the judge in the consideration of foreign arbitral awards in the Federal Court of Australia and the State and Territory Supreme Courts can be done without any discussion of the merits of the disputes. This is consistent with the *Convention's* objective in making the arbitrator's decision final, with no appeal being permitted to a court on the merits. Under this principle 'the interdict of the discussion of the dispute merit' can be done through two steps:

1. The judge's role is exclusive to the examination of the fulfilment of the formal requirements and he/she cannot discuss the merits of the case. The Australian Federal Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* emphasised that:

The effect of an order is to render the Court incompetent to try the merits of the case. However, it may retain competence for matters relating to the arbitration, particularly where the arbitration is to take place within the geographical area over which the court has jurisdiction.¹²²

In the same way, Croft J in *Altain Khuder LLC v IMC Mining Inc* has expressly mentioned that where he addressed some US court judgments and supported that principle with some conditions, saying:

[I]t is not correct for an enforcing court under the *New York Convention* to go behind the holding on the merits on this aspect that has been made by the Arbitrator except to the extent that this is permitted by the Convention grounds during the second stage of the enforcement process ... [However] It does not follow that this principle requires or implies that the exercise by an arbitral tribunal of the power or jurisdiction to determine the extent of its own jurisdiction is necessarily unreviewable by the courts under certain circumstances; such as in enforcement proceedings under the *New York Convention*.¹²³

¹²² See *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* [1998] FCA 558, 37.

¹²³ See *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1.

This illustrates the extent of the authority of the judge in such cases where he/she cannot consider the merits of the dispute. As discussed earlier with respect to the formal requirements and the court's discretion, and as is noticeable in many cases, the judge's authority is to ensure the availability of such conditions and the need for these conditions to be applied in order to recognise and implement foreign arbitral awards.

2. The Australian judges can check just the legal reasons for the award to make sure there is no misconduct or errors of law in the award, as explained above, where the judge has reserved the right to set aside the arbitral award on the basis that the arbitral award was not inclusive of legal reasons.¹²⁴

4.2.2 Legal Nature of the Judge's Decision

It should be noted that some countries have made the implementation of the provisions of foreign arbitral awards before the execution judge.¹²⁵ As for Saudi Arabia and Australia, they consider the case for implementation of the provisions of foreign arbitral as a new stand-alone lawsuit.

Saudi Arabia: Article 20 of the *Saudi Arbitration System* provides that:

The judgment of the arbiters shall be enforceable when it becomes final by the order of the authority originally responsible for considering the dispute and this order shall be made on the request of any of the parties concerned after ascertaining that there is nothing that prevents its enforcement from the *Shari'a* point of view.

This implementation, like the situation in Australia, cannot be created except by a new case before an independent court (the competent court) because in the view of Article 21, 'The judgment passed by the arbiters after an order has been issued for its implementation according

¹²⁴ Hargrave J has stated that if the reasons given by the arbitrators for making the interim award are manifestly inadequate and if there is an error of law on the face of the interim award, the arbitrators in these cases have miscondacted the award and made an error in law. For more information, see *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402.

¹²⁵ For example, Article 33 in the *Code of Civil Procedure No 11 of 1992* (United Arab Emirates) gives the authority to consider the implementation of foreign awards to the execution judge.

to the foregoing article shall be as good as a verdict made by the authority which issued the implementation order.’ Thus, what was issued for the implementation is a judicial ruling issued by a judicial body. This also demonstrates that this judicial matter, in reality, is a court ruling, because everything that is issued by the judiciary in a particular dispute between parties and formed in accordance with the established rules for adjudication is a decision or ruling. This change in the text regarding ‘court order’ and ‘decision’ could cause some confusion, but the text has the same impact.

The differences are in the proceedings of the court, where normally everything issued by the judge is a ‘ruling’. There are so called ‘judicial orders’ and it is known that if the judge does not follow the issuance of these orders using the same procedures, he will never settle disputes by such orders. Additionally, ways to challenge ‘judicial orders’ differ from the appeal in the court judgments.¹²⁶

Finally, it should be noted that there is a ruling released by the Audit-Circuit where it changed the formulation of the verdict to be more mandatory, as stated in *Ruling No 74/ T / 4 of 1427 AH 2007*. However, it is not exactly or literally changing the Sub-Circuits’ provision to give legal force or the powerful texts for the enforcement, but the alteration will be in the Audit-Circuits’ provision ‘part’, which gives such rulings legal force. This shows the authority of the Audit-Circuit in the Grievances Board. On the other hand, it shows that the verdict of implementing or refusing foreign arbitral award should be issued complete as a regular judgment to end the conflict and also shows the extension of legal form stating its force, which can make it implemented as a national provision.¹²⁷

¹²⁶ For more information, see Edward Eid, ‘*Mwso’t Oṣol Elmoḥakmat Elmadnīh ū Al Ethbat w Altnfidh: Joza II: Nẓrīat Al Ehktṣas* [Encyclopedia of Civil Procedure, Evidence and Implementation, Volume II: Theory of Jurisdiction]’ (Ṣader Publishing, 1985) para 284; also see Ahmed Abu Al-Wafa, ‘*Nẓrīat Elahkam fy Qanon Elmura’at* [The Theory of the Provisions in the Procedure Law]’ (Dar Almatboat Aljame’iah, 2007) 31.

¹²⁷ See *Ruling No 74/ T / 4 of 1427 AH 2007* which was also stated in *Ruling No 152 / T / 4 of 1426 AH 2006*.

Australia: According to section 8(2) of the *IAA* (under ‘Recognition of foreign awards’), it is stated that ‘Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.’¹²⁸ This is expressly provided so that what comes from the court in the implementation of foreign arbitral award has the same legal force as a normal judicial ruling; thus, it should be implemented expeditiously, by force, if necessary. However, there is a unique enforcement problem in Australia under the *Convention*, where it is required that the award be enforced in two or more of Australian states or territories, because in such situations, the persons who intends to enforce the award may find themselves forced to file multiple parallel enforcement proceedings in the Supreme Court of the relevant state or territory and could not be presented before the Federal Court.¹²⁹

4.2.3 The Legal Effect of the Judge’s Decision

Initially, according to the above, it should be noted that the idea of challenging the arbitration ruling revolves around the test of the arbitration procedures in terms of the fulfilment of the formal requirements of the arbitral award, so the request for implementation of a foreign arbitral award is not challenging the verdict of the award itself, nor the reasons for it. Thus, the national judge’s task is to consider the fulfilment of the formal and substantive requirements and not to consider the merits of the case. It is natural that bringing the case before the competent court for implementation ends with one of two decisions, namely:

- A. Rejecting implementation by relying on any defence, whether formal or substantive means the inadmissibility of the application of the arbitral award within the territory or the state. This opens the possibility of appeal against the ruling of the competent court to a higher court.

¹²⁸ According to the *Explanatory Memorandum, International Arbitration Amendment Bill 2010* (Cth): ‘1. Item 5 of Schedule 1 of the Bill amends subsection 8(2) of the Act to remove reference to a foreign arbitral award being enforced in a state or territory court “as if the award had been made in that state or territory in accordance with the law of that state or territory”.’

¹²⁹ For more information, see Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge Press, 2011) 431.

B. Acceptance of implementation confers legal force on the rule of foreign arbitration and provides the possibility of its implementation within the territory or the state. This implementation of the rule of foreign arbitral award is equal in the legal force to the national decisions in terms of implementation and the possibility of the use of all legal methods of implementation, including coercive force. In fact, the foreign award became a national ruling by the issuance of the court provision for the implementation, so it is no longer foreign ruling. This is stipulated in the Saudi and also the Australian laws. Article 21 of the *Saudi Arbitration System* states that ‘the judgment passed by the arbiters after an order has been issued for its implementation according to the foregoing article shall be as good as a verdict made by the authority which issued the implementation order’; while Article III of the *Convention* (which is Schedule 1 to the *IAA*), stipulates:

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

It should be noted that if the court has accepted the implementation that does not mean, of course, the abolition of the right to overturn that ruling or the right to appeal before the highest court according to the national laws of both countries.

Therefore, it is obvious that when the court decides the invalidity of the arbitral award that does not mean the loss of the right of appeal to the higher court (Administrative Courts of Appeal in Saudi Arabia and the appeal court within Supreme Court or the full court of the Federal Court in Australia). After that, this verdict becomes final, either by the expiry of the veto or the appeal court supporting the provision of the first court by refusing to implement the foreign arbitration, in this case, the arbitration agreement becomes invalid and the parties to the arbitration have to resort to the competent court to submit the dispute or organise another arbitration agreement or use any other peaceful means to resolve their dispute.

It is worth noting the special case that exists when the arbitral award contains a part that is contrary to public policy; in this case, the final provision from the national court will apply the lawful part, and it will cancel, refuse to implement or ignore the unlawful part. Thus, the severability here confirms the invalidity of the unlawful part and rejects it for implementation with the lawful part, which was approved by the court in the final provision and is able to be implemented.

However, there is a very important and delicate issue, which is that of a situation where the arbitrator/s has exceeded his authority according to the arbitration clause or agreement, the court, as we saw, will apply the lawful part and refuse to implement the unlawful part (that is, the part where the arbitrator exceeded lawful authority). That brings up the question about the part rejected or cancelled and the possibility for the parties to go to the competent court or resort to any alternative dispute resolution to resolve that part. It is also important to know the legal power of the court provision in refusing to implement that part the 'exceeded' part in any other jurisdiction. Basically, if the parties did not conclude such conflicts or parts in their arbitration clause/agreement, that means these parts are not at issue between the parties or, if they are conflict areas, they did not intend to solve or end these issues at least in that arbitral award. However, in the event that they had intended to finalise all of the matters of conflict but they did not mention all of these conflicts in the arbitration clause/agreement for any reason, it would be important to establish the legal power of that award in regard to these parts and the legal power for the court judgment to refuse the part/s where the arbiter had exceeded his/her authority.

It should be noted that in Australia, according to Article V(1)(c) of the *Convention* and also section 8(5)(d) in the *IAA*, this defence (the arbitrator/s has exceeded the arbitration agreement) should be raised by one of the parties. Therefore, the court cannot raise it by itself. That means if no one objected on the arbitrator/s' exceeding the terms of authority in the arbitration clause

or agreement, the Australian court will apply the whole award while taking into account the rest of the conditions.¹³⁰

Accordingly, there is no legal power of such an award in regard to these parts unless the parties give it that power by applying this award peacefully. Therefore, the parties (in the case of refusing to implement the exceeded parts) can choose to go to the competent court or to resort to any other alternative dispute resolution to solve these parts and that depends on the fact that these issues were not legally resolved, as the arbitrator had no jurisdiction to rule on such issues. On the other hand, the court decision in refusing the exceeded parts has no power against any future case about these exceeded parts where the fact is that these parts have not yet been solved. In the event of the parties resorting to the competent court to establish a new case, or present the case (the exceeded part issue) before a new arbitrator/s or any other dispute resolution mechanism, such an arbitral award (just in the exceeded part) has no legal force. The new court or arbitrators can consider the old rule that the arbitrators exceeded their powers as a valuable ruling to help them to achieve justice but they are not obliged by that award.

In regard to the situation in Australia and in Saudi Arabia, if the parties did not agree about the exceeded parts (apart from if the judge by his authority refused to implement the exceeded part as a matter of public policy where the parties agreed about these exceeded parts in the arbitral award), the new jurisdiction can take that award as a presumption before any new jurisdiction as an acceptance by the parties for that award. In fact, such situations hardly occur, but it is still possible.

¹³⁰ In Saudi Arabia and according to the available rulings, there is no such case in that regard; however, by reviewing the Decision of the President of the Grievances Board No 116 of 1428 AH 2007, the situation is quite opposite where such defence is considered as a public policy matter (based on *Ruling No 115 / D / E / 15 of 1429 AH 2009*, (which considered all of these conditions in this decision as a public policy matters as we shall see in the next chapter), Thus, such a defence could be raised by the judge himself, which means the parties have to resolve these issues by any other means. This is still an assumption, relying on the ruling that makes all of the defences related to the public policy. Thus, there is a need to have a real case presented to determine the path of the court on such a critical point. More comparisons between the two systems will be applied in the Conclusion.

4.3 Permissibility of Challenging the Court Judgment

This section deals with the possibility of appeal, impact and powers of the verdict after the appeal. Thus, when the foreign arbitral award is either rejected or accepted by the competent court, this does not mean the end of the case. There is a kind of judicial review of or ‘challenge’ on the decisions of the competent court before a higher court. This section seeks to describe the nature of the appeal and show if it is formal or substantive. This will provide information that will help determine if the appeal ensures the integrity of the decision where it meets the litigation procedures and ensures justice, or involves the merits of the case to verify the application of the law.

The philosophy of arbitration, the secret of its existence and its goals are speed and confidentiality in resolving the conflict. But in order to achieve these goals, the judiciary’s role must be limited to validating the arbitral awards if it was proper and in accordance with statutory procedures. Thus, there is no need to go into the merits of the case and consider the subject matter again. Accordingly, the logical and proper way is that the role of the judge is just limited to validating the formal requirements.

Therefore, the Saudi and Australian laws ensure the possibility of an appeal from recognition or non-recognition on the arbitral award if refused. This, at first glance, gives the suggestion that this is an advantage. However, these laws have enabled the appeal on the arbitral award, with the possibility of appeal which would again prolong the dispute rather than facilitate the process of implementing the rule of foreign arbitration by ensuring that it conformed to the law. In this scenario, it can be said that the arbitration stage became one of the litigation stages.

In Saudi Arabia, for example and according to the process of litigation, recourse to the judiciary from the beginning is better than arbitration, because resorting to the judiciary places the parties before possibly two levels of litigation (as in the old *Grievances Board System* where there were the Commercial Sub-Circuits and then the Audit-Circuits as an appeal court), but resorting to arbitration necessarily would involve three levels, the first level being the arbitration, second the

Commercial Sub-Circuit and the third the Audit-Circuit. As for the new law for the Saudi Grievances Board,¹³¹ litigation before the court is running through three phases or levels, which can be summarised as: (a) the Administrative Courts, (b) the Administrative Courts of Appeal, and (c) the High Administrative Court as the highest degree or level of appeal in the Saudi Grievances Board. With these levels, arbitration becomes the fourth phase in the conflict, which may impede an important goal of resorting to arbitration (that goal being to secure a speedy resolution to conflict). Therefore, this section will argue the permissibility of challenging the ruling that has been issued regarding implementation or refusal to implement the rule of foreign arbitration.

Saudi Arabia: there is no **explicit** and direct text in the *Saudi Arbitration System* or its *Regulation* stipulating that an appeal on the ruling is permissible, where this law refers to the competent court for the consideration of the arbitral award in more than one article. Thus, the methods of appeal and the lawsuit are filed under the law governing such a court. In regard to Article 19 of the *Saudi Arbitration System 1982*, it is obvious that if the litigants, or any one of them, has objected to the arbitral award within the period provided, the original competent authority has to hear the dispute regarding the objection and decide to either reject the objection and issue the order of execution or to accept the objection and decide it.¹³²

This suggests that there is one degree of litigation, which means that the request for the implementation of foreign arbitral award is a new and independent case before the competent authority for it to rule on implementation. But it in fact does not stop at this limit, as ‘generally’ according to the new legislation governing the *Grievance Board System 1982* (Chapter III, which defines the jurisdiction of the courts in the Grievances Board) and according to the rules of proceedings before this court, the appeal on the judge’s ruling (whether in arbitration or an

¹³¹ *Implementation Mechanism of the Judiciary Law and the Board of Grievances Law 2007*, issued by Royal Decree No M / 78, 19/9/1428 AH 2007.

¹³² For more information about the Grievances Board role as an administrative court, see generally Abdulrahman Al Shalhoub, ‘*Alnczam Aldstori fy Almamlakah Al‘rabihi Als‘wdih: byn Ashari’a ū Alqanwn Almuqarn* [The Constitutional System in Saudi Arabia: Between the Sharia and the Comparative Law]’ (Safir Press, 2nd ed, 2005).

administrative case) is permissible and the appeal can be made before the higher courts. This practical and real problem reflects the situation where arbitration has become as an additional layer of litigation.

This is supported by the principles enunciated in the ‘Commercial Audit-Circuit in the Grievances Board: Guideline Principles and Case Law, from 1407 AH (1987) to 1419 AH (1999)’, where it stated under the principles established:

First: the Arbitration Proceedings before the Court: degrees of litigation and the procedures for arbitration cases (The appeal): the texts of the Saudi Arbitration System have given the jurisdiction of the consideration of foreign arbitration to the authority that is originally competent to hear the dispute to decide either reject or implement that award...

Thus, there has been a general statement ‘the competent authority to hear the dispute’ without specifying the degree of judicial standing, and then the competent authority hearing the case will apply its procedures. It is therefore not correct to say that the Sub-Circuit’s provision is final as a second degree after the arbitral tribunal (which is a first degree). This contradicts the procedural rules prescribed in considering cases before the Grievances Board.¹³³

It should be noted that the Audit-Circuits under the old system have the authority to carry out any amendment in the Sub-Circuits’ rulings and also have the right to modify the operation of the ruling itself as necessary to make it a mandatory provision. That was clear in the *Ruling No 152 / T / 4 of 1426 AH 2006* as explained above, where the ruling stated: ‘However, the fact that the operative ruling of the Sub-Circuit does not contain a mandatory phrase for the implementation; hence, the Audit-Circuit has amended the ruling [to make it operative] ... , then the amendment becomes a part of the ruling of the Sub-Circuit.’ This is a formal work rather than substantive, which only emphasises the existence of the mandatory wording of the provision. Additionally, it should be noted that the natural way of appeal is in accordance with the request of any party to the dispute, but the court in accordance with Decision of the Full

¹³³ This judgment was in *Ruling No 53 / T / 4 of 1415 AH 1995*.

Audit-Circuit No 21 of 16.11.1423 AH (2003)¹³⁴ decided by majority that any provision decided by the lack of jurisdiction shall not be final until considered by the competent Audit-Circuit in all cases.

This means that even though there is no request for an appeal, the case shall be sent to the Audit-Circuit to be heard because it is a serious defence where the court is deprived of the possibility of considering a case. This could be a guarantee of justice because it ensures that the rule of the Sub-Circuit was legally correct. This also is demonstrated by two decisions: first, *Ruling No 82 / T / 4 of 1425 AH 2005* and the second is *Ruling No 103 / T / 4 of 1426 AH 2006*. These aimed to ensure the validity of the provision because a ruling of non-jurisdiction avoids any consideration of the decision and would prevent any circuit from considering the case. But a question arises about the binding nature of the provision before the Audit-Circuit amendment. It could be said that the parties did not appeal the Sub-Circuit decision, so they must be satisfied.

As a result, they will apply that decision, but their knowledge of the limits of the jurisdiction of the court cannot prevent the application of justice and this course is an additional guarantee of justice. This proves that an appeal on the ruling of Sub-Circuits (Administrative Courts) is, according to the old or the new Grievances Board legislation, permitted, and there is no explicit text preventing that appeal, whether the ruling approves implementing the foreign arbitral award or rejects it. Furthermore, any party can appeal on the ruling for any other formal reason, such as the case memorandum lacking causes, the cessation of the case due to absence of party/parties, or where the case has been dismissed for any reason. This is so with regard to the regular methods of appeal. There are also issues related to the parties' right to resort to the extraordinary method of appeal, such as the presence of new evidence to challenge the court's decision in an action for the nullity, including the request for a retrial.

¹³⁴ In fact, this decision is not relying on a real case but it is a decision affirming a judicial principle. Such action comes in the form of resolutions issued by the Full Audit-Circuit. However, such decisions are very few and often come in the establishment of a new principle that has been taken in a particular case. However, the Audit-Circuit does not show at all the details of the case or the number of rulings, rather it just issues a decision confirming a particular principle.

Basically, the *Saudi Arbitration System 1983* did not allow or deny such a right in any clear and explicit text, so for clarification one must return to the general rules set forth in the *Grievances Board System 2007* and the *Rules of Pleadings and Proceedings before the Grievances Board* that had been issued in 1989. In fact, there is a new *Law of Procedure* that has not yet been formally adopted, but is still a draft law and not yet approved.¹³⁵

Therefore, it can be said that the appeal against the court provision as to the implementation or the rejection of foreign arbitral award is in principle permissible on one condition, which is that the appellant has to fulfil all of the appeal conditions, so that the appeal can be accepted. However, the special nature of the nullification must be taken into account where it means that the Court of Appeal is just determining the correctness of what happened at the trial and whether that trial was conducted fairly.¹³⁶ Also, the arbitration system as a whole must be supported by the judiciary and that can be done by ensuring that all the formalities have been met, and this supports the suggestion that arbitration should confer the status of accelerated implementation of a court ruling on the implementation of foreign arbitral award.

Based on the above, under the old *Grievances Board System* the Audit-Circuits (Administrative Court of Appeal in the current system) receive appeals on the provisions/rulings of Sub-Circuits (Administrative courts in the current system). As a result, there are some important principles issued by the Audit-Circuits on the provisions of arbitration. The most important of those principles talks about the legal nature of arbitration, where the Audit-Circuits consider the legal nature of arbitration as forming a special category of the judiciary and individuals can resort to it to resolve their disputes away from the procedures established by the state to facilitate the

¹³⁵ The old one is the *Law of Procedure before the Saudi Grievances Board*, issued by Resolution of Council of Ministers No 190 of 16/11/1409 AH 1989, *Umm Al-Qura Gazette* No 3266, 12/4/1409 AH 1989. The new legislation was issued after the completion of this thesis and is the *Saudi Grievances Board System Implementation Mechanism 2007*, issued by Royal Decree No M / 3, 1/22/1435 AH 25.11.2013.

¹³⁶ The Annulment in this regard is 'a judicial decision which sets aside or invalidates an arbitral award.' See Rana and Sanson, above n 72, 296.

litigation process, so this was a ‘special judiciary’ that goes ‘hand in hand’ with the ordinary courts.

However, this special judiciary cannot eliminate the authority of courts because they still have some authority over arbitration. It should be noted that this was contained in the *Commercial Audit-Circuits in the Saudi Grievances Board Guideline Principles and Case Law 1407 AH (1987) to 1419 AH (1999)*, where it is stated under the Arbitration Chapter in paragraph 3 that ‘*the existence of the arbitration clause*: requires the court not to consider the case.’¹³⁷

This binding nature of arbitration means that the Saudi court has changed what has been passed by Islamic jurisprudence, under which scholars believe that arbitration is just a contract; thus, it has contractual nature. Hence, it is binding as is any contract and the theory of contract law will be applied to it. However, the binding nature of this description ‘special judiciary’ is not clear, which may mean ‘it is not a real or [lacks] full judiciary nature’. Accordingly, the mandate of arbitration is also not clear where it raises the question about the applicable rules for arbitration, when there is a lack of a text that governs the arbitration process. It is obvious that the court will apply the general rules of the theory of contract or the general rules of the judiciary.

Australia: the situation differs from Saudi Arabia in accordance with the difference between the two judicial systems. As explained earlier (Chapter 2), the Federal Court of Australia and a Supreme Court of a State or Territory are the competent courts in considering the implementation of foreign arbitral awards.¹³⁸

¹³⁷ This view was stated in *Ruling No 143 / T / 4 of 1412 AH 1992*, which was mentioned in the principles enunciated in the *Commercial Audit-Circuit in the Grievances Board: Guideline Principles and Case Law from 1407 AH (1987) to 1419 AH (1999)*. The parties still have the right to go to the court to raise any claim against the arbitrator or any error on the procedures, even the annulment of the award after its issuance. But in the first stage if there is an arbitration clause/agreement, the court cannot consider this case if one of the parties claim to set aside or ask for the arbitration.

¹³⁸ Chapter 2 in this research (2.2.2 Competent Court in Australia) dealt with the Supreme Court of New South Wales as an example of these courts. It should be noted that most of the cases concerning the implementation of the provisions of foreign arbitration are brought before the supreme courts. For more information see, International Chamber of Commerce, *Country Answers: Australia* (Law as at 18 July 2008) ICC website, above n 87.

In fact, the Federal Court of Australia is a superior court. This may raise the question about the possible dual jurisdiction of the Federal Court when this court shares original jurisdiction with the Supreme Courts of the States and Territories in considering the application of foreign arbitral awards and also operates as an appellate court for the Supreme Courts in some cases under special leave. Accordingly, this situation requires an understanding of the jurisdiction of the Australian Federal Court, especially in relation to the provision of arbitration, and also in regard to the possibility of appeal on the decisions of these courts (that is, the Supreme Court and Federal Court) on the implementation of foreign arbitral awards.

To find out the possibility of appeal on a Supreme Court's ruling to the Federal Court, there has to be an explicit legal text that allows such appeal in these disputes or the appeal could not be granted. Thus, the text of the law to be applied (that is, the *IAA*) must contain a text that allows appeal from the single judge of the Supreme Court 'single judge' to the full court of the Federal Court (three judges); however, the *IAA* does not contain such a provision; therefore, the appeal on the Supreme Court's decisions to recognise or not recognise the foreign arbitral award to the Full Court of the Federal Court is not possible.¹³⁹ Thus, the appeal from the single judge of the NSW Supreme Court is to the full court of the Supreme Court (three judges) and similarly in the Federal Court from one judge to the full court (three judges).¹⁴⁰ It should be noted that there is a possibility under a special leave to appeal on a ruling of the full court of Supreme Court or the full court of Federal Court before the High Court of Australia.¹⁴¹

¹³⁹ So, it can be said that it is under the control of or at the will of the plaintiff to choose the suitable court to seek the implementation of the arbitration award. This could be determined by the location of the defendant but also according to the distribution of the defendant's funds within the country. But the option remains, however, with the plaintiff except in some cases where the subject of the conflict is beyond the jurisdiction of the Supreme Courts, or vice versa, as explained in Chapter 2.

¹⁴⁰ See *Federal Court of Australia Act 1976* (Cth) section 25 stated that it could be one or more judges.

¹⁴¹ See s 33 of the *Federal Court of Australia Act 1976* (Cth), and also see *Commonwealth of Australia Constitution Act* ('*Commonwealth Constitution*') s 73 'appellate jurisdiction of the High Court'.

4.3.1 The Possibility of Appeal on the Provisions for the Implementation of the Arbitral Award

Just like the situation in Saudi Arabia, there is no legal text in the *Convention* or *IAA* or even the *UNCITRAL Model Law* that prohibits or allows the appeal on the court's judgment on implementing or refusing a foreign arbitral award.¹⁴² Therefore, in such cases we have to resort to the court's law or to the procedural law to ascertain the possibility or permissibility of appeal against the court's decision.

Therefore, it is important to mention that the role of the full court of the Federal Court regarding the implementation of international arbitration as it accepts 'under special leave' the appeal on a decision of a single judge of the Federal Court.¹⁴³

On the other hand, in accordance with the law governing the courts an appeal is permitted where the Supreme Court's judgments (single judge) can be appealed before the Court of Appeal within the Supreme Court (most appeals are heard by three judges) and the Federal Court judgments can be appealed before the Full Court of the Federal Court.¹⁴⁴ Additionally, as stated above, under some circumstances the judgments of the appeal courts and the full court judgments can be appealed before the High Court of Australia.¹⁴⁵

This brings us back to the previous point with respect to Saudi Arabia, where the possibility of appeal to more than one level may lead to the loss of the advantages of arbitration and result in

¹⁴² However, *CAA 1984* (NSW) s 40(1)(b) formerly appears to have restricted the right of appeal where 'exclusion agreements' had been reached by arbitral parties regarding 'the right of appeal under section 38(2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.' That does not exist in the *IAA* or *New York Convention*. Note: This Act was repealed and replaced by the *CAA 2010* (NSW), wherein the appeal against the foreign award is mentioned in ss 34 and 34(A).

¹⁴³ *Federal Court of Australia Act 1976* (Cth) s 25(IAA). Also see Federal Court of Australia, *Appeals* ([last update] 18 August 2011) <<http://www.fedcourt.gov.au/litigants/appeals/appeals.html>>.

¹⁴⁴ For the appeal before the Federal Court, see section 25(IAA) of the *Federal Court of Australia Act 1976* (Cth). For more information, see the Federal Court of Australia website. And for the appeal before the Supreme Court of NSW, see section 101 of the *Supreme Court Act 1970* (NSW). Also see *the Court of Appeal* ([last update] 17 April, 2012) Supreme Court of NSW <http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_court_of_appeal.html>.

¹⁴⁵ *Court of Appeal* ([last updated] 17 April 2012) Supreme Court of NSW <http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_court_of_appeal.html>.

the parties having to repeat the proceedings before the courts; this could be a long process, in view of the number of levels of appeal. Therefore, linking the appeal to *one* level is more logical and more effective, where it can, on the one hand, be evaluated from the application of justice and the preservation of public policy in the country and, on the other hand, the advantages of arbitration be maintained, which attracts dealers in the trade area to the method of peaceful settlement of disputes, as the most important aspect is the speed in adjudicating the dispute. Such effects on the choice of arbitration need a special study to examine the effects on the investor's decision in choosing arbitration if he/she knows that there are many levels of litigation in the country.

4.4 Conclusion

4.4.1 Findings and Analysis

There are no major differences between the Saudi and Australian formal requirements. Most of the formal requirements are similar except for the fact that for implementation in Saudi Arabia an award must not violate *Shari'a*. The award shall not be inconsistent with any ruling issued by a national court or inconsistent with a case pending before a national court. The award shall not be issued against the Saudi government (that is, no recourse to arbitration is permitted without prior permission having been obtained). The dispute must not have been resolved by the conciliation before submitting to arbitration.

In Australia, there are only two requirements that are different from Saudi Arabia. These are: In Australia, there are only two requirements that are different from Saudi Arabia. These are: that the arbitration clause/agreement must be in a written document (which remains unclear in Saudi Arabia although it could be argued that since the Kingdom joined the *Convention*, it is a requirement although it may be open to proving the existence of a contract via witness testimony); and the composition of the arbitral authority or the arbitral procedure must be in

accordance with the agreement of the parties or, failing such agreement, then in accordance with the law of the country where the arbitration took place.

The only requirement that may be considered a problem to arbitration is, ‘The award shall not be issued against the Saudi government’. Without understanding the Saudi legal system and laws, it is easy to conclude that this provision discourages arbitration.

Error in applying the proper convention by the Grievances Board: In *Ruling No 100 / T/ 4 of 1425 AH 2005*, the court made an error in choosing to apply the *Riyadh Convention* instead of the *Arab Convention 1952*. Irrespective of the corrections made in *Ruling No 166 / T / 4 of 1428 AH 2008*, this could be a source of discouraging arbitration since any party that views the way that the system handles its cases might lose confidence, fearing that the evaluation of an application for implementation may be based on any preferred conventional laws, that may only suit to serve the aims of the courts and not arbitration and justice to the interested party. The same applies to errors made by the Fifth Sub Circuit leading to revocation in *Ruling No 192 / ES / 4 of 1429 AH 2009*. Hence, when the judge finds himself in front of several agreements he/she may be vulnerable to falling into such an error.

On the other hand, Australian judges did not fall into such a mistake where the *Convention* has become part of the *IAA* and this may also be attributed to the expertise and training for judges. Additionally, the Australian judges in several judgments have adopted a broad interpretation of the *Convention* in order to adapt to the requirements of international commercial arbitration, which may demonstrate the purpose of the existence of the arbitration.

There is also laxity in the provision of facts supporting rulings such as observed in *Ruling No 164 / T/ 4 of 1424 AH 2004* and *Ruling No 166 / T / 4 of 1428 AH 2008*. The rulings did not address or name the formal requirements, but rather expressed them in general terms.

Some of the rulings, however, show accuracy in the implementation of foreign arbitral awards by abiding by what is required under the formal requirements for foreign award implementation.

Examples are the decision supported by the Fourth Audit-Circuit in *Ruling No 231 / T / 4 of 1426 AH 2006*, *Ruling No 23 / T / 2 of 1413 AH 1993*, *Ruling No 192 / ES / 4 of 1429 AH 2009* and *Ruling No 71 / T / 2 of 1413 AH 1993*.

In Saudi Arabia, all formal aspects are also required to be abided by as seen in *Ruling No 103 / T / 4 of 1425 AH 2005*, *Ruling No 36 / T / 4 of 1425 AH 2005*, *Ruling No 152 / T / 4 of 1426 AH 2006* and *Ruling No 102 / T / 4 of 1424 AH 2004* also prove the application of formal requirements are provided for in the laws. They mention and specify the basis of the formal requirements, and are mandatory in both countries.

Concerning the role of the judge in international conventions and national laws in considering foreign arbitral awards, judge's decisions are based on legal grounds provided by domestic arbitration laws; that is Article 20 of the *Saudi Arbitration System*. The court system, however, affects the final decision. The Audit-Circuit, for example, can change the Sub-Circuits' provision to give it legal force.

Similarly, in Australia the judge's decisions are based on legal grounds provided by domestic arbitration laws. That is section 8(2) of the *IAA*. Decisions have the same legal force as normal court rulings. The foreign award is considered a national ruling by the issuance of the court's provision for the implementation in both countries. This is a provision of the respective countries' laws. In Saudi Arabia, it is Article 21 of the *Saudi Arbitration System*; in Australia, it is Article III of the *Convention* (which is Schedule 1 to the *IAA*).

It is also clear that in both countries, the judge's decision is final and has final legal force except for cases where the arbitrator exceeded his legal authority. Such exceeded parts are left for the parties to decide on whether to go for a new arbitration agreement including the exceeded part or to resort to a competent court to help resolve the matter. In both countries the judge has no power to discuss the merits of the case.

Another finding is that in Saudi Arabia, cases related to the lack of jurisdiction have to be sent to the Audit-Circuit to be examined even if there is no request for an appeal. There are no explicit texts allowing or prohibiting appeals on Sub-Circuit rulings, but evidence from certain rulings show that such appeals are allowed. This can be considered disadvantageous to arbitration in Saudi Arabia; however, it could be said that such procedure is to protect legitimacy in the country in terms of making sure that the court had no jurisdiction. Though, if rulings on cases are not published and there are no references to previous cases to make new rulings, any foreigner would not know if such courts allow appeals. If this material were to be made clear to anybody who wishes to resort to arbitration, it would be far easier for such person to consider arbitration in Saudi Arabia.

The Saudi legal structure could also be another disadvantage to arbitration and could be the reason why some researchers and professionals consider Saudi Arabia as hostile to arbitration. It has the Court of Appeal which has to review the rulings of Sub-Circuits irrespective of the presence of an appeal. This slows down the arbitration process.

In Australia, the *IAA* does not contain any explicit legal text that allows appeal on arbitration rulings from a Supreme Court to a Federal Court and similarly from a Federal Court to the full Federal Court. Appeals are made from the Supreme Court single judge to Supreme Court full court with three judges. The same applies to the federal court's appeal system. Appeals from both full courts can only be submitted to the High Court of Australia. This shows the match between the Saudi and Australian judicial systems in this point where both arbitration laws did not mention the possibility of Appeal; however, this depends on the foundations and principles that underlie the judicial system in the two countries.

4.4.2 Applying the Three Criteria

Efficiency of the conditions requires examining that whether these conditions ensure the purpose for which arbitration is sought or discourage the arbitration. Therefore, the law and

more positive role of the national court that provide more facilities for arbitration and supports the implementation is considered more efficient.

Justice in this analysis means ‘assessing whether the law provided equal rights to the parties in the litigation proceedings’; it also means that it is not fair ‘in the arbitration’ for the subject matter of the case to be considered by the national judge who is making the decision regarding the recognition and enforcement of the foreign arbitral award.

In Saudi Arabia: laws guiding the implementation of foreign awards and the legal structure of the Saudi’s judiciary are factors that have affected efficiency where the lack of explicit texts allowing or prohibiting appeals on Sub-Circuit rulings is a draw-back in the conditions used to recognise and implement foreign arbitral awards, and the arbitration system. Additionally, lack of explicit texts that specify documents (that is, the documents required to prove the reciprocity principle) affects efficiency based on ideological diversity. Moreover, not considering writing as a condition for arbitration or arbitration agreement may be seen as an advantage that increases the effectiveness of the judicial role as it is possible that the Saudi judge will accept arbitration in any form whatsoever. However, the existence of the arbitration clause or arbitration agreement in writing is, in some cases, essential as the judge may be forced to read and examine the clause/agreement to prove the existence of the arbitration, to find out the limits and the powers of the arbitral tribunal or to examine the extent of the arbitral award’s conformity with public policy, as we shall see in the next chapter (Chapter 5). Moreover, the willingness to use any regional convention to which the Kingdom is signatory rather than the optimally relevant convention to which it became signatory in 1994 (the *New York Convention*) or the *Arab Convention 1952*, however, is an example of the Sub-Circuits errors in making decisions.

On the other hand, a reform of the Saudi judicial system could focus on how to eliminate case reviews or on how to improve the Sub-Circuit’s competency in decisions concerning arbitration. The Audit-Circuit Court has to review Sub-Circuit decisions which slows down arbitration (due

to the number of processing times, treatment by the lower court), and incompetency of the judges and court staff all affect the efficiency of the system in handling arbitration cases.

The time taken to handle the cases, the fact that decisions have to be reviewed in Audit-Circuit courts, and the number of court levels that the case has to go through are all sources of inefficiency.

However, justice is served irrespective of the time taken and the number of courts it is subjected to. There is also evidence that in all cases, societal values are maintained. Most Sub-Circuits in their decisions consider the violation of *Shari'a* laws. The Audit Courts in their rulings ensure justice and the maintenance of societal values. Finally, there is laxity in provision of facts supporting rulings (which can serve to expedite rulings). All these show that there is a focus on maintaining societal values and ensuring justice.

In Australia, there are very few issues affecting the efficiency of the laws in this regard. The conditions are simpler and fewer compared to those of Saudi Arabia.

It is evident that there is no explicit legal text in the *IAA* that allows appeal of arbitration rulings from Supreme and Federal courts to full courts. Such absence of the legal text affects efficiency based on ideological diversity. The appeal process, however, could discourage resort to arbitration, because of the time taken. This affects efficiency based on the time taken to complete the process of arbitration. On the other hand, the judge's discretion in deciding what public policy is, is both advantageous and disadvantageous. It encourages arbitration, for justice is observed (the judges ensure justice in handling cases), but it could discourage arbitration because the scope of public policy is not defined. Justice is served, however, irrespective of the time taken and it is evident that in all cases, societal values are maintained.

4.4.3 Discussion

There are multiple decisions and conventions that govern the implementation of the provision of arbitration in the Saudi Arabia, in contrast to Australia, where the *IAA* contains the most

important international conventions and covers nearly all of the arbitration provisions as well as having precedents as a common law jurisdiction that are regularly published and readily available for perusal by judges. Also with respect to the requirement for written documentation, in Australia this is expressed explicitly, but in Saudi Arabia this condition has not been formally confirmed, because if there is no written agreement, the courts can apply the principles of *Shari'a* where the existence of arbitration is accepted by all methods of proof not just by the existence of a 'written document'. However, the absence of a 'written agreement' may violate the texts of the *Saudi Arbitration System* in general and the *Convention* as explained earlier.

There are many similarities in these formal conditions between the two countries but with some differences in application according to some instances, such as requiring proof of reciprocity, where the Australian and Saudi courts considered the accession to the *Convention* as sufficient reason for the existence of reciprocity. However, the Saudi Grievances Board went further than that because certain provisions of national laws (in the foreign country) may be present that demonstrate the possibility of applying the rule issued by any Saudi courts in that country (as stated in the Saudi Grievances Board ruling regarding to a ruling issued in the United Kingdom). Therefore, it can be said that on the practical side many decisions have been issued and an examination of them helps elucidate the facts. In Australia, there is no judgment about an award that has been issued in a non-signatory state; indeed most of the judgments that have been presented for implementation in Australia have been issued in a *New York Convention* signatory state.

On the other hand, the judge's discretion is very important aspect with regard to the implementation of arbitral awards in Australia. The authority of the judge is very broad and flexible in the assessment of defences and can even create (by interpretation) some conditions not stated in the legal text; but, it can be accounted as a public policy matter and thus required to be maintained by the Australian courts that an arbitral award is to be accepted wherever at all possible. Finally, the legal nature of arbitration has an impact on the work of the judge, and it

was clear that arbitration has a mandatory nature in many of the Australian rulings. But the Saudi Grievances Board's rulings did not address the degree to which arbitral awards are mandatory.

Saudi Arabia: International conventions and national laws have provisions that guide the implementation of foreign arbitration in each country. These provisions are the formal and substantive requirements that have to be made available by the judges. The role of the judge is to ensure that the formal and substantive requirements of any foreign arbitration award are met; however, this is affected by several factors and this affects the efficiency of the laws. In Saudi Arabia, laws guiding the implementation of foreign awards and the legal structure of the Kingdom's judiciary are factors that have affected efficiency.

The relationship of the Saudi Grievances Board's circuits (Administrative Courts (Sub-Circuits) with the Courts of Appeal (Audit-Circuits)) affects the application of the formal and substantive requirements as provided by the national laws and the international conventions. The Audit-Circuits are superior to the Sub-Circuits, yet their ruling is not binding on the Sub-Circuits except under specific conditions outlined in the discussion above. The Sub-Circuits are free to choose their or the Audit-Court's opinion if the rule of the Audit-Circuit's provision is based on objective reason/s or the jurisprudence, and the Audit-Circuit can directly take up a case if they are not convinced by the Sub-Circuit's point of view. It means that decisions by Sub-Circuits can be overturned irrespective of their freedom to make their own judgment. This affects the efficiency of the laws guiding implementation of foreign arbitration since it reduces the speed of resolving the disputes and further complicates the process of solving disputes through arbitration. This militates against the reasons for resolving disputes through arbitration. If the degree of complexity of the process increases and the time likewise rises, resolution of disputes would just have 'easily' and 'swiftly' been done through the courts directly.

The principle of reciprocity is also another provision that reduces the efficiency of the laws. The courts are allowed to determine whether the principle of reciprocity should be applied; and there

are no specific definitions of what documents should be submitted to prove the reciprocity. From the above discussion, Saudi Arabian judges have refused to enforce some foreign provisions based on the lack of proof of the reciprocity, which may be accounted as unfair to those seeking to prove the existence of reciprocity to their courts. Implementation of some arbitral awards to those who seek to prove reciprocity has been denied on the basis of the type of proofs they provide, yet if the right documents needed to prove reciprocity had been specified, there would have been no issue, but that lack of specificity in the governing legislation is an obstacle to efficiency in this regard, and the application is rejected on that basis that 'the principle of reciprocity could not be demonstrated'. Such is the case of *Ruling No 102 / T / 4 of 1429 AH 2009* and *Ruling No 97 / T / 3 of 1411 AH 1991* as explained. However, in this regard it is important to mention that the search in regard to condition of reciprocity before the Saudi courts will be based on the time of the case is brought before the Saudi courts and not the time of the issuance of the arbitral award. This could be counted as a support to the efficiency of arbitration law. This is approved in *Ruling No 102 / T / 4 in 1429 AH 2009*.

There is also a problem in the condition dealing with disputes that have been solved by conciliation before being submitted for arbitration. Indeed, if there is conciliation, there should not be any arbitration, but consideration should be given to cases where one party does not honour the agreement. There are no specific rules guiding judges on how to deal with such cases, and one of the cases may have been unfairly judged (*Ruling No 187 / T / 4 of 1426 AH 2006*). Additionally, in this Ruling the process of solving the problem became longer, as it does in such instances. The long procedures in this case (starting with the dates for suing and then the cancellation of the case and then opening the case again) raise questions about court efficiency, the lack of which in turn inevitably affects the course of justice. It should be noted that it is difficult in most cases to know the time that was taken to decide the case. This is due to the style of presentation of the cases in the Grievances Board. However, in this case (*Ruling No 187 / T / 4 of 1426 AH 2006*) the ruling of the Sub-Circuit was sent to the Audit-Circuit in 26/05/1426 AH (03/ 07/ 2005) and it has been considered in 15/08/1426 AH (19/ 09/ 2005).

Efficiency is also determined by the judge's action in dealing with cases, specifically if the judge considers the merits of the case of arbitration award or not. In Saudi Arabia, it is stated clearly that 'all the international agreements (the Arab, Gulf [GCC] and the *Convention*) have emphasised the inadmissibility of considering the merits of the case.' The inadmissibility is confirmed by both the older and the more recent decisions of the President of the Grievances Board. By not considering the merits of the case, the judges are encouraging arbitration, otherwise solving of disputes through arbitration would be the same as solving them in the courts following the normal procedures of the court rendering arbitration meaningless.

There is a condition that allows an appeal on the arbitration award if refused with a possibility of a second appeal (at more than one level). This condition could be a setback to the efficiency of the laws of foreign arbitration. By allowing parties to appeal and appeal again, the process of resolving the dispute is prolonged rather than dealt with once and for all.

The safeguard of the principle of a fair trial within a reasonable time could improve the efficiency of the judiciary system. This could be done by improving the ability of the court to react promptly and to make an appropriate judgment which can be a determining factor in the efficiency of the enforcement in a just and reasonable time.

Therefore, the appeal should be narrower in arbitration disputes than in other contexts because the dispute has already gone through one stage of resolution. This appeal is permissible in both Saudi Arabia and Australia, but its negative effects can be felt more in the Saudi Arabia than in Australia because of the Saudi legal structure. Saudi Arabia had (according to the old system of the Saudi Grievances Board) many degrees of litigation, where the arbitration is the first step of solving the dispute and the ability of appeal before the competent court (the Sub-Circuits) and then again later to the Audit-Circuits which may then return the case to the Sub-Circuits if does not agree with the Sub-Circuits provision; the parties still have the right to appeal again to the Audit-Circuit, so 'in some cases' the parties may face nearly five levels of appeal. However, in the new system of the Grievances Board the Saudi lawmaker tried to cover this legal loophole.

This new system has decided on three degrees of litigation which are: the Administrative Courts as the first, the Administrative Courts of Appeals as the second and the High Administrative Court as the highest degree. Thus, if the stage of arbitration is taken into account with these three degrees of litigation, that makes solving the problem through four levels. Because of this, opting for litigation can be considered better than arbitration. If a foreign arbitral award is refused enforcement and a party (defendant) appeals and appeals again, the process of solving the dispute can be prolonged which affect the efficiency of the arbitration process.

As a result of these levels, the Sub-Circuits have refused some provision where the Audit-Circuits apply them. This is due to the lack of training of judges for this type of issue where some judges consider that any breach of any legal Islamic rule is contrary to public policy, even if the offence is not according to an explicit text or breaching of an Islamic principle, as explained earlier.

This leads one to wonder about accuracy as an element of *efficiency*. The probability of issuing an accurate judgment by the court of first instance (Sub-Circuit in Saudi Arabia and Supreme courts and Federal Court in Australia) is very high in Australia. Thus, based on the judgments that have been used in this chapter, it can be said that generally the Australian courts are more accurate because there have not been much judgments reversed by higher courts. This also may be due to the fact that the Australian courts follow the provisions of the High Court which provide stability in the judicial principles and provisions. On the other hand, most of the Saudi courts' judgments (Sub-Circuits) were overturned by the Audit-Circuit as previously explained.

This shows the need for the Grievances Board to express more interest in training judges. More importantly, with the new structure of the Grievances Board, it is suggested that the Saudi lawmaker give the authority for the implementation of any foreign arbitral award directly to the Administrative Court of Appeal (the Audit-Circuits in the old law) to ensure greater efficiency by applying the proper provision and reducing the number of appeals to be a single process

from the Administrative Court of Appeal to the High Administrative Court. This will encourage the resort to arbitration and contribute to efficiency of the law.

Furthermore, there is no case before the courts of Saudi Arabia on the defence that the arbitrator/s has exceeded their powers according to the arbitration clause or arbitration agreement or misconduct of the application of the law. This compares with the situation in Australia, it is clear that based on *Ruling No 115 / D / E / 15 of 1429 AH 2009* (which was detailed earlier), all the conditions are within the public policy defence; thus, the judges themselves can raise the defence that 'the arbitrator/s has exceeded [their] powers' as a public policy matter. By contrast, in Australia, the law and the cases settled regarding that matter have shown that this defence must be raised by one of the parties or the court will apply or refuse the whole award. This is due to the adversarial system in Australia. So there is no such power for the Australian judge which makes his/her job easier, whereas the Saudi judge has greater obligation to check such a defence.

In Saudi Arabia, therefore, the level of effectiveness of the law is reduced due to some few conditions (such as the award shall not be issued against the Saudi government (unless prior permission to resort to arbitration has been obtained)) while a large number of conditions positively support the implementation of foreign arbitration hence efficiency (for example, the court's power should not exceed the merits of the case). Therefore, it could be said that the efficiency of the Saudi law regarding the implementation of foreign arbitral awards is low compared to Australia, as we shall see below.

Saudi Arabia's judicial jurisdiction defence is superior to other defences before the courts. This is as provided by *Ruling No 49 / T / 3 of 1418 AH 1998* where the Audit-Circuit advised the judge of the Sub-Circuit to begin with the judicial jurisdiction defence before any defence (that is, the lack of jurisdiction) as an essential and logical defence. There is no clear unfairness portrayed in this provision, but this does not mean that it will not be unfair in specific cases. Almost all the rulings by the judges are fair according to the explanations given as to why the

final rulings are accepted. For example, *Ruling No 273 / T / 1 of 1411 AH 1991* shows that violation of procedures is unacceptable and so considered against public policy. Another example is *Ruling No 231 / T / 4 of 1426 AH 2006*, where the original documents were required, but only a copy of the original award were presented.

A few Saudi cases have raised some questions about the equal rights of both parties. One instance is *Ruling No 100 / T / 4 of 1425 AH 2005*, where the Fourth Circuit Court did not provide any analysis of the use of Articles 30(b) and 34(c) of the *Riyadh Convention*. The arbitral award was issued in Egypt, which is an Arab state but is not a signatory to *Riyadh Convention*. The Saudi court made an error in considering such provisions from a state that was not a signatory to the convention. The same error occurred in *Ruling No 137 / T / 4 of 1427 AH 2007* where Egypt was considered a signatory to the *Riyadh Convention* while it was not clear whether it was. It could be said that parties who may not get equal rights in such cases are the defendants where the court did not apply the proper convention which may affect their rights.

The Saudi courts' inability to define and deal with reciprocity cases in a simple way is also another issue that may contribute to inefficiency. When the one seeking foreign arbitral implementation has been given the duty to prove reciprocity, he/she should be well informed of what the courts require to prove the reciprocity (the requested documents). This is not done by the Saudi law or by the courts; instead, the party who seeks to implement the foreign arbitral award is left to resort to the general rules of evidence and proof. This may be accounted as unfair since some of them are not accepted on the basis that they do not prove any reciprocity. *Ruling No 102 / T / 4 of 1429 AH 2009* involved an award where the party relied on the general rules of evidence and proof, and the Twentieth Sub-Circuit refused the implementation on the basis that there was no legal or practical provisions. This ruling was overturned by the Audit-Circuit and the proofs submitted accepted. The Audit-Circuit stated that the *Saudi Arbitration System* did not require specific documents to prove the reciprocity principle; thus, it is fair to

accept any documents that show the reciprocity. However, the existence of the reservation of reciprocity in the absence of a detailed legal text may contribute to unfairness.

Inefficiency does not always mean injustice. There may be some inefficient conditions that still lead to justice. However, ambiguity in the text or conditions imposed by the court without legal basis may increase *uncertainty* about the legal requirements in the implementation of foreign awards, which may involve injustice to the affected party. Yet in another ruling, *Ruling No 97 / T / 3 of 1411 AH 1991*, implementation was refused based on the absence of proof of reciprocity. The obvious question here is about where to implement the arbitration award in the case of refusal of both countries on the basis of reciprocity, where this refusal has nothing to do with the arbitration award, but just a rule that governs the judicial work.

Ruling No 187 / T / 4 of 1426 AH 2006 may reveal some injustice because the plaintiff was supposed to be heard in a court based on the complexities of the case but was not. A single unmet requirement led to a judgment that can be considered unfair. Thus, the plaintiff tried to solve the dispute through legal means, but did not succeed. The first step was raising the issue in a Fifth Sub-Circuit court where the case was cancelled due to the absence of the defendant's lawyers. Then the parties resorted to conciliation outside the court but the defendant failed to keep the commitments agreed under the conciliation. The court refused to implement the initial award based on the existence of the conciliation. This may be right according to the law but it is hard to say that is fair. Among all the cases, there are no cases where the subject matter was considered. This guarantees the effectiveness of preserving the rights of all parties by respecting their will when they resort to arbitration and ensures the application of the law.

In Australia, there are very few issues affecting the efficiency of the laws in this regard. The conditions are simpler and fewer compared to those of Saudi Arabia. There are nine conditions, all of which guide the judges in the implementation of foreign arbitral award and almost all of them have shown how effective they can be in implementing foreign arbitral awards. From the discussion, there are very few or no rulings that can be considered biased or discouraging

arbitration. Some that could even discourage arbitration have been dealt with in a manner that still encourages the use of arbitration instead of the normal judicial procedures of settling disputes. Some of the issues are: the issue of the principle of reciprocity and consideration of merits of a case.

When the merits of a case are considered, the value and meaning of arbitration is lost and this can discourage people from going for arbitration as a way to solve their disputes. Australia had a case (*LKT v Chun*) where a defendant claimed that the arbitrator had exceeded the powers he/she was given by determining the joint and several liabilities. The judge read and evaluated the arbitration agreement and concluded that the arbitrator made no mistake and was acting according to the provisions of the agreement (specifically clause 11.1 of the agreement). The judge's analysis may have been considered as going into the merits of the case, but considering the defendant's claims, the only way to determine the arbitrator's authority was by evaluating the arbitration agreement or clause. This could mean that the Australian courts have adopted a liberal attitude in interpreting arbitration agreements to determine the authority of the arbitrator/s, where in this case the judge went deep into the conflict and discussed the clauses of the agreement. It may also indicate that Australian courts are dealing with the defence 'the arbitrator has exceeded his authority' with more powers than any other formal requirement by considering the matter of the dispute or by considering the arbitration agreement/clause to determine the powers of the judge. Hence, it could be affirmed that the Australian judges apply arbitration in a way that reaffirms the will of the parties to the disputes.

The principle of reciprocity is also a problem in Australia since there are no defined conditions that guide its application. Determination of reciprocity is left to the Australian courts which, according to the case presented above, have determined that 'to the satisfaction of the court' delineates the meaning of this principle. Additionally, there are no specified documents that should prove reciprocity or clear requirements stated by the Australian courts as requirements of proof of reciprocity.

The court, however, dealt with the issue in a simple way that encourages arbitration. The Saudi process in this regard does not seem as favourable to arbitration as there the courts seem to have specific requirements for proof of reciprocity, leave the burden of proof to the plaintiff and do not make clear the requirements to the plaintiff. As a result, one would be more likely to go for arbitration in Australia rather than Saudi Arabia if an award could be enforceable in both countries.

Additionally, in Australia (as mentioned in Chapter 2), the courts that have jurisdiction over the enforcement of foreign arbitral awards are the state Supreme Courts and the Federal Court. This, as indicated above, allows foreign arbitral award enforcement cases to be appealed. The Supreme Court judgments can be appealed in the Appeal Court (three judges), the Federal Court judgments can be appealed in the Full Court (three judges) and in some cases, the Appeal Court and the Full Court judgments can be appealed in the High Court of Australia by special leave but this is rare and exists where a claim should involve a constitutional issue or on deciding issue of major public importance or involve questions of law that have been decided in inconsistent ways by two or more lower courts. Decisions made by Australian courts can be appealed. This makes the process of solving disputes through arbitration long just as is the case of Saudi Arabia. However, in Australia (as a common law jurisdiction) courts must follow precedents set by superior courts in their hierarchy and it is rare in arbitration cases to have special leave to be considered before the High Court, and as stated earlier it is also rare that decisions are overturned by the appellate courts, which tends to indicate a degree of accuracy and reliability in the initial ruling which could tend towards greater efficiency. This is made possible by the existence of precedents that are published and readily available to judges.

The difference may also be in the levels where Saudi Arabia may have five (under the old law) if an appeal is made twice while Australia may have four if an appeal is made twice (and in both instances considering arbitration as a separate level). Australia has the two courts (that is Supreme Courts at state and territory level and Federal Court at national level, each containing

its own appeal courts). Here arbitration is level one, first re-examination by court creates a new level, and the appeal within the courts (that is, within the Supreme Courts and the Federal Court) and the possibility to appeal to the High Court creates other levels. Saudi Arabia has two court levels both of which have jurisdictions on foreign awards, but one has to audit the other's decisions, that is, the Sub-Circuits' verdicts have to be audited by the Audit-Circuits making it two levels plus the arbitration, making it three levels. First and second appeals add the levels to five. The most important characteristic of arbitration is the speed in adjudicating the dispute, so with these kinds of procedures, such a characteristic may be lost.

Australia has fewer and simpler conditions compared to the Saudi Arabian conditions (plus the judge's discretion, which is very important factor). Saudi Arabian courts give the same treatment to foreign arbitral awards and foreign judgments; using the same principles may affect the process of implementing the provisions of arbitration because of the difference between the two provisions, which shows the need for a separate international arbitration system to implement such awards.

There are no cases where equal rights are not observed. All the cases mentioned in this chapter maintain the parties' rights. There is a case where a defendant argued that the arbitrator had exceeded his/her power in deciding the liabilities of the case (*LKT v Chun* [2004] NSWSC 820). The judges had to go back to the conditions of the agreement to determine the truth. This defendant may have been arguing in this manner with the thought that the judges were not supposed to consider the merits of the case, which makes him or her correct, but wrong considering the reason why the courts exist and why the arbitration implementation was taken to court. There was no other way for the judges to determine the role and power of the arbitrator, except to analyse the provisions of the arbitration agreement or the arbitration clause. Justice was served through that. It clearly shows what the Australian judges focus on.

Another case that shows what the Australian judges focus on is *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, where an arbitration agreement by an act of

signing was not considered to be valid, (nor would the dispatch or receipt of a letter or telegram if unilateral have been sufficient) but an exchange of letters, telegrams and emails (as in this case) made both contract and arbitral clause valid (at [149]–[151] especially [151] (Alsop J)). This is an argument based on Article II of the *New York Convention*. The ruling describes what such an agreement is and how broad the interpretation of the *Convention* is while considering the requirements of international commercial arbitration.

There are cases where the court's wide discretion is used to weigh evidence, but justice is still achieved as in *Altain Khuder LLC v IMC Mining Inc.* There is only one case with a critical problem (a problem in regard to determining reciprocity) but which still secured a just ruling (*Comandate Marine Corp v Pan Australia Shipping Pty Ltd*). In this case, it is clear from the discussion that the court did not comment on how the reciprocity was checked although it pointed out the use of section 7(1)(d) of the *IAA*; there was no indication of who bore the onus to prove reciprocity, and there was no indication of how the papers were examined to prove ratification of the *Convention* or not (at [5]). There are no defined rules or requirements on how to assess reciprocity, but the courts may have checked the position of the parties without any request from any of them to check the availability of all the formal requirements first and then considered the objective conditions. Finally, there are no cases where discussions about the merits of the disputes were undertaken.

It is important to look more at the willingness of the court to examine the arbitral award if it was obtained by fraud or corruption or is contrary to the natural justice. Such a trend by the courts shows its interest in achieving justice for all parties in terms of protecting the honest party, who has fulfilled his legal obligations; it also shows the court's intention to provide legal protection for all parties from the arbitrator if he/she exceeds the powers granted to him/her by the arbitration agreement.

It could be said that all the conditions have reasons for existence which includes the maintenance of societal values in general. So all of these conditions as depicted in the analysis

encourage arbitration hence help achieve the aim of arbitration, although some deficiencies and differences are present in some aspects of the law in both countries.

Finally, in the balance between these criteria, justice to the parties in the individual cases can be seen in the court's role highlighted more in supporting parties in holding to their bargain, which is consistent with efficiency, versus the need to protect the parties from a defective process, which might involve re-trying the dispute, which in turn militates against both judicial and arbitral efficiency.

5 GENERAL CONDITIONS: PUBLIC POLICY AND THE LIMITS OF *SHARI'A*

5.1 Introduction

The implementation phase of the arbitral award is a very important stage in the arbitration process. The real purpose of resorting to arbitration is to end the conflict by applying the arbitral award. Thus, the application process affects the arbitration process in general, from the beginning in the resort to arbitration until the issuance of the award. For example, one of the noticeable results in an international arbitration survey, which was conducted in 2010, was that 66 per cent of the respondents identified the neutrality and impartiality of the legal system as one of the top influences on the choice of the law governing the substance of the dispute.¹ This shows the importance of the interaction of the competent courts with the foreign awards, where they should support the implementation of the arbitral awards.

In fact, the *Convention* has played a significant role in the enforcement of foreign arbitral awards by adopting several provisions that establish common definitions and rules to govern the process of recognition of international commercial arbitration agreements and the implementation of the provisions of foreign arbitral awards, while maintaining the national legal system of any signatory state. In general, national arbitration laws prescribe various grounds for challenging the implementation of foreign awards. These limited lists of grounds followed what has been stated in the *UNCITRAL Model Law* and Article V in the *Convention*.²

Indeed one of the most important defences that can be used to refuse to implement the foreign arbitration is the *arbitrability* of the dispute. The international conception of arbitrability derives

¹ For more information, see School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration* (QMUL, White & Case) <<http://www.arbitrationonline.org/research/2010/index.html>> 12.

² See Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: An Overview' (Paper prepared for the Symposium on Making the Most of International Investment Agreements: A Common Agenda, Paris, December 2005) 6.

from the *Convention*.³ It provides that every contracting state shall recognise arbitration agreements referring to matters falling in the domain of arbitration.⁴ In fact, the formulation of legislation and laws governing states continues to be influenced by globalisation leading to many countries having similarities in some aspects of public policy as well as differences.⁵ In addition, ‘A subject matter that may not be submitted to arbitration in domestic cases may, by virtue of the narrower international public policy, be submitted to arbitration in international cases.’⁶

In fact, the *public policy* defence is one of the major grounds to set aside foreign arbitral awards, and many countries have interpreted this concept in accordance with their national legislation rather than international laws and values.⁷ For example, *Ribā* is one of the major ‘sins’ in Islam, and is the imposition of interest on a debt or the payment of interest on money deposited; or ways of selling or buying specific commodities that are unacceptable in Islam.⁸ Thus, *Ribā* is an action that is forbidden in the commercial area in Islam, which makes it a public policy principle before any Saudi judge. Hence, any foreign award containing *Ribā* will force the judge

³ See Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business*, (Kluwer Law International, 2nd ed, 2006) 213.

⁴ See Amazu A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press, 2001) 56.

⁵ For more information, see R Daniel Kelemen, ‘Globalization, Federalism and Regulation’ in David Vogel and Robert A Kagan (eds), *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (University of California, 2004) 269, 272.

⁶ See Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, International Council for Commercial Arbitration <http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> 11. It has been observed that ‘international public policy is generally considered to be narrower in scope than domestic public policy.’ See Pierre Mayer and Audley Sheppard, ‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) *Arbitration International* 249, 249–50.

⁷ For more information see Fifi Junita, ‘Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia’ (2008) 5 *Macquarie Journal of Business Law* 384; also see Gennady M Danilenko, ‘Implementation of International Law in CIS States: Theory and Practice’ (1999) 10 *European Journal of International Law* 51.

⁸ *Riba* as a public policy defence will be discussed in more detail in section 5.4.1 The Saudi Grievances Board and the Application of Public Policy ‘B. Scope of ‘Violation of Islamic Law’ in the View of the Saudi Grievances Board’. Additionally, Baamir believes that the banking interest is a very important goal in the bank sector and also the main contradiction in the public policy of Saudi Arabia. See Abdulrahman Yahya Baamir, *Shari’a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing, 2010) 4. A ‘sin’ is something that is a ‘transgression against divine law or principles of morality’: *Concise Oxford Dictionary* (Clarendon Press, 6th ed, 1976).

to refuse the *Ribā* section and apply the rest of the award if severability is possible, or else refuse the implementation for the whole award.

The term ‘*public policy*’ is one of the main provisions contained in Article V of the *Convention*; it explains exclusively the reasons of refusal for recognition and implementation of foreign arbitral awards in the member states. These reasons are contained in paragraph 2(B), which allows the national courts to refuse the implementation of any award if that award is contrary to public policy.

One of the major difficulties that may face the process of adjusting the application of this defence is that the rules or principles which can be considered related to public policy in one country may differ from those in other countries.⁹ Thus, some actions that may be permissible in a particular country may be considered invalid in another state because they violate public policy. For example, the existence of financial benefit, which consists of interest on debt or interest on bank deposits, is considered legitimate in a country like Australia, yet it is considered contrary to public policy in the Kingdom of Saudi Arabia because, as a kind of usury or *Ribā*, it is contrary to *Shari’a*.¹⁰ Further to that, the evaluation of these actions may differ in the same country, from one region to another, or over time.¹¹

⁹ For more explanations, see Catherine Kessedjian, ‘Public Order in European Law’ (2007) 1(1) *Erasmus Law Review* 28.

¹⁰ It should be noted that there are two main types of *Riba* recognised by all of the Muslim scholars. These are ‘*Riba al-nasi’a*’ and ‘*Riba al-fadhl*’. This will be discussed in more detail in section 5.4.1 The Saudi Grievances Board and the Application of Public Policy ‘B. Scope of ‘Violation of Islamic Law’ in the View of the Saudi Grievances Board’, 1. The prohibited Contracts ... 2. Usury). Additionally, for more information, see Mahmoud A El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge, 1st ed, 2006) 49–50. Additionally, any loan that contains a financial benefit is *Riba* and this is very important point because it relates to the most important factor in modern economic life, which is the contracting of loans. For more details, see Frank E Vogel and Samuel L Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Kluwer Law International, 1998) 77.

¹¹ For more information about this defence, see May Lu, ‘The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England’ (2006) 23(3) *Arizona Journal of International and Comparative Law* 747, 770; Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Thomson Reuters, 2011) 298; also Mohammed Aboul-Enein, ‘*Tnfith Itfaqiat New York fy Aldwl Al’rbiah* [Application of the New York Convention 1958 on the Recognition of Foreign Arbitral Awards and Implementation in the Arab World]’ (Paper presented at the *New York Convention 50 Years: Practical Perspectives on the Recognition and Enforcement of Foreign Arbitral Awards*, Cairo, 10–11 November 2008) 5.

This chapter shall address the issue of *public policy* where the role of the national judge in the implementation of the provisions of foreign arbitral awards takes a wider range and has greater freedom in determining the meaning of *public policy*. This is due to the wider meaning of this principle, as we shall see in the next lines. This ambiguity or indeterminacy in the definition of the *public policy* gives judges the authority to assess what is considered a breach of public policy. Hence, it could be said that the national judge examines the foreign arbitral award in terms of availability of the formal requirements and he/she cannot discuss the merits of the case. However, the judge's authority is beyond that in the case of examining the breach of public policy. This makes the study of this principle necessary as those affected need to know its borders and its dimensions in the national laws and international conventions and to know the real role of the judge in the determination of such principle.

In examining this matter, the chapter shall highlight the most important aspects of this principle: the definition of public policy 'in theory' as an attempt to arrive at a legal definition; the scope of public policy and its impact on the application of the provisions of foreign arbitral awards; and finally the judicial role in applying the public policy in the provisions of the courts. The matter of public policy in Australian and Saudi courts will be addressed by analysing court rulings in both countries (that is, provisions that have been obtained in accordance of the research method, which was described at the beginning of this research in the research methodology).

5.2 General Principles of Public Policy

Public policy is based on the citizens in a given society and can be characterised as a single pattern, flow or path, often its most basic values that are embodied in domestic legislation; hence, each state has its own notion about what is required by its own public policy.¹² Such a pattern facilitates the enforcement of laws while at the same time allows the creation of simpler

¹² See Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell Limited, 4th ed, 2004) 419.

codes and rules or laws in relation to the given society. Public policy in essence refers to the absence of disorder as it relates to societal norms.¹³

Therefore, the essence of public policy is not easy to define and it differs from context to context and from country to another. For instance, public policy in the context of the criminal justice system may be defined as the absence of public disorder and the quiet orderly behaviour of people in public situations. It entails people acting sagaciously and reasonably, and with respect for others. Problems can arise, however, when there is disagreement regarding what comprises a breach even within a society, for example when one person's harmless excitement on the street may constitute an aggravation to another.¹⁴ Internationally, it may be more complex when there is a disagreement between what comprises public policy as the public good in one country is different from another. Examples in this regard could include *Ribā* (interest) in commercial transaction contracts, or permissibility of arbitration in or contracts involving trade in alcohol or equipment for gambling or importation or transportation of prohibited material.

It is noted in the International Law Association's *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* ('*ILA Final Report on Public Policy*') that the public policy exception is mentioned in most enforcement conventions and in domestic legislation.¹⁵ This exception is also involved in international conventions that concern the enforcement of foreign judgments. In regard to the enforcement of arbitral awards, the term 'international public policy' has been used by a number of countries to restrict the scope of public policy. Thus, the narrowing of the public policy exception and the application of

¹³ Ibid 165. In fact, this 'public policy' defence prevents courts from enforcing contracts or awards if it violates the law or is generally against the interest of the public. For more information, see Jonathan A Marcantel, 'The Crumbled Difference between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception' (2009) XIV, *Fordham Journal of Corporate & Financial Law* 597, 608.

¹⁴ See Ahmed Fathi Sorour, '*Alqanon Aljeneṭ Aldstwrī* [The Criminal Constitutional Law]' (Dar Al Shorooq, 2nd ed, 2002)10.

¹⁵ International Law Association Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitration Awards*, ILA Conference, New Delhi, 2002. Text available as a pdf file at International Law Association, *Committees – International Commercial Arbitration (1989 – 2010)*, 'Conference Resolution (English) New Delhi 2002', see <<http://www.ila-hq.org/en/committees/index.cfm/cid/19>>. ('*ILA Final Report on Public Policy*').

‘international public policy’ has been adopted by the *ILA Final Report on Public Policy*, where it recommended that

the expression “international public policy” is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award.¹⁶

In fact, there have been many attempts to define the contents of ‘public policy’ and ‘international public policy’, but unfortunately, there is no precise definition.¹⁷ Additionally, the main recommendation given by the *ILA Final Report on Public Policy* was regarding the content and scope of international public policy so as to limit such exception.¹⁸ Thus, it seems, ‘it is difficult, if not impossible, to define the concept of public policy.’¹⁹

On the other hand, acts are categorised as not adhering to public policy when they are contrary to public norms, social customs and values.²⁰ In trade, public policy can involve public norms, social customs, values, and regulations that involve the parties. In addition, some scholars have opined that the idea of public policy is linked to social, political or moral foundations of each

¹⁶ Ibid 3[11].

¹⁷ According to Rana and Sanson, public policy is incapable of precise definition; thus, it is ‘a variable notion, depending on changing manners, morals and economic conditions’. See Rana and Sanson, above n 11, 310.

¹⁸ See Mayer and Sheppard above n 6, 251. According to Shaleva ‘The idea of “public policy” is notorious among judges and scholars as a concept not susceptible to definition. Theory and practice generally agree that public policy reflects some moral, social, economic or legal principles ...’: Vesselina Shaleva, ‘The “Public Policy” Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia’ (2003) 19(1) *Arbitration International* 67, 76.

¹⁹ See Julian D M Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 722. In fact, ‘public policy has a different meaning within different legal traditions...’. For more information, see Fernando Mantilla-Serrano, ‘Towards a Transnational Procedural Public Policy’ (2004) 20(4) *Arbitration International* 333. Additionally, for more information about the difficulties in defining the public policy principle, see Mayer and Sheppard, above n 6, 250. Additionally, according to the *ILA Final Report on Public Policy* there have been real attempts to define the contents of the term public policy and also the term ‘international public policy’; however, no precise definition is possible. See *ILA Final Report on Public Policy*, above n 15, 4 [12].

²⁰ For more information, see ‘public order crime’: lawyerment, *Law Dictionary* <http://dictionary.lawyerment.com/topic/public_order_crime/>.

state, and relates to the higher interest of the country, that is, to the interests of the society and the legal system as whole.²¹

Thus, all of the rules of law in the state that affect these foundations can be considered as public policy rules. This is apparent from the provisions of the law itself and the wording of legislation and associated texts. It may be also inferred from the rulings that are settled by the judiciary (precedents). As such, the idea of public policy is one with a degree of relativity, as it may vary according to circumstances, time and communities.²² Thus, it can be said that it is still an undefined concept of unknown scope.²³ However, it is a concept that the courts do apply for a variety of reasons and justifications related to the wide scope of such concept. Thus, it is not a meaningless concept, but it is not highly specified.

The existence of such a condition makes parties hesitant to conduct trade in a foreign country as their actions may be regarded as a ‘cause of disorder’, contrary to how the very same operations or activities or negotiations are confidently regarded in their domestic jurisdictions, where these are viewed as perfectly acceptable.²⁴ Thus, it has been argued that public policy and what constitutes trade irregularities are directly correlated to the views of morality existing in the various jurisdictions.²⁵ For Middle Eastern countries that link Islam with government power (including in the government’s scope the duty to maintain and protect Islam as the religion of the state and its people), public policy in dealing with citizens from other countries should be in

²¹ See Wolfgang Kasper and Manfred E Streit, *‘Institutional Economics: Social Order and Public Policy’* (Edward Elgar Publishing, 2000) 311–12.

²² See Hamza Haddad, *‘Alḥkīm fī Alqwanīn Al’rbīyah [Arbitration in Arab Laws]’* (Al-Halabi Press, 2007) 384, 389.

²³ It should be noted that some researchers differentiate between the international and the national public policy. But what matters here is what will be applied before the national courts, which will apply the national public policy to any foreign rule. For more information, see *ibid*, 390.

²⁴ See Asouzu, *above n 4*, 56; also G Bajaj, *Arbitration in the Kingdom of Saudi Arabia* (DLA Piper, 2009) <www.dlapiper.com/arbitration-in-the-kingdom-of-saudi-arabia/>.

²⁵ For more information, see Kasper and Streit, *above n 21*, 312; also see Brendan Maguire and Polly Radosh, *Introduction to Criminology* (West/Wadsworth, 1999).

accordance with *Shari'a*.²⁶ For instance, in Saudi Arabia, the *Saudi Arbitration System of 1983* provides an example, where Article 20 demonstrates the need to follow the rules of *Shari'a* so as to be able to implement any arbitral award, when it states that the enforcement may be issued at the request of any of the parties 'after ascertaining that there is nothing that prevents its enforcement from the *Shari'a* point of view.'

The same meaning has also been clarified in Article 39 of the *Implementing Rules [Regulations] of the Saudi Arbitration System of 1983*. These Rules did not only take care of international trade norms, but also gave attention to the local norms and values with explicit stress on the prohibition of the violation of the precepts of *Shari'a* that control and monitor domestic and foreign awards.²⁷

Foreign investors and companies should therefore be aware of the constraints of public policy in the states in which they wish to operate or invest, for states do not intend to compromise their public policy. In addition, if they are to succeed in the region, those engaging in foreign arbitral awards need to be aware of public policy of the country in which the award is intended to be implemented and ensure that their negotiations and actions are in accord with it.²⁸

The Islamic term for the public policy principle is 'the common interest' ('*Masaleh Morsalah*'). An often cited academic adage states that Muslims have to fulfil contractual requirements except those which 'allow what is prohibited or prohibit what is allowed'.²⁹ This shows that the public policy in the *Shari'a* is linked generally to the explicit texts that have cited clearly in the

²⁶ For more information about Islam and state laws in the Middle East, see Nicholas H D Foster, 'Islamic Commercial Law: An Overview (I)' (2006) 4 *Indret: Revista para Analisis del Derecho* 1, 4; also see Baamir, above n 8, 32.

²⁷ See *Saudi Arbitration System 1983* art 20. For more information, see George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (Special Series 2003) 24(4) *University of Pennsylvania Journal of International Business Law* 509.

²⁸ Ibid 32; also see R Doak Bishop, James Crawford and William Michael Reisman, *Investment Disputes: Cases, Materials, and Commentary* (Kluwer Law International, 2005) 1263. For more information about the influence of oil on life in Saudi, see Walaa Refat, '*Althkīm Altjarī Alwtnī ū Aldwfi fy Almmlaka Al'rbiah Als'wdiah* [International and National Commercial Arbitration in Saudi Arabia]' (Chamber of Commerce and Industry in Jeddah, 1999) 87.

²⁹ See Baamir, above n 8, 67; also see Asouzu, above n 4, 46.

Qur'ān and *Sunnah*. As for the provisions that have no explicit texts, these are not included in the public policy principle.³⁰ This view has been supported by the President of the Saudi Grievances Board in the old Decision No 7 in 1405 AH 1985 where it stated in the third paragraph that it is not legal to implement a foreign rule if it is contrary to an 'asset' of *Shari'a*.³¹ However, assets of *Shari'a*, as we shall see in the analysis of the Grievances Board's rulings later in the application section, are not confined to specific provisions or texts. However, judges and Islamic scholars have tried to limit the scope of these assets to a certain frame, that is, where it is restricted to the existence of an explicit text in the holy *Qur'ān* or *Sunnah* or a consensus ('*Ijma'a*') among scholars about a particular issue.

As mentioned earlier, there are international efforts designed to facilitate the use of transnational arbitration, for example, the *UNCITRAL Model Law*, which was adopted on 21 June 1985 and was amended by the UN Commission on International Trade Law on 7 July 2006. This law applies to international arbitration in commercial matters and any agreement that has been made or ratified between the United Nations and the signatory states is subject to it. It provides the option of the parties to authorise a third party to make determinations on issues of arbitration while giving states some room for the possibility of refusing to implement any foreign arbitral award if it is contrary to public policy. The aim is to restore and maintain policy (and hence confidence) in trade activities.

The *Convention* was tailored to make arbitral awards faster and more efficient. A recurring problem for the scheme has been the court's refusal to recognise these awards due to their conflict with the laws of the enforcing states on the basis of matters of public policy.³² Unfortunately, all of these efforts have not resulted in a specific definition of 'public policy' that can prevent any ambiguity in the text. The *Convention* has left it to the national courts of

³⁰ See President of the Saudi Grievances Board's Decision No 7 of 05/15/1405 AH 1985, art 3. This was replaced by the Decision No 116 of 1428 AH 2007.

³¹ This will be explained in more detail later in this chapter when analysing the Grievances Board's decisions (see section 5.4.1 The Saudi Grievances Board and the Application of Public Policy).

³² *Convention* art V.

member states to interpret what constitutes ‘public policy’ in their individual states. This may lead to different interpretations between countries. Rajagukguk states that one view is the ‘narrow’ interpretation, one that refuses to enforce any foreign award may only occur in the case of violation of ‘the most basic notions of morality and justice’.³³ Another view he describes is the ‘broad’ one, where courts in some countries interpret ‘public policy’ in a wide manner, which may include the violation of the national laws and regulations of the state as breaches of ‘public policy’.³⁴

Whilst states increasingly recognise the significance of rapid and impartial resolutions to cross-border trade disagreements, it has been said that the ‘Middle East is yet to fully embrace’ the contemporary arbitral scheme.³⁵ A more optimistic view argues that this stance toward global arbitration is ‘increasingly reversing’.³⁶ In recent years, many countries in the Middle East have shown greater openness and confidence in their judicial systems to accept and implement the provisions of foreign arbitral awards. The reconstruction of arbitration laws in several Middle East countries, the mounting number of Arab nations that have become signatories to the *Convention*, and the institution of arbitration hubs all over the region, show that international arbitration is acquiring favour.³⁷ Saudi Arabia is at present in the process of opening up its

³³ See Erman Rajagukguk, ‘Implementation of the 1958 *New York Convention* in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy’ (Paper presented at the 3rd Asian Law Institute (ASLI) Annual Conference on the Development of Law in Asia: Convergence versus Divergence?, Shanghai, 25–26 May 2006) 2, where the author quotes William W Park, ‘When the Borrower and the Bankers are at Odds: The Interaction of Judge and Arbitration in Trans-Border Finance’ (1991) 65 *Tulane Law Review* 1323, 1354 (where Park was himself quoting a US case, *Parsons and Whittemore Overseas Co v Société Générale de l’Industrie du Papier (RATKA)* 508 F 2d 969, 974 (2d Circ, 1974).

³⁴ Rajagukguk, above n 33, 2. He also notes that implementation of arbitral awards may be refused not only because they breach explicit laws or policies but because they may have a detrimental effect on the ‘national interest’ or ‘the local economy’: at 2, where the author quotes Randall Peerenboom, ‘The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People’s Republic of China’ (2000) 1 *Asia-Pacific Law and Policy Journal* 65.

³⁵ See Mark Wakim, ‘Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East’ (2008) 21(1) *New York International Law Review* 1, 27.

³⁶ *Ibid.*

³⁷ *Ibid* 2.

economy, which process includes a vast program of privatisation and restructuring of the legal regime in order to attracting foreign investment.³⁸

In Australia, the *IAA* is the inclusive Commonwealth Act for implementing foreign arbitral awards where it concerns international foreign arbitral awards, and it also includes the three international conventions that cover the implementation of foreign arbitral awards. In fact, this Act has restricted the Australian courts' interference in arbitration dealings to ensure the parties' independence in going to arbitration, and thus make certain of its confidentiality and finality, as 'in most developed jurisdictions, local law affords international arbitrators virtually unfettered freedom to conduct the arbitral process.'³⁹ The reason for that freedom is clear because greater court involvement causes the loss of the valued features of arbitration. Additionally, Australia has adopted (and incorporated into the *IAA*) the most significant international convention on arbitration (the *New York Convention* in addition to the *UNCITRAL Model Law*) which are of great importance in limiting the national courts' control on foreign arbitral awards.⁴⁰

Notably, there are some differences between the texts that consider public policy as a reason for refusing to implement the foreign arbitral award in the laws of both countries. In Saudi Arabia, the conventions' texts regarding the public policy defence are cited in several cases. Such a text is Article V(2) of the *Convention*, which states that 'Recognition and enforcement of an arbitral award *may* also be refused ... (b) ... if the award would be contrary to the public policy' (emphasis added).

The use of the phrase 'may refuse' in Article V(2) could imply that a court may, on the other hand, '*not* refuse to implement the award even if the award is in a contrary to the public policy',

³⁸ The Saudi privatisation plan has been included in the development plans over decades. For more information, see Baamir, above n 8, 42; also see Rodney Wilson, Abdullah Al-Salamah and Ahmed Al-Rajhi, *Economic Development in Saudi Arabia* (RoutledgeCurzon, 2004) 28.

³⁹ See Gary Born, *International Commercial Arbitration*, vol I (Kluwer Law International, 2009) ('*International Commercial Arbitration*') 183.

⁴⁰ See John Tarlinton, *International Commercial Arbitration and Public Policy: With Principal Reference to the Laws of Australia, France, Switzerland, the United Kingdom and the United States* (Doctoral Dissertation, University of Technology, Sydney, 2003) 43.

thus rendering implementation a matter of discretion for the country concerned and its judiciary.⁴¹ Nevertheless, whilst this may be possible for other jurisdictions, it would appear less likely in the case of Saudi Arabia where ‘public policy’ is most closely equated with *Shari’a*. This is clear from an analysis of the Decision of the President of the Grievances Board No 7 of 1985. It was there expressly stated that ‘it cannot be in any way to imagine the possibility of approving the execution of any foreign award if it is contrary to the sources of the assets of *Shari’a*.’

However, the decision also demonstrates a tendency to identify and restrict the concept of ‘public policy’ in regard to *Shari’a*; it attempts to determine the term ‘public policy’ by limiting it to these matters which violate the assets of *Shari’a*, that is, tenets have been cited in the holy *Qur’ān* and *Sunnah* and agreed on among the scholars.⁴² This then would permit a foreign award to be implemented if it violates an issue that is the subject of controversy rather consensus among Muslim scholars.

It is, however, important to determine what the assets of *Shari’a* are, if an asset of *Shari’a* can survive the presence of theological disputation about a specific issue, or if it is related more to the existence of explicit texts in the holy *Qur’ān* and *Sunnah*.⁴³

In Australia similarly, there is an interpretation in regard to the *IAA* that says:

The use of the word ‘may’ in s.8 (2) indicates that a residual discretion to refuse an enforcement of the award outside the provision of s.8 (5) and (7) of that act ... [Thus] under

⁴¹ Emphasis added. For more information regarding the court’s discretionary power in this regard, see generally Mayer and Sheppard, above n 6.

⁴² See Abdulaziz Al-Foraian, ‘*Alḥkīm Alwaṭany ū Aldwly ū Trq Tanfīdh* [National and International Arbitration and Ways of Implementing the Provisions]’ (Almiman, 2007) 145; also see Mohammed Al-Mqswdi, ‘*Alshrūt Alshklīh ū Almwqūih ltnfīth ḥkm Alḥkīm Alajnby fy Almmllakh* [Substantive and Procedural Requirements to Implement the Provisions of Foreign Arbitral Awards in Saudi Arabia]’ (Al-Dar Alhndsih, 2000) 23.

⁴³ This will be discussed by analysing the court rulings in the next section of this chapter (5.4.1 The Saudi Grievances Board and the Application of Public Policy). Because it is a very important question to answer if we know that ‘[T]he most common ground for rejection of foreign arbitral awards by the Board of Grievances is that the arbitral award is contrary to public policy.’ For more information, see Bajaj, above n 24.

the IAA “it should be noted that, under the Act, it is the enforcement of the award that must be contrary to public policy” to refuse any foreign award.⁴⁴

Under these rules and regulations, there is a difference between recognition and enforcement of an award.

Article V(2)(b) expressly recognises this when it says that ‘[t]he recognition or enforcement of the award would be contrary to the public policy of that country’.

This shows the ability of the court to refuse any award that is contrary to the public policy in the basic transaction as well as in implementation. Thus, refusing to recognise the award (as it is contrary to public policy) means to refuse to implement that award based on the same ground. On the other hand, the application of a foreign arbitral award that includes a violation of public policy in the underlying contract ‘not in the enforcement itself’ eliminates the legal protection of the system as a whole, so the court has the right to refuse to implement the foreign arbitration if the contract is contrary to public policy as a matter of protection of the legal system in the state based on the public policy exception.⁴⁵ This shows that anything contrary to public policy affects recognition and implementation of an award.

Defining public policy is very important in formulating the public policy defence under Article V of the *Convention* and also the ‘public policy’ in national laws. First of all it should be noted that scholars have differed in their understanding of national and international public policy,

⁴⁴ See Martin Davies, Andrew Bell and Paul Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010) 872.

⁴⁵ It should be noted that the Arabic term for the *public policy* is ‘*Alnezam Alam*’ which means (if translated into English) ‘the public order’ and in fact the term ‘public order’ is a French expression (‘*ordre public*’) where its English translation is *either* public policy or public order. Thus, it can be said that public order and public policy are two sides of the same coin. Therefore, this research deals with these terms ‘public order and public policy’ as one as they lead to the same meaning, being intrinsically involved one with the other. For more information about the similarity between these terms, see Larry N Gerston, *Public Policy Making: Process and Principles* (M E Sharpe, 2nd ed, 2004) 11; Kessedjian, above n 9, 28; Baligh Hamdi Mahmoud, ‘*D’wa Ebtal Aḥkam Althkī m Aldwly: Derash Muqarnah* [The Suit of Invalidating the Provisions of International Arbitration: A Comparative Study]’ (Dar Aljameah Aljadeeda, 2007) 465–6.

which requires that special attention be paid to that difference.⁴⁶ However, the national court will always protect its own national public policy in refusing to enforce any foreign arbitral award, and that is what Article 5(2) of the *Convention* relates to (see section 3.2.1 *New York Convention 1958* (A) Historical Context of Article V of the *Convention*). Additionally, international public policy ‘has been described as not being concerned with purely national influences, but rather with “fundamental standards” of the international community, covering both trading standards and humanitarian concerns’.⁴⁷ Thus, it is obvious that the public policy defence can be raised on different grounds, which may include any of the grounds for refusing any foreign awards.

In recent times countries have formulated a system of international conventions, compacts, memoranda and communiqués and a variety of other procedures and documents meant to regulate business activity. Thus, the reconciliation of arbitration rules in the national laws and international conventions plays an important role as it has a great impact on investment. This is informed by the fact that arbitration legislation affects foreign investor decisions.

Therefore, it can be said that public policy in accordance with the law and the enforcement of foreign arbitral awards aim to ensure that the actions of business persons conform to the legal terms of the legal agreement that exists between the parties to that agreement; and also to preserve the societal values and international trade conditions set by the national laws.⁴⁸ However, there have been a number of researchers who have tried to define ‘public policy’ and

⁴⁶ See Mahmoud, above n 45, 467. Indeed, some researchers believed that there are three categories of public policy which can be summarised as domestic, international and transnational public policy, and ‘which category is applicable to an individual arbitration depends on the nature of that arbitration’. For more information, see Kenneth-Michael Curtin, ‘Redefining Public Policy in International Arbitration of Mandatory National Laws’ (1997) 64 *Counsel Journal* 271, 281.

⁴⁷ See Tarlinton, above n 40, xviii. For more information about the public policy types, see Mohammed S Abdel Wahab, ‘*Alneẓam Al‘am ū Tnfith Ahkam Althkīm: Nẓrh Muqarnh* [Public Policy and Enforcement of Arbitral Awards (A Comparative Assessment)]’ (Paper presented at the *New York Convention: 50 Years: Practical Perspectives on the Recognition and Enforcement of Foreign Arbitral Awards*, Cairo, 10–11 November 2008) 7.

⁴⁸ Not in all cases can the court protect these principles, as in some cases, the courts overturn strictly law based expressions to protect the higher interests of society.

determine its standard, but they were unable to determine exactly what public policy is.⁴⁹ That is due to the differences in the public policy principle from state to another and also the differences in the same state from one region to another or over time.⁵⁰

For example, Tarlinton believes that finality of the arbitral award is seen in many jurisdictions as more important than the contravention of public values.⁵¹ The reason for that is the combination of a liberal approach to arbitrability and a restrictive approach to the application of public policy. Indeed, Tarlinton believes that the *Convention* is constructed to facilitate the implementation of foreign arbitral awards; however, it did not give a precise definition of public policy, so this can act as a safety valve for all signatory countries in the implementation of arbitral awards.⁵² However, Tarlinton believes that private arbitration requires public supervision and that public policy must be applied⁵³ rather than restricted because the latter would be ‘at odds with the very conception of public policy itself’!⁵⁴

This may be contrary to the principle of creating a uniform (or unified) understanding of the term public policy, which was sought by the *Convention*. Therefore, we cannot allow any ambiguity or expansion in the powers of the judiciary because any increased ambiguity or expansion of judicial powers could include elimination of the most important benefits of arbitration as a peaceful means to settle disputes in the area of international trade.

⁴⁹ For more information, see Mayer and Sheppard, above n 6, 249. In that regard Jubran believes that public policy is the basic rules and general principles of the law of nations or the principles of the law of merchants. However, he did not give a precise meaning or limit these principles to clarify the public policy meaning. For more information, see Sadiq Muhammad Jubran, ‘*Alṥkīm Altjarī Aldawfī Wfqan Le Alitfaqīh Al’rbīh Leṯ ṯḥkīm Altjarī 1987* [International Commercial Arbitration in Accordance With the Arab Convention for Commercial Arbitration of 1987: Research in the Law of International Trade]’ (Dar El-Halabi Press, 2005) 173.

⁵⁰ For more information, see Okasha Abdel-Aal, ‘*Alejraat Elmadanīh ū Aljenaīh Eldawfīh* [International Civil and Commercial Procedures]’ (Dar Al-Fath, 1994) 383; also see Nabil Zaid Al-Makabla, ‘*Tatbīq Aḥkam Alṥkīm Alajnaīh* [Implement the Provisions of Foreign Arbitral Awards]’ (Dar Al-Nahdha, 2006) 66.

⁵¹ For more information, see Tarlinton, above n 40, 167. Tarlinton himself argues that the ‘narrowing of the public policy defence [in the ways he describes in his thesis, such as emphasising finality over other considerations or being overly ‘pro-enforcement’] is not appropriate’: 167.

⁵² Ibid 171, 255.

⁵³ Ibid 255–6.

⁵⁴ Ibid 168. See also 170–1.

Finally, Tarlinton supports the view that suggests the establishment of a court of international commercial arbitration which will make orders for enforcement and these orders will be automatically enforced by municipal courts unless public policy is offended.⁵⁵ Even if the practical difficulties in establishing such a transnational court could be overcome, this would not eliminate the need for national courts to define the boundaries of a state's own public policy. According to this proposal, the national courts retain the power to estimate the violation of public policy.

Additionally, Ma in her doctoral thesis has reported several good findings and made some clear recommendations. Most important is her attempt, in the interest of facilitating 'consistency and clarity in the judicial application of the public policy exception',⁵⁶ to define the 'public policy exception' by limiting such exception in 'Mandatory Rules of Public Policy'; which she in turn tried to define as:

[r]ules intended to encompass the arbitral award, proceedings or dispute under consideration, as expressed or embodied in the enforcement state's statutory and case law, as well as in the international instruments and customs adopted or otherwise recognised by the enforcement state.⁵⁷

As a result, she suggested that

In the interests of consistency and convenience, IAA s 19 (which deems certain conduct to be contrary to Australian public policy for the purposes of the public policy exceptions in Model Law Arts 34 and 36) should extend to the public policy exception in IAA s 8(7)(b) and New York Convention Art V(2)(b).⁵⁸

Despite the fact that this definition does not give a precise standard or specify certain instances, because it is too difficult to do so, it is a summary of what may fall under the violation of public policy (that is, the 'Mandatory Rules of Public Policy').

⁵⁵ Ibid 270–7.

⁵⁶ Winnie (Joe-Mei) Ma, *Public Policy in the Judicial Enforcement of Arbitral Award: Lessons for and from Australia* (Thesis of Doctor of Legal Science (SJD), Bond University, December 2005) 43.

⁵⁷ Ibid 129.

⁵⁸ Ibid 136, 303.

Ma also believes that ‘the award must be tainted or otherwise affected by the illegality of its underlying contract, such that its enforcement would be contrary to the applicable mandatory rules of public policy.’⁵⁹ This, in fact, corresponds to what has been applied by British courts and is a requirement in the Saudi Courts. In Britain, the court refused to implement the arbitration ruling in the case of *Soleimany v Soleimany*, because the underlying contract was illegal according to British law. On the other hand, in Saudi Arabia, we find the text of Article 5(1) of the Decision of the President of the Grievances Board’s No 116 of 1428 AH (2007), where it states explicitly that any arbitration should be refused if it was contrary to Islamic *Shari’a* law, where the *Shari’a* law is considered as the public policy in Saudi Arabia. Moreover, Ma believes that the judge can consider the subject matter only ‘if the alleged public policy violation cannot be determined by a mere review of the award’.⁶⁰ Giving such authority to judges may allow them more room in regards to the definition of public policy, which may cause the rejection of many of the provisions, which ultimately does not serve the implementation of the provisions of foreign arbitral awards. So, it must be explicitly contrary to public policy and the violation must be clear so that judges would not need to analyse the subject matter of the contract. For example, in the case of *Soleimany v Soleimany* the original contract included explicit breaches, including smuggling and bribes.⁶¹

Therefore, we can say that public policy is an undisciplined and non-specific term, which is also variable over time and from one country to another. Thus, the real criterion of knowledge of public policy in the country at a particular time is the analysis of the judicial decisions that may reflect the true reality of this term. This will be discussed later in this chapter in the section of ‘judicial role in applying public policy’.

⁵⁹ Ibid 303.

⁶⁰ Ibid 304.

⁶¹ See *Soleimany v Soleimany* [1998] AppLR 02/19, where the violation of public policy in this case is very clear. Additionally, this case will be discussed in more detail in the next few pages.

5.3 Scope and Impact of the Public Policy

5.3.1 Scope

There are very important questions that must be answered in order to determine the scope of the public policy, that is, whether ‘contrary to public policy’ means: contrary to a direct, clear and explicit legal text; or more than that, and include the violation of the ‘spirit of law’ and the principles underlying the law. Additionally, it is important to determine if societal values have any effect in shaping the scope of public policy in regard to arbitration in international trade.

Public policy formulation requires the taking into consideration of public morals in all their aspects. Hence, societal values determine how public policy relates to business persons from other countries and cultures. This is because societal values determine what the society can tolerate and what it cannot. As a result, it is a major determinant of success in international trade. For public policy to be attained, it is a necessary requirement for the responsible government agencies in charge of public policy formulation to formulate, pass and implement the necessary legislation which may be used to enforce public policy.⁶² This in turn reveals the differences in the positions of countries in the interpretation of the idea of public policy contained in Article V(2) of the *Convention* and this in turn is reflected in the formulation of arbitration laws in these countries.⁶³

Accordingly, it can be said that public policy includes the moral and social values of a society. Thus, violating the public policy of a state does not ‘only’ mean the violation of a direct and explicit legal text but it also means the violation of the social and ethical principles in that state. Hence, public policy underpins all aspects related to maintaining trade or commercial relations

⁶² Gerston, above n 45, 4.

⁶³ For more information, Yahya Abdullah Al-Samaan, ‘*Tnfith Aḥkam Althkīm Alajnabīah fy ḍw Itfaḳāt New York fy Almmḷaka Alʿrbīah Alsʿwdīah* [Implementation of the Provisions of Foreign Arbitral Awards in the Kingdom of Saudi Arabia in the Light of the *New York Convention*]’ (2000) 14 *Journal of Diplomatic Studies* 7, 45.

while considering the interest of all parties involved and also the interest of public in general. Thus any aspect that detracts from this harmony disturbs public policy in business.⁶⁴

Consequently, public policy in international trade can be termed as the accurate application of the principles of the law and adhering to behaviour that does not disrupt business operation or offend any of the parties involved in the business. It includes the respect for people's culture, behaviour and norms when conducting business and in regard to the terms or clauses of a signed contract between two parties. Public policy in this regard also involves respecting international principles and all actions taken to ensure a smooth running in business operations.⁶⁵

On the other hand, according to the flexible nature of the public policy, the scope can be determined by the structure of law, culture and the economic position of the country, where the whole legal system may specify the scope of such a term, and the culture of society and social principles may contribute to the delineation of this principle.⁶⁶

Additionally, it is noticeable that economic development may require the state to be more lenient in implementing the provisions of foreign arbitral awards and in regard to the degree of rigour (strictness) with which the principle of public policy is applied, in order to maintain economic development and attract foreign investments. In the end, however, the final decision to determine the scope of public policy is in the hand of the court and that differs from one case to another.⁶⁷

5.3.2 Impact of Public Policy

Maintenance of public policy is necessary for successful international trade and economic development of the parties involved. In fact, it is of pivotal importance and it is the judicial way

⁶⁴ For more information about the impact of national legal system on arbitration, see Bühring-Uhle, Kirchhoff and Scherer, above n 3, 42–6; also see Al-Samaan, above n 63, 45.

⁶⁵ Thus, '*public policy*' here could include both the national and international public policy, where business operations should align with both national and international public policy.

⁶⁶ See Jalal El-Ahdab and Abd Al-Hamid El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 3rd ed, 2011) 62–3.

⁶⁷ Ibid.

for the protection of the public interest by determining the application of the law and shaping its development. Public policy has a significant role in the process of arbitration itself. This is because it is a part of the overall function of the arbitration. Thus, arbitrators must apply the public policy of the applicable law.⁶⁸

Public policy affects the international legal culture. This is because its use in arbitration enables a convergence of different legal cultures from different countries. It is in these kinds of convergence that practitioners from diverse backgrounds fashion new practices.⁶⁹ Several have suggested that this development has resulted in the development of ‘international arbitration traditions’, blending together fundamentals of common law and public law traditions.⁷⁰ Others perceive arbitration as a field of divergence among traditions or as a contest among various parties.⁷¹

Additionally, the main impact of the concept of the violation of public policy in the jurisdiction of recognition of foreign awards is nullity, which eliminates the legal disposition. Thus, it can be said that nullification is always a penalty consequent upon each violation of the concept of public policy which leads to the lack of legal force and the abolition of any legal impact of the arbitral award.⁷²

5.4 Judicial Role in Applying Public Policy in their Decisions

It is important to highlight the need for extrapolation of judicial rulings to discover the judicial orientation in Saudi Arabia and Australia and to extract a definition or at least extract a specific

⁶⁸ See Tarlinton, above n 40, xvii, xviii.

⁶⁹ See Tom Ginsburg, ‘The Culture of Arbitration’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1335, 1335.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² For more information, see Imad Tariq Al-Bshri, ‘*Fekrat Alneẓam Al’ām fy Elshari’h Eleslamih: Alnẓrih ū Altatbīq Drash Muqarnh Bain Elshari’h ū Alqanon Alḥdīth* (2002) [The Idea of Public Order in Islamic Law, “Theory and Practice”: A Comparative Study between Islamic Jurisprudence and Modern Laws]’ (Doctoral Dissertation in Law, Faculty of Law, University of Alexandria, Egypt, 2002) 213.

judicial standard in regard to public policy. Thus, this section will deal with the courts' provisions in regard to the public policy in both countries (Saudi Arabia and Australia).

5.4.1 The Saudi Grievances Board and the Application of Public Policy

It should be noted that the *Saudi Arbitration System* did not explicitly mention the term 'public policy', but states in Article 20:

The judgment of the arbiters shall be enforceable when it becomes final by the order of the authority originally responsible for considering the dispute and this order shall be made on the request of any of the parties concerned after ascertaining that there is nothing that prevents its enforcement from the *Shari'a* point of view.

This may indicate only one exception to recognition, namely the violation of *Shari'a*. As mentioned earlier, the regulation of the arbitration system has stated in Article 1 that '[a]rbitration is not permitted in matters wherein conciliation is not permitted, such as *Hudūd*, *Li'aan* between the couple, and all that is related to public policy'. *Hudūd* in *Shari'a* are: those crimes which are punishable by '*Hadd*', '*Hadd*' being the penalty that has been assessed by Allah (God Almighty) to be imposed in the circumstances specified; thus, the correctness of this punishment (whether *Qisas* (retaliatory) or *Ta'zir* (discretionary)) has been determined by Allah himself. This means that the standard for this kind of crime is the type of penalty assessed, which can be described as a '*hadd*'. '*Li'aan*' (or oath) is when the husband accuses his wife of adultery and she in the same time denies the offence. They then have to do the '*Li'aan*', which means that each one of them swears that he is sincere in his claim, and then they will be separated irreversibly, because the impossibility of their life together. This '*Li'aan*' enables both parties to avoid the punishment set for them (punishment of the defamation by the husband (divorce) and the punishment of adultery (stoning) for the wife).⁷³

This new provision (adding 'all that is related to public policy') by regulation is an addition to the text of Article II of the *Saudi Arbitration System*, yet the role of the regulations is to explain

⁷³ For more information about these terms, see Mahmoud Naguib Hosni, '*Mbade Alqanon Aljnal Al-Islamī*' [Principles of Islamic Criminal Law] (2006) 186.

the system, and basically implementing rules or regulations are not allowed to add new provisions.⁷⁴

With regard to international treaties, Article 37 of the *Riyadh Convention* states:

‘the provisions of the arbitrators’ ... the awards of arbitrators shall be recognised and implemented at any of the contracting parties in the same manner provided for in this section, taking into account the legal rules of the contracting party and the competent authority of the contracting party has to implement the award, except in the following cases ... E - If any part of the adjudication be in contradiction with the provisions of Islamic *Shari’a*, the public order or morality [rules of conduct, morals] of the requested party.

This can include two terms: public policy and the provisions of *Shari’a*, but the word ‘morality’ or ‘*Aladab*’ has been added to ensure non-violation of the social order by the arbitral award. With regard to the reservations entered by Saudi Arabia to most of the international conventions it precisely stated that the application of any such convention shall not violate the *Shari’a* and public policy.⁷⁵ It is therefore important to determine the meaning of public policy in Saudi Arabian context.

In general, for Middle East countries that link Islam with government power, public policy should run aligned with *Shari’a* law. The Islamic principle of public policy is that of ‘common interest’: *Masaleh Morsalah*. For the rules of Islamic public policy, there are precise borders such as those prohibiting speculative deals (*Gharrer*) and those forbidding usurious interest (*Ribā*).⁷⁶ The Islamic legal schools interpret and generate the method for identifying what precisely is permitted and what is not. Although, the views of each school may be different on a number of issues, a broad Islamic public policy is obviously to a degree applicable to global

⁷⁴ That opens the door to the question of the legality or constitutionality of such increase.

⁷⁵ However, the Saudi government did not enter such a reservation to the *New York Convention*. This may be due to the fact that this agreement gives all signatory countries the right to refuse the implementation of any foreign award if it is contrary to ‘public policy’. For more information about any state’s reservations, see UNCITRAL: United Nations Commission on International Trade Law, *Status: ‘1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards’* (2 October 2010) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

⁷⁶ See Wakim above n 35, 12.

commercial transactions.⁷⁷ Accordingly, success in business cannot be achieved if public policy has been violated. Defining public policy in Islam is more complex and more controversial, because Islam is concerned not only with the profound theological issues, but it also with the mundane aspects of everyday life.

By extrapolating from the rulings that have been released by the Saudi Grievances Board, it can be seen that this court refers to public policy in two instances: the violation of *Shari'a*, and the violation of legal regulations relating to the arbitration, the 'peremptory norms of public policy'. It should be noted again that the Saudi Grievances Board deals and applies the same principles for the foreign arbitral awards and foreign court judgments. As a result, this section may refer to them both in exploring the concept and dimensions of public policy.

A. Violation of Islamic Law

Islamic public policy, so to speak, in regard to the Saudi Grievances Board can be summarised as described below. It can be said that in the texts of the *Saudi Arbitration System* there is a disparity in expression in some provisions. This is due to the fact that public policy in some court rulings relating to *Shari'a* is very wide in reference to the violation of *Shari'a* in general without any specifics having been given. In other rulings, this term became more specific by referring to the fact that the violation related to a particular asset of *Shari'a*. For example, it is very clear in *Ruling No 33 / T / 4 of 1427 AH 2007*, which is in fact a foreign judgment; but, as earlier explained, the Saudi Grievances Board deals with the provisions of foreign courts and the foreign arbitral awards in the same manner; thus, the court will apply the same principles to all such provisions. The parties in this case were from Yemen and the conflict concerned a contract that involved a commercial partnership between them. The parties initially resorted to the Court of Western Eb in the Yemen Arab Republic; thus, the original provision was issued by a Yemeni court. Accordingly, the plaintiff requesting the implementation came to Saudi Arabia

⁷⁷ See Bajaj, above n 24.

seeking the enforcement of that provision because the defendant was a resident in Saudi Arabia and his assets were also in Saudi Arabia.

This ruling was based on the decision of a foreign court, so it is not an arbitral award, although there is no significant difference in the applicable principles. The Second Sub-Circuit of the Grievances Board considered this case and supported the foreign judgment by issuing a ruling in favour of the plaintiff, entitling the plaintiff to SAR 37,000 from the defendant. The Audit-Circuit approved that ruling. Noticeably, the Audit-Circuit mentioned that the foreign ruling fulfilled all formal requirements⁷⁸ and also did not ‘clash’ with the law and the assets of *Shari’a*. It is obvious that the court has merely said that there is no clash with the provisions of *Shari’a*, but no further detail or explanation is provided in regard to which *Shari’a* provisions or principles are related to the case.

Also, in *Ruling No 157 / T / 4 of 1427 AH 2007*,⁷⁹ which was an application for a Kuwaiti court judgment released by the Kuwaiti Appeal Court, the Audit-Circuit made a general statement about public policy. The case was filed by a Kuwaiti woman against her Saudi ex-husband. She was seeking to implement a court ruling issued by the Court of Appeal in Kuwait on payment of the children’s expenses (child support). The plaintiff objected to the foreign rule as it did not take into account his financial circumstances and the court had ordered him to pay a large sum of money. The Audit-Circuit stated that the Court had no right to consider the merits of the case or answer any substantive defence as long as that foreign rule did not violate *Shari’a*. Actually, this observation depends on the fact that the plaintiff had a chance to raise such a claim before the Kuwaiti court. Thus, the Audit-Circuit concluded its ruling by saying, ‘[I]t is clear that the provision is not contrary to the Islamic law.’ The Audit-Circuit did not specify the standard of the violations that can exist or explain any possible violation of public policy or what is the

⁷⁸ The formal requirements are the presentation of the original foreign court ruling and the plaintiff having proof of the finality of that ruling which must be the *res judicata*. These requirements will be discussed and analysed in more detail in the next chapter.

⁷⁹ The court has also mentioned the formal conditions, which were discussed in the last chapter, and also mentioned Islamic public policy.

Islamic public policy in this ruling. The Circuit has merely stated that there is no violation of the rule of *Shari'a*.

That also was clear in *Ruling No 95 / T / 4 of 1427AH 2007*,⁸⁰ which stated that 'it has been proved that the award that was required to be implemented satisfies the [formal] conditions [that has been mentioned in the Saudi laws] that must be met to accept the request [for] execution and there is no violation to the rule of Islamic *Shari'a* law.'⁸¹

It is noted that *Ruling No 92 / T / 4 of 1424 AH 2004*⁸² has added the component of public morality by stating that the award that was required to be implemented is 'not contrary to Islamic law or public morals and public policy in Saudi Arabia and it meets the requirements specified in the agreement.' This ruling basically refers to the *Riyadh Convention on Judicial Cooperation*, signed between member nations of the League of Arab States. The term *public policy* here was taken and used according to Article 30 of the *Riyadh Convention* without there being any intent on the part of the Court for public morality that may be fairly new or outside the scope of *Shari'a*.⁸³

Another provision (*Ruling No 204 / T / 4 of 1428 AH 2008*) was about implementing two related foreign judgments released by two Egyptian courts. The first ruling was released by the Family Court in Cairo and the other by the Court of Bulaq El-Dakrur in Cairo. The first court ruling was about the proof of paternity and the second ruling confirmed the payment of expenses for

⁸⁰ This case was presented by an Egyptian woman against her Saudi ex-husband for the living expenses for their daughter. The woman was seeking to apply a ruling issued by the South Cairo Court, which ruling was supported by the Court of Cassation in the Arab Republic of Egypt.

⁸¹ Also the Sub-Twenty-Fifth Circuit's *Ruling No 11 / D / F / 25 of 1417 AH 1997*, which is supported by *Ruling No 208 / T / 2 of 1418 AH 1998* issued by the Second Audit-Circuit, and stated that 'the formal requirements are available and that [the] waiver of the plaintiff bank interest, which [is] inconsistent with the provisions of Islamic law, makes the award valid for ... implementation on the territory of the Kingdom of Saudi Arabia.' This case will be discussed in detail in the next chapter because of its value in explaining the principle of reciprocity.

⁸² This case was raised by a Syrian woman, who was seeking to enforce a Syrian court ruling against her ex-husband who has the Saudi nationality so that she would be able to recover the rest of her dowry after their divorce.

⁸³ It should be noted that Article 30 in that convention has stated the cases of refusal to recognise any foreign arbitral award may be based on '(A) if it is contrary to the provisions of Islamic law or the provisions of the constitution or public policy or morality in the contracting party where the award is requested to be recognised'.

the child. It is noticeable that the court referred to the violation of rule of Article II of the *Arabic Convention 1952* and copied the text of Article 3(d) without any explanation or comment. The latter states that the ‘competent judicial authority: shall not refuse to implement the provision except in the following circumstances: ... (c) If the verdict was contrary to public policy or public morals in the requested state of implementation’.

Ruling No. 188 / T / 4 of 1426 AH 2006 reported that ‘the text of judgment is not contrary to Islamic law and public policy in Saudi Arabia’⁸⁴ and hence the judgment could be implemented. In this sentence the term ‘the text of judgment or pronouncement’ underlines the lack of exposure to the merits of the case, but the court has a restricted role that is limited in the implementation.

B. Scope of ‘Violation of Islamic Law’ in the View of the Saudi Grievances Board

According to some of the Grievances Board’s rulings, the scope of Islamic public policy is limited to the *assets of Shari’a*. This is evident in the court identification of the violation of Islamic public policy where this is limited to the violation of the explicit texts (from the *Qur’ān* or *Sunnah*), where there exists no difference of opinion among the scholars or where there is a consensus among scholars (*‘Ijma’a’*) on a particular issue. According to Trumbull,

There are very few laws that bind all Muslims. Only laws that are explicitly stated in the Qur’an, or have been reached by the consensus of the Muslim community [*Ijma’a’*] are considered binding on all Muslims. The prohibition of pork, for example, is an explicitly stated rule that is unanimously recognized by the Muslim community.⁸⁵

A very important ruling was released by the former Second Audit-Circuit (*Tdgeeg*), which is now the Fourth Court of Appeal under the new law. This ruling, *Ruling No 235 / T/ 2 of 1415 AH 1995*, was on an application for the enforcement of a foreign judgment that had been issued

⁸⁴ This case involved a Syrian woman against her Saudi husband to apply a provision issued by the court of Damascus in the Syrian Arab Republic. This woman obtained her divorce, the rest of her dowry, and also the husband has to pay for the child support.

⁸⁵ See Charles P Trumbull, ‘Islamic Arbitration: a New Path for Interpreting Islamic Legal Contracts’ (2006) 59(2) *Vanderbilt Law Review* 609, 631.

by the *Shari'a* Court in Dubai. The case was summed up as the failure of the defendant to buy cars and spare parts according to the parties' agreement; that caused damage to the plaintiff through loss of profits and the existence of the dispute between the parties also caused significant effects on the work.

The Tenth Sub-Circuit refused to implement the foreign judgment on the ground that it breached public policy (*Shari'a* public policy) because the potential profit is considered as 'uncertain' or unable to be ensured and so could be considered '*Gharer*' under *Shari'a*.⁸⁶ Thus, potential profits do not require compensation unless it is confirmed that such profits are according to the Islamic principle; 'what is certain, is possible to be ensured'. Therefore, as this foreign judgment contains compensation for the potential profit, which is contrary to Islamic law, it must be rejected. This was the argument of the Sub-Circuit. However, the Second Audit-Circuit revoked this ruling and stated that 'the Sub-Circuit's provision contained general terms and phrases and did not show the related evidence [direct text] from the *Qur'an*, *Sunnah* or *Ijma'a*, which show the prohibition of the potential profits.' This omission is cited as the reason to quash the ruling of the lower court. In fact, 'potential profit' is a controversial issue among scholars.

Thus, there has to be a clear and explicit legal or Islamic text on such points for them to be considered as a public policy ground. Therefore, 'the Sub-Circuit has to demonstrate the violation of the law with real evidence derived from consensus '*Ijma'a*', from the opinions issued by the jurisprudence complexes, or senior Islamic scientists which confirms this interpretation. Any *controversial issue is not a matter of public policy*.'⁸⁷

⁸⁶ According to Khan, '[a]ny contract based upon speculation or containing a provision that is activated on the basis of a specific, but uncertain event is void, meaning that an Islamic arbitrator would not award anticipated profits in an action for breach of contract.' See Almas Khan, 'The Interaction between Shariah and International Law in Arbitration' (2006) 6(2) *Chicago Journal of International Law* 791, 799.

⁸⁷ See *Ruling No 235 / T / 2 of 1415 AH 1995* (emphasis added).

Hence, it is clear that the general terms and principles do not fall within the framework of public policy contained in the conventions. Accordingly, the Audit-Circuit has revoked the sentence based on the absence of conclusive evidence on the violation of *Shari'a* because compensation for the potential profit remains a controversial issue among scholars and has not been settled.

Moreover, there is a very important ruling that has been issued by the Fourth Audit-Circuit (*Ruling No 1 / T / 4 of 1424 AH 2004*) which was the abolition of the Second Sub-Circuit *Ruling No 3 / D / F / 2 of 1423 AH 2003*. The case was raised by a Kuwaiti woman against her Saudi husband before the Court of Farwaniya in Kuwait (the couple did not separated, but they did not live together). The case was about the custody of their children, who were at that time of litigation in Saudi Arabia with their father.⁸⁸ The Audit-Circuit's ruling became more specific, stating that

the Sub-Circuit ruling stated that the foreign judgment ... requested to be implemented in Saudi Arabia is not violating any explicit Islamic texts that had been agreed upon, the Islamic assets or its general rules [However,] the Sub-Circuit did not discuss the lack of jurisdiction [of] the Kuwaiti court [when] the defendant is a Saudi citizen and there is no legal jurisdiction for the Kuwaiti courts to consider such a family case.⁸⁹

In another provision, *Ruling No 102 / T / 4 of 1424 AH 2004*⁹⁰ released by the Fourth Audit-Circuit stated follows,

⁸⁸ This ruling is very important and worthy of mention here because the Audit-Circuit has not commented on that phrase which is related to *Shari'a* public policy, because the reason for revoking this ruling relates to the violation of domestic legal rules (as we shall see in the next section). Thus, this ruling may reflect the Grievances Board's trend in regard to public policy.

⁸⁹ The verdict was contrary to the rules of jurisdiction where the defendant has objected to the Kuwaiti courts on the basis of lack of jurisdiction because he was a Saudi citizen and there was no legal jurisdiction to consider such a family case. However, the Kuwaiti courts did not respond to this request and issued the provision against him in the case. Thus, there was no violation of *Shari'a*; however, it is contrary to domestic legal rule as we shall see.

⁹⁰ This ruling was issued by the Court of 'Personal Status' in Kuwait, which was supported by the Kuwaiti Court of Appeal. The case was a request from a woman (wife) with Kuwaiti nationality, against her husband who has Saudi nationality. The claim was for payment by him of a monthly amount to cover expenses for her and their house and the servant (all of which expenses she was paying). In Islam, the husband is obliged to spend on his wife and his home. In this case, the defendant 'husband' was claiming that his wife was not living in the house and so she did not deserve any money. But she was claiming that he did not ask her to return home after they were separated, so the husband is obliged during the period of marriage to pay the expenses of the wife and their house. It should be noted that there is a debate between Muslim jurists about the women's rights to expenses in the event

saying there is a violation from the rule that [is] meant to be implemented [in accordance with] the *Shari'a* law is not supported by a clear evidence [evidence here means a direct text from the holy *Qur'an* or the *Sunnah* or an *Ijma'a* between Muslim Scholars], because it is not violating a legitimately definitive texts and was not contrary to consensus '*Ijma'a*', but it decides what the *Shari'a* decides....

The same words exist in *Ruling No 13 / T / 4 of 1425 AH 2005*.

Indeed, the Court of Appeal became more explicit in a relatively recent decision (*Ruling No 269 / ES / 4 of 1431 AH 2010*).⁹¹ This case was an application of a foreign arbitral award issued by the International Court of Arbitration in London.

The plaintiff sought to implement an arbitral award that had been issued by the Court of International Arbitration in London in the Case No 10142 of January 2004 against the defendant. The arbitration court's ruling required the defendant to pay GBP 450,000 for expenses incurred by the plaintiff and also pay the arbitration fees which had been paid by the plaintiff (totalling USD 300,000) with annual interest on these amounts equal to 6 per cent. Significantly, the plaintiff had explicitly waived the usury part (*Ribā*).

The case had been considered by the Sixteenth Sub-Circuit, which issued the *Ruling No 13 / D / E / 16 of 1428 AH 2008*, which was revoked by the Fourth Audit-Circuit *Ruling No 169 / T / 4 of 1428 AH 2008*. After that, the case was referred to the Fifteenth Sub-Circuit which issued the *Ruling No 115 / D / E / 15 of 1429 AH 2009*.⁹²

The first verdict, issued by the Sixteenth Sub-Circuit, is a refusal to implement an arbitral award based on the failure to prove the reciprocity between Saudi Arabia and the United Kingdom.

that they leave the house. Thus, the Audit-Circuit has stated that it is not a principle or a legal basis as it is a controversial issue where there is no explicit text in that regard. So according to the Audit-Circuit, she deserves to be paid.

⁹¹ This ruling was issued by the Fourth Court of Appeal, which was the Fourth-Circuit of Audit in the old law of the Grievances Board. But after the issuance of the new law of the Grievances Board by the Royal Decree No M / 78 of 19.09.1428 AH 2007, as explained before, all of the Audit-Circuits became known as 'courts of appeal', and have the abbreviation 'ES' which came from *Estinaf* instead of 'T' which was a reference to *Tadgeeg* (Audit).

⁹² This change or transfer of the case from the Sixteenth Sub-Circuit to the Fifteenth Sub-Circuit was due to the new management changes in the court where the Sixteenth Sub-Circuit was abolished and all of the cases were transferred to the Fifteenth Sub-Circuit in accordance with the Decision of the President of the Grievances Board No 54 of 1428 AH 2008.

This ruling was set aside by the Fourth Audit-Circuit in *Ruling No 169 of 1428 AH 2008* at a time when Saudi Arabia and United Kingdom were parties to the *Convention*. Thus, the case was returned to the Sub-Circuit to consider the Audit-Circuit's notice.⁹³

The Fifteenth Sub-Circuit also refused to enforce the foreign arbitration but on another ground, that is, the violation of public policy in Saudi Arabia, as the contract includes interest or *Ribā*, which is contrary to public policy in the Kingdom of Saudi Arabia as it violates Islamic law.

This Fifteenth Sub-Circuit cited the text of the first paragraph of the Decision of the President of the Grievances Board, which states that, 'any foreign provision that [is] requested to be implemented in Saudi Arabia should not be contrary to Islamic law' and then the circuit stated that 'such controls [conditions] are considered from the public policy, which should not be violated or ... any right dropped, even the right to claim some of what came in the provision.' Thus, the Sub-Circuit declined to implement the foreign arbitral award because it involves the proportion of *Ribā* in the aggregate amount of the provision; although the plaintiff's attorney expressed his will by waiving the usury part. The Circuit insisted on rejecting the implementation based on the inclusion of *Ribā*, which is forbidden (*Muharram*) by *Shari'a*, which in turn then counted as contrary to public policy in Saudi Arabia.

The Fourth Court of Appeal in *Ruling No 269 / ES / 4 of 1431 AH 2010* reversed that provision by saying, 'This conclusion of the Sub-Circuit is under consideration ...' and then it explained the meaning of public policy in *Shari'a* by saying:

Controls and conditions, for the implementation of foreign arbitral award and judgment that have been issued by the president of the Grievances Board, are preventing the implementation of foreign provision if it includes a part that contrary to the law or public order where it was not possible to apply the non-offending part without the other; but if the severability is possible [the execution of the sentence without the contrary part] there is no reason to refuse the implementation; that what has been agreed upon by the court.

⁹³ This means that the Court does not take the date of the arbitration as a criterion in determining the rule of reciprocity, but rather the date of raising the case of the implementation. In fact, we should support such an approach where it is in the favour of supporting the arbitration. This was explained in detail in the last chapter, which was about the formal requirements, which includes the proof of the principle of reciprocity.

This decision may express the meaning of Article 10 of the new 2007 law of the Grievances Board, which supports the consolidation of the principles that have been stabilised (settled) by the courts in the Grievances Board; however, it gives the court the right to change any stabilised principle when needed. Additionally, this judgment is a real application of the possibility of severability for the application of foreign arbitral awards, if a severable part contradicts public policy (as earlier explained). This possibility is stipulated in Article 5 of the *Convention*. Furthermore, this ruling has referred to paragraph 5(1) of the new decision — Decision No 116 of 1428 AH (2007) — of the President of the Grievances Board on the regulations and conditions of the implementation of foreign arbitral award, where it stipulates the possibility of severability for the application of the foreign award.⁹⁴ Thus, the court is obliged, in the case of the possibility of severability, to implement the non-contrary part.

Equally important to the recognition of the possibility of severability, the Court of Appeal did not comment on the argument that all of the controls and requirements have been addressed in the Decision of the President of the Grievances Board No 116 of 1428 AH (2007) and are considered as a public policy defences, which may mean an agreement to that provision. Such a trend puts all of these conditions as public policy defences so the court here expands the scope of the appeal on the basis of public policy and makes it too large.

There was *Ruling No 189 / T / 4 of 1427 AH 2007*, where the plaintiff sought to implement in Saudi Arabia a foreign judgment issued by the First Instance Court in North Cairo in the Arab Republic of Egypt against a Saudi Company. The defendant was obliged by that ruling to pay SAR 48,944.50. This case was presented to the Seventeenth Sub-Circuit in 2006. This circuit rejected the implementation of the foreign judgment based on the violation of *Shari'a* because the basic transaction was about music (songs), and songs with musical instruments are forbidden in the *Shari'a*; thus, this provision could not be applied in Saudi Arabia because it

⁹⁴ See the new Decision — Decision No 116 of 1428 AH (2007) — of the President of the Grievances Board No 116 of 11/7/1428 AH 2007.

contrary to the provisions of *Shari'a*. However, the Fourth Audit-Circuit annulled this provision, based on the fact that there is no conclusive evidence or express provision in the *Qur'an* or *Sunnah*, and also there is no consensus *Ijma'a* between Muslim scholars about the status of songs in the Islamic law. Most importantly, the Audit-Circuit stated that it is true that there are some scholars who have adopted the idea that the prohibition of songs is a tenet of Islam, but there is not a consensus or prevailing opinion; thus, the judge should not force people to accept his beliefs in matters of non-consensus.

This provision has specified what should be considered against public policy in *Shari'a*, what the assets of *Shari'a* are, and what are considered to be the controversial issues (non-consensus). It has also explained the nature of the judge's role where he cannot impose his opinion on people in the controversial issues. Thus, what can be rejected is the award that violates any assets of *Shari'a*, and the judge should not apply what he believes is true on any controversial issue among *Shari'a* scholars, but must take into consideration the existence of different points of view.

The Saudi Grievances Board has described public policy in general terms in relation to some rulings to reject the implementation of foreign awards, or in cases to prove that there is no violation of *Shari'a*. However, it is through these general terms that the Grievances Board has tried to limit Islamic public policy in the assets of *Shari'a*. The assets of *Shari'a* are difficult to specify and also contain some general and non-specific principles, such as the *Gharer* contracts. *Gharer* contracts are forbidden by *Shari'a*. These contracts are almost impossible to specify and name, because in the real world and from one period to another, the types of transactions are always creating new kind of contracts, which forces judges to consider each contract separately.

It is important to understand why the court is trying to determine the assets of the Islamic law as those with relevant direct supporting texts in the holy *Qur'an* and *Sunnah* and to issues that have been agreed upon among the *Shari'a* scholars. It is also important to know why the Saudi Grievances Board allows recognition or enforcement of foreign awards even if the foreign

arbitration is contrary to a view that is the subject of controversy among Muslim scholars. This conduct could be due to two reasons: the first is the desire of the Saudi Grievances Board to facilitate commercial transactions as a step that supports arbitration as a parallel path to that of the judiciary; and second, such application is to support the Saudi government's position as an active member in the system of global trade and a way to show good faith in the implementation of international conventions.

In regard to international trade contracts and international arbitration cases, it can be said that the defence of Islamic public policy in Saudi Arabia are inclusive of three features or three types of defences that are explained as follows:

1. *The Prohibited Contracts*: these are contracts that are originally prohibited by the *Qur'ān*, *Sunnah* and *Ijma'a*, with clear and explicit Islamic legal texts. Any actions or contracts and even acts that stem from such contracts that are also forbidden by an explicit text in the *Qur'ān* or *Sunnah* render a contract unenforceable. For example, liquor contracts or any related contract like selling, buying or delivering alcohol, are all forbidden.⁹⁵ Additionally, the best example of such a category is *Ruling No 189 / T / 4 of 1427 AH 2007* where the Sub-Circuit refused to implement the foreign judgment on the basis of the prohibition of the musical songs in Islam, because music is the basis of the contractual relationship between the parties in this case.

The Audit-Circuit revoked that ruling because the prohibition of songs is not in accordance with an explicit text in the *Qur'ān* or *Sunnah* or in accordance with *Ijma'a* between the Muslim scholars. Thus, in the case of an alcohol contract, the Grievances

⁹⁵ For more information, see Arthur James Powell, 'Only in Paradise: Alcohol and Islam' in C K Robertson (ed), *Religion & Alcohol: Sobering Thoughts* (Peter Lang Publishing, 2004) 95, 95.

Board will refuse implementation on the grounds of the prohibition of the basic transaction, which here is about alcohol.⁹⁶

2. *Usury (Ribā)*: has been mentioned explicitly in the *Qur'ān* and *Sunnah* and there is a consensus *Ijma'a* among Muslim scholars on its prohibition.⁹⁷ This is based on the principle that it is not justice to exploit another person. Unjustifiable profit at the expense of another person is exploitative. It is also forbidden (*haram*) in Islam, under the concept of wealth accumulation, to build up wealth that is not a product of work. Payment of interest is therefore considered *haram* and is expressly forbidden in the *Qurān*.⁹⁸ Prohibition of *Ribā* is a very important principle in Islamic finance and therefore in commercial transactions. The principle has universal application in different schools of Islamic jurisprudence, but its concept is interpreted differently.⁹⁹ One type of *Ribā* has been revealed in the *Qur'ān* which is *Ribā Al-jahhiliyya*, and there are two types of *Ribā* recognised in the *Sunnah* which are *Ribā Al-Nasi'a* and *Ribā Al-Fadhl*.¹⁰⁰ Additionally, it is very important to mention that the common translation for *Ribā* is 'interest' but there are some other meanings apart from that.¹⁰¹

⁹⁶ Any dispute that is related to such contracts will be refused implementation. For more information about the prohibition of alcohol and the prohibition of any act or conduct related to alcohol in Islam, see *ibid*, 95. Additionally, there are some faults and defects that can dissolve the contract under *Shari'a*; however, such faults and defects are considered as substantive issues, where the parties have to raise them before the arbitral tribunal as they relate to the original dispute; thus, the judge cannot discuss the merits of the case and he also cannot consider any substantive defences, as we saw in the last chapter. For more information about the contracts in *Shari'a* and their termination, see Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3rd ed, 2011) 197.

⁹⁷ According to McMillen,

Conventional Western finance is firmly based on the concept of interest, the accretive earnings on money with the passage of time, or amounts in excess of principal (i.e. *Riba*), and related risk-reward structures, particularly payment preferences in financing contracts and related collateral security structures ... The risk-reward [in Islamic] conception is fundamentally different.

See Michael J T McMillen, 'Contemporary Islamic Finance: An Introduction to Essential Concepts' (2009) 38(4) *International Law News* 1, 10.

⁹⁸ See Abdulkader Thomas, *Interest in Islamic Economics: Understanding Riba: Islamic Studies* (Routledge, 2004) 25.

⁹⁹ *Ibid* 26.

¹⁰⁰ See Vogel and Hayes, above n 10, 72.

¹⁰¹ These commodities have been mentioned in *Sunnah* 'in a direct Hadith' specifically where these commodities should not be exchanged except in an equal quantity and in immediate effect. For more information, see Hussain, above n 96, 202. And for more information about these commodities, see

a. *Ribā Al-jahhiliyya*:

Al-jahhiliyya 'is a description of the period before Islam.'¹⁰² This kind of *Ribā* could be seen in the event when the lender asked the borrower in an interest-free loan if he/she would settle the debt or swap it for larger debt of longer maturity period.¹⁰³ This kind of *Ribā* was prohibited and described in the holy *Qur'ān*.

b. *Ribā Al-Nasi'a*:

The term *nasi'a* or *nasi'ah* means to reschedule or to wait and it refers to the time period that is allowed for the borrower to repay the loan in return for additional money. Hence it refers to the interest on loans.¹⁰⁴ This kind of *Ribā* has been prohibited in the *Sunnah* and it is accrued 'when delivery of one countervalue is deferred in a sale transaction involving countervalues which are susceptible to *Ribā*.'¹⁰⁵ This kind of *Ribā* refers to the interest on the loan.

c. *Ribā Al-Fadhl*:

Ribā Al-Fadl can be defined as all excess over what is justified by the counter-value.¹⁰⁶ One of the great goals in Islamic finance is not just to eliminate the exploitation in having interest on loans but also to avoid any dishonest and unjust

Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (E J Brill, 1996) 31.

¹⁰² Ahmed A El-Ashker, *The Islamic Business Enterprise* (Taylor & Francis, 1987) 39.

¹⁰³ El-Gamal, above n 10, 50. Also generally see Muhammad Ayub, *Understanding Islamic Finance* (John Wiley & Sons, 2009).

¹⁰⁴ M Umer Chapra, 'The Nature of Riba in Islam' (January – June 2006) 2 (1) *Journal of Islamic Economics and Finance* 2; also see Abdulrahman Khalil Tolefat and Mehmet Asutay, *Takaful Investment Portfolios: A Study of the Composition of Takaful Funds in the GCC and Malaysia* (John Wiley & Sons, 2013) 20.

¹⁰⁵ See Saeed, *Islamic Banking*, above n 101, 35; also see Jaquir Iqbal, *Islamic Financial Management* (Global Vision Publishing House, 2009) 101.

¹⁰⁶ Iqbal, above n 105, 102.

exchanges in business transactions.¹⁰⁷ This kind of *Ribā* is applied on hand-to-hand transactions and sale of commodities.¹⁰⁸

It should be noted that there is no difference of opinion among Muslim scholars about the prohibition of *Ribā* because of the clear texts in the *Qur'ān* and *Sunnah* that vehemently condemn *Ribā*.¹⁰⁹ However, few scholars in the modern era have tried to restrict the definition of *Ribā* by allowing some financial benefits on some commercial loans.¹¹⁰

However, contracts that include *Ribā* could be valid contracts, where the original contract is permitted. Thus, the foreign award could be partially applied by applying the legal part of the award with the exclusion of the usury part, as we have seen in some rulings.

3. *Gharer Contracts*: were also originally considered forbidden but are not precisely defined and must be clarified. It is under the judge's discretionary authority to decide whether an act is *Gharer* or not.

Gharer represents uncertainty in the contract, which is forbidden in *Shari'a*. *Gharer* means 'to undertake ... a venture blindly without sufficient knowledge or to undertake an excessively risky transaction.'¹¹¹ It is not a specific contract because any civil contract could become a *Gharer* given certain circumstances. Jamila Hussain has addressed the circumstances that can turn any contract into a *Gharer* contract. They are:

- When the seller is not in a position to hand over the goods to the buyer; or
- The subject matter of the sale is incapable of acquisition, for example, the sale of fruit which has not yet ripened or fish or birds not yet caught; or
- Speculative investments such as trading in futures on the stock market; or

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ See Saeed, *Islamic Banking*, above n 101, 41; also see Ayub, above n 103, 44. Interestingly, Islam is not the only religion that prohibits *Riba* or usury. Christianity and Judaism also have condemned such action. For more information, see Mervyn K Lewis and Latifa M Algaoud, *Islamic Banking* (Edward Elgar, 2001) 185.

¹¹⁰ They believe that these benefits should be read in accordance to the general text of the holy *Qur'ān*'s prohibition of *Riba*. Thus, these financial benefits should be excluded from the *Riba* category. For more information, see Saeed, *Islamic Banking*, n 101, 41.

¹¹¹ Hussain, above n 96, 204.

- Where the purchaser is not given the opportunity of inspecting goods before purchasing them.¹¹²

These legal principles would prevent the implementation of foreign judgments and foreign arbitral awards in the Kingdom of Saudi Arabia, because forbidden contracts violate an explicit provision (text) in the main Islamic sources (*Qur'ān* and *Sunnah*). Also, the prohibition of usury is one of the most important legal principles in business dealings in the Islamic world. However, where contracts are subdivisible into parts that are applicable / and those not applicable (in accordance with *Shari'a*, for reasons such as *Ribā*), such a principle can prevent the implementation of the part of the foreign award that violates *Shari'a* whilst permitting the application of the part that does not violate *Shari'a*. In addition, the prohibition of *Gharar* aims to ensure the rights of the parties that have a legitimate and logical ground to prevent manipulation or exploitation of any of the parties in the contractual relationship.

C. Violation of Legal Regulations Relating to the Arbitration 'Peremptory Norms of Public Policy'

From the extrapolation of the available provisions of the Saudi Grievances Board, it is also clear that public policy is not only confined to the assets of the *Shari'a*, but extends to any violation of law within the country. There are legal norms and principles that are considered public policy from the view point of the Saudi Grievances Board. These are as described below:

1. *Lack of jurisdiction*: it is known that the 'rules of competence'¹¹³ can be raised by the judge on his own without a request from any of the parties to the dispute under public

¹¹² For more information about these circumstances and the way to avoid such circumstances, see *ibid* 124.

¹¹³ This means that the local rules of jurisdiction, which govern the distribution of cases to the courts, are according to the geographical distribution. For more information about the Saudi Courts jurisdiction, see Nasser Bin Mohammed Al-Ghamdi, '*Alkhtṣāṣ fī Alfqh Alislāmī M' Byan Altatbīq Alḥālī fī Almmḷaka Al'rbīah Als'wdīah* [Jurisdiction in Islamic Jurisprudence with an Indication of its Current Application in the Kingdom of Saudi Arabia]' (Maktabat Al-Roshd, 1st ed, 1420 AH 2000).

policy rules.¹¹⁴ This is illustrated by many judgments that have been released by the Grievances Board. For example, *Ruling No 103 / T / 4 of 1426 AH 2006*,¹¹⁵ where it was expressed that there is no jurisdiction to implement a foreign judicial delegate letter issued by a foreign arbitrator or judge. Also in *Ruling No 52 / T / 3 of 1410 AH 1990* the court ruled that it has no jurisdiction regarding the enforcement of an arbitral award that has been issued to a foreigner who had resided in the Kingdom for a period of time, but at the time of implementation had left the kingdom on a final exit visa.¹¹⁶

2. *Legal status of parties*: in the event of a request for implementation of a foreign arbitral award made by a person who has no interest in that case, the Grievances Board will not accept the request because the party making the request is not relevant. This was clear in *Ruling No 71 / T / 3 of 1412 AH 1992*. This was also settled by the Court in a relatively recent case, *Ruling No 236 / T / 4 of 1426 AH 2006*, where the request for implementation was by a foreign company against the commercial agent and a distributor for that foreign company in Saudi Arabia. The agent company claimed that the original ruling had been against the foreign company, and as the agent had not involved in that foreign ruling, the

¹¹⁴ For more information about the judges role in general, see Abdul Rahman Bin Saleh Al-Yahya, 'Ale'trad 'la Elhkm ū Nqdech fy Qanon Osol Elmohakmat Eljzaeyh Als'wdi: Drash Muqarnh [The Objection to the Rule and Its Revocation in the Saudi Law of Criminal Procedure: A Comparative Study]' (Masters (Research) Thesis, Umm Al-Qura University, 1425 AH 2005).

¹¹⁵ Where the case is a request to implement a rogatory decision, which is not a judgment or an arbitral award. This Rogatory was released by the Court of Civil Execution in Aleppo in favour of a Syrian woman against her husband, a Saudi national. The Audit-Circuit confirmed that what was presented is a rogatory decision, which has not the form or content of foreign judgments or arbitral awards that had been mentioned in the *Arab Convention*. That is, the *Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards*, 14 September 1952 (entered into force in 10 November 1952).

¹¹⁶ And also note that a ruling released by a non-competent tribunal is not applicable in the Kingdom on the basis of violation of public policy, based on the lack of jurisdiction of the source of the ruling (the basis of the lack of the arbitrators' jurisdiction). In this instance, the Kuwaiti court is not competent to adjudicate in proceedings between a 'Kuwaiti wife' and a 'Saudi husband' where the husband is a permanent resident in Saudi Arabia. As a result, if we apply this trend to the provisions of arbitration, the Grievances Board will not apply any arbitral award where the arbitrators exceed their authority in adjudicating the case. This was explained in the previous chapter; see *Ruling No 1 / T / 4 of 1424 AH 2004* which was explained previously. The arbitrator/s jurisdiction also was discussed in more detail in the previous chapter.

case had to be against the original company not the company acting as agent,¹¹⁷ or person related but not named in the original arbitral award judgment. Therefore, where the defendant party is just a commercial agent, the matter of whether they are a party to the case is irrelevant, unless there is an authorised agency to do so.

It should be noted that the Grievances Board has not described that rejection as a public policy defence; however, it refused the implementation according to a general judicial principle which is the presence of legal status for the parties to any lawsuit. This principle did not exist in any convention related to the enforcement of foreign arbitration or in the *Saudi Arbitration System*. The rejection can be interpreted, however, as the implementation of a general principle of law which should be observed and its violation not accepted.¹¹⁸

3. *Controls on implementation:* The Decision of the President of the Grievances Board No 116 of 1428 AH (2007) contains the controls on the implementation of any foreign arbitral award or judgment, and these are considered as public policy rules that shall not be violated. In the Fifteenth Sub-Circuit' *Ruling No 115 / D / E / 15 of 1429 AH 2009*, the final ruling of the foreign arbitration included the benefits of usury (*Ribā*). Although, the plaintiff expressly asked for the amount of *Ribā* to be waived and asked the court not to pay attention to those amounts, the Fifteenth Sub-Circuit refused to implement the award because of the presence of interest or *Ribā*, which is contrary to public policy and contrary to the *Shari'a*.

Notably, the court cited the text of the first paragraph of the Decision of the President of the Grievances Board which indicated that any foreign provision should not be contrary

¹¹⁷ In this case the plaintiff is a foreign company and the defendant is a Saudi person, 'Mouawad' as general manager of a Swiss Company in Geneva. The foreign judgment was issued by the Federal Court of Appeal in Abu Dhabi - Civil Division V. The original sentence was issued against the Swiss company, not against Mouawad, either himself personally or as a general manager of the Swiss company.

¹¹⁸ This feature makes this principle related to the public policy.

to *Shari'a* to be implemented in Saudi Arabia. Then the court stated that these controls are considered as public policy, which should not be violated or cannot be severed by any party. In addition, parties cannot drop or waive some of these provisions.

Nevertheless, this provision has been revoked by the Court of Appeal in *Ruling No 269 / ES / 4 of 1431 AH 2010* where the Court adopted the partial application of the award and confirmed the court's ability to implement the legal parts by refusing to implement the contrary part. The Court of Appeal did not comment on this argument, thus making all of the controls and requirements that have been addressed in the Decision of the President of the Grievances Board No 116 of 1428 AH (2007) public policy defences. Again this silence may mean an agreement to that provision which permits all of these conditions to be used as public policy defences.

Therefore, the existence of formal and substantive requirements within Decision of the President of the Grievances Board No 116 of 1428 AH (2007) renders these requirements public policy defences. This leads to the expansion of the limit of the public policy defence and will make all of the Grievances Board rulings able to rely on the public policy ground in refusing any foreign award.

4. *Arbitrability*.¹¹⁹ the term 'arbitrability' has a general meaning, which can be expressed as disputes that can be referred to arbitration according to national legislation, international convention or judicial authority. Courts often refer to 'public policy' as the basis of the arbitrability; thus, the subject matter of conflict is the main key in determining arbitrability of a dispute.¹²⁰ According to the *Implementing Rules of the*

¹¹⁹ This is according to the regulation and, in fact, there is no such defence before the court in that matter. Furthermore, according to the regulation text, the issue of arbitrability is not defined clearly in a Saudi law text, but will refer to the general rules of Islamic law. Thus, the arbitrability considered as a public policy matter that is related to law texts and also related to the principles of Islamic law at the same time.

¹²⁰ For more information, see Laurence Shore, 'Defining "Arbitrability": The United States vs the Rest of the World' (15 June 2009) *New York Law Journal* 'Special Section'; also see Born, *International Commercial Arbitration*, above n 39, 243.

Saudi Arbitration System, arbitrability is one of the public policy matters, where it is stated in the first Article that '[a]rbitration in matters wherein conciliation is not permitted shall be not accepted, such as '*Hudūd*', '*Li'aan*' between the couple, and all that is related to public policy.'

Therefore, any dispute that is not permitted to be solved by conciliation in *Shari'a* cannot be solved by arbitration at all.¹²¹

It should be noted that the four Islamic schools of thought (*Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*) have agreed on the permissibility to arbitrate in business dealings, although some differences exist in relation to some criminal matters, which is beyond the scope of this research.¹²² This explanation concerns the Islamic aspects related to commercial transactions in *Shari'a*.

The Saudi legislature did not specify the exact types of matter that could be excluded from arbitration. Additionally, there are no judicial decisions that define and specify the particular conflicts or the prohibited matters that cannot be solved by arbitration. It is therefore necessary to return to the principles of law to see what can be applied by the Grievances Board in this matter. Thus, in Saudi Arabia, it can be said that conflicts that relate to the security of the country and the high policy of the country (any policy or decisions are related to its sovereignty) cannot be solved by arbitration. Additionally, any disputes that are related to employment in or the workings of the judiciary, such as the sacking of the judge, cannot be solved by arbitration. The reason for such prohibition is that such disputes are related to the higher interests of the state and could not be considered by special arbitrators.¹²³

5.4.2 Australian Courts in Approving the Public Policy Exception

In Australia there are a number of judgments about the foreign arbitral award and, in most cases, the issue of violation of public policy has been used as a defence against the enforcement.

¹²¹ For more information, see Al-Foraian, above n 42, 92.

¹²² For more information, see *ibid* 90.

¹²³ For more information about this vision, see *ibid* 131.

Different judges have arrived at different decisions, all of which when analysed, may present a definition of how public policy is viewed by the judges.

This number of cases raises some questions about the judicial meaning of public policy according to Australian courts, such as whether the definition could be discerned from the decisions made by judges in cases where public policy has been adjudged to have been violated, as well as the standards of public policy, and when the public policy defence should be used and when it should not be used. Additionally, the approach taken by the Australian courts should be explained and measured by the provisions of the *Convention*.

A. *Definition of Public Policy According to Australian Courts*

Under normal circumstances, public policy comprises the rules and values that serve the social, economic or political interests of a region (region in this case may be a nation, a state, a group of nations or a particular place) or those pertaining to justice or morality of a specific place.¹²⁴ These rules and values are developed to ensure law and order.¹²⁵ Considering the cases that will be presented in detail, public policy is not just the already written laws and values or already established and well known rules and values of a particular place. Its judicial meaning in some instances is the maintenance of the reason why the public policy (under normal circumstances) was developed in the first place and preservation of the role of the court in ensuring morality or justice in a specific place.

If contravention of public policy is the defence against enforcement of foreign arbitral award, this defence is not the only way to serve justice. The intentions of the parties have to be determined to serve to reveal the real reason for the courts' existence, which is to preserve public morals and social values. Therefore, the parties must always take into account the legal principles in the country of implementation. Also, the court in the interpretation of this

¹²⁴ For more information, see Ma, above n 56, 33.

¹²⁵ Ibid.

exception should not expand its standard, and should take into account the desire of the parties when they resorted to arbitration.

According to most of the cases, public policy as a defence against enforcement of foreign awards is more like preventing the recurrence of immorality in the name of acting according to legal requirement of a country, nation or region. For example, it is clear in *Corvetina Technology Ltd v Clough Engineering Ltd*,¹²⁶ where the parties (the British company, *Corvetina*, and the Pakistani company, *Clough*) had a contract governed by the British law. Conflict arose between the parties and they resorted to arbitration to resolve this conflict. The main claim by *Clough* was that the arbitration proceedings were contrary to the public policy of both English and Pakistani laws (Pakistan being the country of performance of the contract). It is important to mention that the arbitrators ignored that claim and found in favour of *Corvetina*. The place of application for enforcement for this international arbitral award was Australia (Supreme Court of NSW).

Thus, *Corvetina* sought to enforce that award in NSW. *Clough* has argued that *Corvetina*'s performance under the contract violated Australian public policy. *Corvetina* defended such claim before the NSW Supreme Court on the basis that *Clough* could not raise the objection of public policy in the enforcement proceedings because the issue of public policy had already been settled by the arbitrators. Thus, *Corvetina* requested suspension of the discovery pending until the resolution of its request for clarification regarding the defendant's entitlement to make allegations or seek to prove certain matters in regard to particular paragraphs of its amended defence. However, after two notices of motion from *Corvetina*, the court refused that request and insisted on settling the public policy question first.¹²⁷

¹²⁶ See *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700. For more analysis of this case, see Albert van den Berg (ed), *International Council for Commercial Arbitration, Yearbook: Commercial Arbitration 2005*, vol XXX (Kluwer Law International, 2005) 410–15. ('2005 ICC Yearbook 2005').

¹²⁷ In fact, this case is a notice of motion filed on 23 July 2004; the plaintiff sought:

McDougall J dismissed that in accordance with British and Australian legal principles, which allow the defendant to raise the objection of public policy in the enforcement proceedings, even if the public policy issue was discussed and dismissed by the arbitrators. Additionally, he argued for a balance between the defence of public policy and its application mechanism under the *Convention* and the court's discretion in the application. Hence he pointed out that the court must use its own discretion in implementing its own public policy; therefore, he disagreed with *Corvetina's* argument when he stated that:

I do not think that it can be said that the court should forfeit the exercise of the discretion, which is expressly referred to it, simply because of some "signal" that this might send to people who engage in arbitrations under the Act. There is ... a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy.¹²⁸

Each country has its own public policy; thus, there is no objection or legal impediment to any party who may wish to raise the public policy defence before the enforcement court, even if he failed to successfully raise that defence before the court of supervisory jurisdiction.¹²⁹ Moreover, with changing times, environment and human activities, reasons behind human actions have to be determined in order to ensure justice or moral behaviour.¹³⁰ This will not be obtained unless the judges have been given the right to examine each case separately, which makes them always obliged to apply the national public policy.

[A]n order that there be no discovery ordered in these proceedings until a question, defined in the notice of motion, is resolved. That question is as follows: Whether the defendant is entitled to allege and seek to prove in these proceedings that the plaintiff performed, purported to perform or intended to perform its obligations under the contracts in a manner which (a) was contrary to the public policy and laws of the place of performance, namely, Pakistan (b) was contrary to Australian public policy; by reference to the facts particularised in paragraph 4(b) of the Amended Defence and the matters alleged in paragraph 4(c) of the Amended Defence.

See *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700, [1]–[2].

¹²⁸ Ibid [18] (McDougall J).

¹²⁹ That was very clear in *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1.

¹³⁰ For more information, see van den Berg, 2005 *ICC Yearbook*, above n 126, 410–15.

Indeed, van den Berg disagreed with the essential argument of the plaintiff in *Corvetina*,¹³¹ which was that the arbitrators had discussed the merits of the case; thus, the issue of public policy cannot be raised on the subject of proceedings before the court because that is discussing the merits of the case, which is beyond the court's jurisdiction. It is important to note that each judge is obliged to apply the national public policy and this will be possible by considering any stage of the arbitration proceedings to make sure there is no violation of the public policy (without considering the matter of the case).

This view has been supported by the text of Article V of the *Convention*, which approved the right of raising violation of public policy but it did not specify the type of violation or specify the stage of the arbitration. Additionally, van den Berg believes that the Australian text in that regard, section 8(7)(b) of the *IAA*, is very broad and gives the court a general discretion.¹³² This general discretion was observed in *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd*. This case was decided by the Supreme Court of Victoria (Australia).¹³³ The judge in this case reported:

In my view, the answer should be in the affirmative. The void provisions of the award are to be regarded as ineffective and not part of the award and any leave that will be given will be given to enforce the paragraphs of the award that are valid and effective. Thus, any judgment may be fairly said to have the same effect as the award ... There is no variation in respect of the matters there dealt with by the award. They are simply to be regarded as ineffective and not part of the award.¹³⁴

The judge also expressed a belief that by trying to preserve the 'spirit of the *Convention*', the courts are not just in place to act according to the already developed and implemented laws and rules.

¹³¹ Ibid.

¹³² Ibid 411.

¹³³ See *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd* [1995] 128 FLR 458.

¹³⁴ Ibid 11.

For example, in *Yang v S & L Consulting*,¹³⁵ the application was for a foreign arbitral award made in China under the IAA. The main issue was whether enforcement of the award would be contrary to public policy or not. The plaintiff was a Chinese national and the defendant was Australian. In 2002, the plaintiff (Yang) applied for a visa (subclass 127 business owner) to reside permanently with his family in Australia. Yang engaged the services of the second defendant, Mr Stephen Lee (a registered migration agent). In 2003, Mr Yang was advised by the Australian Consulate in Hong Kong that his application for a permanent entry visa to Australia had been approved. In 2004, an agreement between Mr Yang and *S & L Consulting Pty Ltd*, entered into force. The agreement was also signed by Mr Lee himself as guarantor.¹³⁶

In fact, clause 10 of that agreement provided that any dispute arising out of, or relating to, the agreement should be submitted for arbitration to the China International Economic and Trade Arbitration Commission according to that Commission's arbitration rules. Additionally, the clause provided that the arbitral award would be final and binding on both parties. The agreement was written in Mandarin and it was translated into English by an interpreter and translator accredited by the National Accreditation Authority for Translators and Interpreters in Australia.

The conflict started in 2007 when *S & L Consulting* had not procured a third party to purchase Mr Yang's shares, nor paid him AUD 500,000 owing if *S & L* had failed to find a buyer for those shares in the Australian company.¹³⁷ Accordingly, Mr Yang resorted to arbitration.¹³⁸ A

¹³⁵ See *Yang v S & L Consulting* [2009] NSWSC 223.

¹³⁶ Ibid 2.

¹³⁷ For more information, see Baker and McKenzie, *The Baker & McKenzie International Arbitration Yearbook* (Wolters Kluwer Russia, 2009) 8.

¹³⁸ According to the agreement that was signed in 2002 between the parties, Mr Yang made a commitment to either establish or participate in an eligible business in Australia; and maintain direct and continuous involvement in the management of that business. After his successful application for an Australian visa, Mr Yang entered into a contract with *S & L Consulting* to buy shares in an Australian company. *S & L Consulting* promised to complete all formalities relating to Mr Yang and his family obtaining Australian citizenship; Mr Yang and his family's permanent residency would not be revoked by the government unless they did not live in Australia for sufficient time during the three years after the contract was signed, which can be seen as a promise in behalf of the Australian government made by *S & L Consulting* company; and the most important is that if a third party buyer

notice for the arbitration proceedings was given to the parties; however, the defendants did not appear before or make submissions to the Commission.

The Arbitration Tribunal consider the conflict and found that the agreement was valid and effective and the plaintiff had fully performed his obligations and that S & L Consulting and Mr Lee had failed to carry out their obligations.

The defendant argued that the guarantee in clause 6 of the agreement was contrary to public policy of the law found in the Australian *Migration Act 1958* (Cth). However, this claim did not mean that the agreement was not enforceable nor that the award given to the plaintiff should not be enforced based on that Act.

It could be said that considering the argument of the defence and to some extent it is contrary to public policy, but only a section of what is considered public policy. The argument that was provided by the defendant was that the guarantee in clause 6 of the agreement provides the plaintiff with an incentive not to comply with the undertakings he had made to the government on the basis of which the visa had been issued. The plaintiff was issued a 127 subclass visa and so bound by the requirements of the *Migration Regulations 1994* (Cth) 127.218.

The argument of the defence is that the primary criteria of a subclass 127 visa, to allow himself and his family to reside permanently in Australia, would not be met by the plaintiff if that clause was enforced. In fact, there is no proof showing the plaintiff's intention to either abide or not by subclass 127.216(b) and (c) of the *Migration Regulations 1994*, which was made under the *Migration Act 1958* (Cth), and there is also no proof showing that the plaintiff did abide by those rules.

White J in *Yang v S & L Consulting* argument was based on the judgments in the following cases: McHugh J in *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 at 613; and

for Mr Yang's shares in an Australian company had not been found within three years, S & L Consulting would buy those shares.

Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215 at 229–30, where White J provides that McHugh J in *Nelson v Nelson* identified ‘four exceptions to the dictum of Lord Mansfield’ in *Holman v Johnson*.¹³⁹ Justice White summarised these exceptions as follows:

[T]he courts will not refuse relief where [1] the claimant was ignorant or mistaken ... [2] where the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member ... [3] where an illegal agreement was induced by the defendant’s fraud, oppression or undue influence ... [4] where the illegal purpose has not been carried into effect.¹⁴⁰

He additionally clarified that equity and legal rights should not be denied because they are associated with unlawful purpose, but provided exceptions.¹⁴¹

By making this judgment, the court is trying to show that public policy is not just following what had been previously written as a rule or principle for law and order, but ensuring that morality and justice prevails.¹⁴² The Australian court shows that the sole reason for the development of such rules and values is to ensure justice and moral behaviour. By enforcing the award the *Convention* rules and the national public policy are respected and justice is served.

Immorality is also prevented when the defendant was engaging in the agreement and the intention was to abide by the binding rules, which in this case were not obeyed. That was clear in Justice White’s judgment where he stated: ‘If clause 6 were unlawful, it could be severed. The elimination of clause 6 would not change the nature of the remaining promises in the agreement’. This shows the respect of the court for the agreement and the need to be fulfilled by the parties, which also shows the support of the good faith principle.

In fact, ‘immorality’ as a *public policy* defence was clearly addressed in *Parsons & Whittemore* which was released by Southern District of New York, where Smith J stated that ‘[e]nforcement

¹³⁹ See *Yang v S & L Consulting* [2009] NSWSC 223, 12.

¹⁴⁰ Ibid 12–13.

¹⁴¹ Baker and McKenzie, above n 137, 9.

¹⁴² In the same meaning of preserving the social morals, the Canadian Supreme Court has stated; ‘The public policy defence turns on whether the foreign law is contrary to our view of public morality.’ For more information, see Toronto Lawyers Zvulony and Company, *Enforcement of Foreign Judgments: Corruption Defence* (29 November 2010) US Judgments Law <<http://zvulony.ca/2010/articles/us-judgments-law/corruption/>>.

of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.' ¹⁴³ In addition, morality here could be defined as an application of the good faith principle in the trade area where judges preserve the importance of the original bargain between the parties and respect their agreements, ensure that there is no engaging in false or misleading advertising in that regard, and that all parties are clear and reasonable identified as the agreement. That could be supported by the judgment of Croft J where he stated that "“contrary to the public policy of that country” in art V(2)(b) means “contrary to the fundamental conceptions of morality and justice” of the forum' ¹⁴⁴

On the other hand, section 8(7)(a) of the IAA¹⁴⁵ applies where the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the state or territory in which the court is sitting. This forms part of the Australian law, and in any case this is contrary to public policy because 'the applicable law for determining arbitrability is Australian law'.¹⁴⁶ Enforcement of foreign arbitral awards cannot, therefore, be awarded if the court finds such an award is as a result of a dispute in which the subject matter cannot be settled by arbitration (*Arbitrability*). Grounds here would be against public policy and it is also against the *Convention*.

¹⁴³ For more information, see Federal-circuits vlex website, *Parsons & Whittemore Overseas Co Inc, Plaintiff-Appellant-Appellee, v Société Générale de l'Industrie du Papier (Rakta), and Bank of America, Defendants-Appellees, Societe Generale de L'Industrie du Papier (Rakta), Defendant-Appellee-Appellant*, 508 F 2d 969 (2d Cir, 1974) (2012) Federal-circuits vlex <<http://federal-circuits.vlex.com/vid/whittemore-papier-rakta-37634820>>.

¹⁴⁴ See Croft J in his judgment in *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1 (28 January 2011). Thus, it could be said that morality here stems from the people's culture and social values. Also morality could be counted as international public policy where the International Law Association Committee on International Commercial Arbitration in the *Final ILA Report on Public Policy* suggested that in recommendation (e) 'The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned.' See Mayer and Sheppard, above n 6, 251.

¹⁴⁵ It should be noted that Barrett J believed that 'It is thus clear that it is not open to the court to impose conditions upon s.7 stay which will detract from the integrity of the arbitration process the Commonwealth Act mandates.' See *Westpac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894.

¹⁴⁶ See Luke Nottage and Richard Garnett, 'The Top Twenty Things to Change in or around Australia's International Arbitration Act' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 155. It should be noted that 'there is a narrow understanding of non-arbitrability in Australia.' For more information about the arbitrability, see Matt Skinner and Justin Simpkins, 'Enforcement of Foreign Awards in Australia' (2011) 77(1) *Arbitration* 54, 57.

Thus, it could be said that arbitrability is an element of the public policy defence to refuse the implementation.¹⁴⁷ A relevant example is *ACD Tridon v Tridon Australia*.¹⁴⁸ In this case the plaintiff *Tridon* was a company formed in Canada and the first defendant *TAPL* was a company incorporated in Australia. The fourth defendant, *Tridon New Zealand Pty Ltd TNZL*, was a company incorporated in New Zealand. The plaintiff, a minority shareholder in the first defendant, sought orders for access to corporate documents of the first defendant and its controlled entities (including the fourth defendant). The plaintiff relied partly on statutory remedies under the *Corporations Act 2001* (Cth), and partly on the provisions of a shareholders' agreement, which contains an arbitration clause, between itself and the second defendant. The plaintiff also sought to establish the right to terminate a distribution agreement between itself and the first and fourth defendants. The plaintiff argued that the subject matter was not arbitrable. The defendant's claim was to stay the court proceeding because of the existence of the arbitration clause.

In this case Austin J addressed some limitations of public policy and offered some examples. He then addressed another case (*A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170) and mentioned a very important point in that case that an '[a]dditional ground seems to have been that a winding up order operates to affect the rights of third parties, not merely the rights of the parties to the arbitration clause'.¹⁴⁹

However, the significant question was whether this proceeding should be wholly or partly stayed because the dispute or part of it was capable of settlement by arbitration pursuant to the arbitration clauses (in the original contract).

Austin J believes that because the

[S]tatutory question was different from the questions raised in other aspects of the dispute, it was proper to characterise the statutory claim as a separate "matter" ... McLelland J

¹⁴⁷ For more information, see Ma, above n 56, 151.

¹⁴⁸ [2002] NSWSC 896.

¹⁴⁹ [2002] NSWSC 896 [191] (Austin J).

observed that the word “matter” in s 7(2)(b) “denotes any claim for relief of a kind proper for determination in the Court. It does not include every issue which would, or might, arise for decision in the course of the determination of such a claim”.¹⁵⁰

The court held that matters arising under the *Corporations Act* could generally be submitted to arbitration, which concerned the parties’ rights that stem from the contract. Also, the court gave a wide and liberal interpretation to the arbitration clause to include some corporate disputes. The court noted that the matters that could not be solved by arbitration will be solved under its Rules. This shows the power of the court under the *Convention* and the *IAA* to refuse to implement the arbitral award if the dispute cannot be resolved by arbitration (that is, ‘arbitrability’).¹⁵¹

Additionally, Mary Keyes believes that where third parties are involved in a dispute, a narrow interpretation for the justification in the scope of the arbitration agreement should be adopted; thus, the result of that agreement may be interpreted not to apply to the third party disputes, but to give effect to the parties’ presumed intentions, efficiency, and avoiding potentially inconsistent outcomes.¹⁵² This is due to the principle that in Australian courts the principles applied in interpreting jurisdiction clauses are similar to those applied in the interpretation of arbitration clauses. As a result, in *Heilbrunn v Lightwood Plc* Allsop J stated that ‘provisions conferring jurisdiction ... should be interpreted liberally and without imposing limitations not

¹⁵⁰ [2002] NSWSC 896 [107 and 103] (Austin J).

¹⁵¹ See *ACD Tridon v Tridon Australia* [2002] NSWSC 896. Most importantly, Austin J (at 243) made a significant distinction between the court power under section 53 of the *Commercial Arbitration Act 1984* (NSW) and the powers under section 7 of the *IAA* in the stay of proceedings, where the court power under section 53 of the *CAA* is

[t]o order that a proceeding be stayed until arbitration takes place, where the requisite conditions are satisfied. Unlike s 7(2) of the *International Arbitration Act*, s 53 gives the court a discretion to order a stay and does not purport to require that the discretion be exercised when the requisite preconditions have been met.

Thus, if the proceedings are capable of being resolved by arbitration, the subject matter is capable of being solved by the arbitration.

¹⁵² See Mary Keyes, ‘Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice’ (2009) 5(2) *Journal of Private International Law* 181, 198.

found in the express words'. However, according to Keyes 'as for arbitration clauses, in some cases the courts interpret jurisdiction clauses strictly.'¹⁵³

In the *Transpac* case, Hall J found that section 8(7) and (8) of the *IAA* prescribe some circumstances where the national court can refuse to enforce a foreign award or defer the proceedings in which the enforcement of an award is sought; and he additionally noted that 'these two subsections are not dependent on any request coming from the party against whom the Award is invoked.'¹⁵⁴ In *Transpac* there is no evidence presented to support the existence any of the grounds contemplated in section 8(7) and (8) of the Act, that is, there is no basis upon which the court could find that the dispute would not be capable of being solved by arbitration, should this dispute be 'governed by the laws of this State' nor that to enforce the award would be contrary to the public policy (section 8(7)).

In addition, there is no evidence presented to provide the possibility of setting the award aside, such as when an application being 'on foot' in an overseas jurisdiction.¹⁵⁵ Therefore, in accordance with Australia's obligations under the *Convention* and section 8 of the Act, Hall J finds that this condition 'arbitrability' must be applied in accordance with the national law where there is no evidence that the subject of the dispute is unenforceable under the valid domestic legislation.¹⁵⁶ Thus, such condition 'arbitrability' must be in accordance with the domestic law as applied by the judge.

Furthermore, Lockhart J in *White Industries Ltd v Trammel*, has examined the arbitration clause in that case and noted:

[p]roceedings brought by the applicant were capable of settlement by arbitration under the agreement between the parties, s.7(2)(b) of the Arbitration (Foreign Awards and Agreement) Act 1974 (Cth) applied, allowing the proceedings to be stayed, and so much of

¹⁵³ Ibid 201. See Allsop J in *Heilbrunn v Lightwood Plc* [2007] 243 ALR 343.

¹⁵⁴ *Transpac Capital PTE Limited v Buntoro* [2008] NSWSC 671 [44].

¹⁵⁵ Ibid [45].

¹⁵⁶ Ibid [45]–[46].

the proceedings as was capable of being settled by arbitration, to be settled in that manner.¹⁵⁷

Lockhart J explained that when the proceedings are capable of being settled by arbitration, the award will be applicable under his jurisdiction and also the subject matter is capable of being solved by the arbitration. In addition, when the dispute is capable of being settled by arbitration, the award should be settled in the same matter.

Consequently, the court will refuse to apply the award if the proceedings from the beginning were incapable of being resolved by arbitration. Therefore, the judge will stay the proceedings if this is the case, which means he/she will refer the case to the arbitrators in the ground that matter is capable of being resolved by arbitration.

It is clear that the number of cases regarding the enforcement of foreign arbitral awards before the Australian courts is higher than for cases before the Saudi courts which, however, remain very few. As few Australian cases explore matters related to the public policy in approving foreign arbitral awards, it is useful to consider the British approach. In fact, there is an extremely important case that has been issued by the English Court of Appeal with regard to public policy, and this case was cited in several Australian judgments. Surprisingly, ‘the *Soleimany* case appears to be the first case in which the English Court of Appeal refused to enforce an award on the basis of public policy.’¹⁵⁸

In the *Soleimany* case, the parties have chosen the Jewish law. In fact, the *Arbitration Act 1996* (UK) in section 46(1)(b) did not limit the parties to the national legal system of the United Kingdom.¹⁵⁹ This case was about an application of an international arbitral award issued in Israel. The original transaction between the two English Jewish parties (who originally came from Iran) was a contract for exporting valuable Persian and other Oriental Iranian carpets, but

¹⁵⁷ (1983) 51 ALR 779, 1 [(ii)].

¹⁵⁸ See Ma, above n 56, 175; also see *Soleimany v Soleimany* [1998] AppLR 02/19.

¹⁵⁹ See Loukas A Mistelis, *Concise International Arbitration* (Kluwer Law International, 2010) 792.

the implementation of that contract includes smuggling Persian carpets out of Iran and bribery of some Iranian officials.

In greater detail, the case involved ‘the plaintiff’, ‘Abner’, who migrated from Iran to England as a student, but, following the arrival of his father (‘Sion’ the defendant) in England, he returned to Iran at Sion’s request to help free a consignment of carpets that had been seized by the Iranian customs authorities.¹⁶⁰ To do so, Abner claims to have suffered severely at the hands of the Iranian authorities; but while in Iran he also concluded that there were substantial profits to be made from the export and sale of Persian carpets, but the export from Iran would (as he has always accepted) have involved contravention of Iranian Revenue laws and export controls. Abner’s statement is that he had arranged the purchase of the carpets in Iran, and that Sion had undertaken to act on his behalf in selling these carpets in the West. Abner admitted that it was the carpets belonging to Sion which had been seized by the authorities in Iran. These carpets were seized because they were being smuggled out of Iran, as per Abner’s affidavit; and Abner, in order to free those carpets, had to bribe the Revolutionary Guards.¹⁶¹

The plaintiff in this case demands the defendant pay the value of the smuggled Iranian carpets and also to pay a compensation for the other costs that he met, but the defendant refused to do so. Accordingly, they agreed to arbitrate this conflict in Israel according to the Israeli law in the Beth Din (Court of the Chief Rabbi). The arbitral award issued in favour of the plaintiff and awarded an amount equal to all the money that he paid (including the costs of smuggling the carpets) to the plaintiff; but the defendant declined to implement that award. The plaintiff was forced to resort to the British court because the assets and property of the defendant were located in Britain. The court recognised that this award is properly viewed as unenforceable on the basis that the original contract, which contains smuggling and bribery, was illegal in the country where implantation was being sought (the United Kingdom), even if such actions as

¹⁶⁰ For more information, see *Soleimany v Soleimany* [1998] AppLR 02/19.

¹⁶¹ It was written in the award that ‘Abner purchased quantities of carpets and exported them, *illegally* (our emphasis), out of Iran.’ See *Soleimany v Soleimany* [1998] AppLR 02/19.

‘smuggling and briberies’ were deemed not to affect the parties rights under the governing law in the country of the original arbitral award, here Israeli law.¹⁶² The English Court of Appeal considered the award contrary to public policy. Lord Justice Waller clarified the point of conflict, which was the court’s jurisdiction to re-open the case to evaluate the illegality of the basic transaction, when illegality was involved. The court stressed that, if there is prima facie evidence that an award is based on an illegal contract, the enforcement judge should make further inquiries to obtain the valid evidence. The judge should get evidence from the other party, from the arbitrator, as to whether it was fair for the arbitrator to have reached such a conclusion, or whether the arbitrator is competent in relation to the inquiry or whether there collusion or bad faith had existed in order to produce the award. This according to the judges did not mean that judges should conduct full scale trial on those matters, but (where engaging in a full trial on the matters would lead to mischief such as delays and so on that arbitration was designed to avoid) inquire sufficiently to decide on whether it is appropriate to give full credit to arbitrator’s award. The judge can only embark on a more complex inquiry into the issue of illegality if the judge decides at an early stage that he/she would do so.¹⁶³

The judge’s power to decide to give full faith and credit to the arbitrators’ award or to embark on a more elaborate enquiry into the issue of illegality shows the seriousness of such jurisdiction because the laws and international conventions expressly prohibit consideration of the merits of the case before the competent court.¹⁶⁴ Therefore, any contract that is illegal under English domestic law shall not be enforced by an English court, nor shall the courts enforce contracts that are considered illegal by the laws of a foreign country. This rule, according to *Soleimany v*

¹⁶² It should be noted that ‘the arbitrator felt justified in ignoring that illegality.’ See Adam Johnson, ‘Illegal Contracts and Arbitration Clauses’ (1999) 2(1) *International Arbitration Law Review* 35, 37.

¹⁶³ See *Soleimany v Soleimany* [1998] AppLR 02/19. 8, [51].

¹⁶⁴ For more information and evaluation of *Soleimany* case, see Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) 414; Rana and Sanson above n 11, 312; also see Jacob Grierson, ‘Court Review of Awards on Public Policy Grounds: A Recent Decision of the English Commercial Court Throws Light on the Position under the *English Arbitration Act 1996*’ (2009) 24(1) *MEALEY’S International Arbitration Report* 1, 2.

Soleimany, applies to the enforcement of arbitral awards as to the enforcement of contract in legal proceedings.¹⁶⁵

This case illustrates several important points regarding the use of public policy as a reason to refuse to implement the provisions of foreign arbitral awards. These points are:

1. The judge has no right to examine or consider the subject matter of the basis transaction between the parties in the first instance.
2. The judge must make sure whether it is proper to give full faith and credit to the arbitrators' award regarding the illegality of the basis transaction.¹⁶⁶
3. The judge is obliged, when he believes that there is a serious request in determining the legality of the original deal between the parties, to consider that point.
4. The judge is obliged to reject the implementation of a foreign arbitral award if it is illegal according to the national law, even if the original contract is considered legitimate under the law where it was made.¹⁶⁷
5. That rejection of the application should be based on violation of public policy which cannot be included in any other defence of the refusal to implement any foreign arbitral awards.

Finally, besides what is stated in the *Convention*,¹⁶⁸ Australian courts have tried to consolidate some of the wide terminology, such as 'public policy', which is under the flexibility that the

¹⁶⁵ See *Soleimany v Soleimany* [1998] AppLR 02/19, 11 [66].

¹⁶⁶ According to Shai Wade, 'There would not normally be any objection to an arbitral tribunal having jurisdiction to consider the legality of the underlying contract.' See Shai Wade, 'Westacre v Soleimany: What Policy? Which Public?' (1999) 2(3) *International Arbitration Law Review* 97, 101.

¹⁶⁷ In fact, at common law, the contract is illegal where it is 'formed or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or providing any other remedies arising out the contract': see Carol Mulcahy, 'The Challenge to Enforcement of Awards on Grounds of Underlying Illegality' (1998) 64(3) *Arbitration* 210.

¹⁶⁸ As explained above, the 'courts are still empowered under the *New York Convention* to review the awards for public policy consideration and may refuse their enforcement accordingly.' See Amr A

national courts enjoy when they define and interpret this principle; it is also under their discretion to refuse (or not to refuse) to enforce an award which violates public policy.

B. *Limits of Public Policy in the Decisions of the Competent Judicial Authority*

It is true that through the court's decisions, the limits of public policy can be determined. This was clear in the *Resort Condominiums v Bolwell* case, and *Corvetina Technology v Clough Engineering Ltd*, and also in the *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd* case.¹⁶⁹

In *Resort Condominiums v Bolwell* there is an important decision by the court, which could affect future court decisions if enforcement of the award was granted. Because of that, the court could not enforce the award; and the basis of the ruling was that in Australia, courts have a general discretion as an additional ground for not recognising and enforcing an award which otherwise qualifies to be recognised under the *Convention*. The court based its argument on section 8(5) of the *IAA* which omitted the word 'only' in its provision of grounds under which recognition and enforcement of foreign awards should be recognised or enforced. Because of that, it was argued that section 8(5) provides for residual discretion as an additional ground for refusal of enforcement of such awards.¹⁷⁰

This shows the level of control that the Australian courts have over the cases.¹⁷¹ According to Garnett and Pryles, many academic commentators do not agree with the decision, arguing that the Australian court does not have such residual discretion. According to them, the defences, put

Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism' (2000) 41 *Harvard International Law Journal* 419, 442.

¹⁶⁹ This case, *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, has been cited in *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; also *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd*, [1995] 128 FLR 458.

¹⁷⁰ For more information, see Richard Garnett and Michael Pryles, 'Recognition and Enforcement of Foreign Awards under the *New York Convention* in Australia and New Zealand' (2008) 25(6) *Journal of International Arbitration* 899, 904.

¹⁷¹ *Foreign Judgments Act 1991* (Cth) s 7(2)(xi) has a similar provision, which gives the Australian courts the discretion to set aside a registered foreign judgment if the enforcement of that judgment 'would be contrary to public policy'.

in place in Article V of the *Convention* and section 8(5) of the *IAA*, were exhaustive. It means that they leave no room for additional grounds for rejection of enforcement of foreign awards.¹⁷² This, compared to the situation in Saudi Arabia, is similar where the decision of the President of the Grievances Board limits the public policy in the assets of the *Shari'a*.

In *Corvetina Technology v Clough Engineering Ltd*, the NSW Supreme Court tried to show its limits; however, it could not decide whether the courts have a general discretion to the expressed grounds in sections 8(5) and (7).¹⁷³

In *Resort Condominiums v Bolwell*,¹⁷⁴ the court also found three reasons why the enforcement of the award that was presented was against public policy. First, the arbitrator's orders were so vague and sweeping, which makes the enforcement of the award impossible;¹⁷⁵ secondly, 'they were not orders that a Queensland court would make',¹⁷⁶ which suggests that decisions made by the arbitrators should correspond to the law of the country in which the award will be enforced (although this seems impossible, for even at the time of decision making, the arbitrators may not know the country in which the award will be enforced); and thirdly, the enforcement of these orders would constitute double implementation where similar orders had already been issued by a US court in respect of the same subject matter.¹⁷⁷

In more detail, the *Resort Case* was between an Australian franchisee and a US franchisor, where the franchisee had breached his obligations, including failing to pay royalty fees due. Consequently, the franchisor resorted to arbitration where he was given some interim measures of protection (until the arbitrators gave the final award). The claimant obtained similar orders

¹⁷² This is as evidenced in the following cases: *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)*, 508 F2d 969, 973 (2d Cir, 1974) and *Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625. For a more detailed explanation, see Garnett and Pryles, above n 170, 911.

¹⁷³ See van den Berg, 2005 *ICC Yearbook*, above n 126, 410–15; also see Garnett and Pryles, above n 170, 904.

¹⁷⁴ See *Resort Condominiums v Bolwell* [1995] 1 Qd R 406.

¹⁷⁵ This represents the 'uncertainty' in the award of the arbitrators, which makes it capable of being refused.

¹⁷⁶ Garnett and Pryles, above n 170, 911.

¹⁷⁷ *Ibid*.

from a US court, and the arbitral award was sought to be enforced in Queensland, Australia. The defendant claimed that these were interim orders (interim measures of protection) that did not solve or end the conflict and so the arbitral award could not be enforced in Australia under the terms of the *Convention* and the *IAA*. The judge stated that these orders ‘are clearly of an interlocutory and procedural nature and in no way purport to finally resolve the dispute ...’.¹⁷⁸ Such interlocutory and procedural orders cannot be accounted as a final award where it can be measured on the interim measure which is not also a final award. According to Nottage and Garnett, ‘courts and commentators generally agree that most interim measures are not “final” enough to be enforceable under the New York Convention or s.8 ... such orders are not arbitral awards, and are binding on the parties but shall not be subject to enforcement by a court.’¹⁷⁹ That is because such interims ‘are, of course, by definition not final.’¹⁸⁰ However, it should be noted that the *UNCITRAL Model Law* in Articles 17B and 17C mentioned the implementation of such interims. Conversely, these Articles ‘are not phrased as an option as in the revised Art 7 on writing requirements which suggests less consensus within *UNCITRAL* and its member states.’ This in turn reflects the lack of final nature of such orders in the implementation where it shall not be subject to enforcement by the national court.¹⁸¹

In the *Resort* Case the court also ‘suggested that an enforcing court in Australia has a *general discretion* outside the grounds stated in the *Convention* not to recognise and enforce an award that otherwise qualifies for recognition under the *Convention*’.¹⁸² So the judge examined the qualifications of these interims as ‘arbitral awards’ under the *Convention* and then he decided that, according to the Article I of the *Convention*, the decision that was meant to be enforced

¹⁷⁸ See *Resort Condominiums v Bolwell* [1995] 1 Qd R 406.

¹⁷⁹ See Nottage and Garnett, above n 146, 168–9.

¹⁸⁰ See Kaj Hobér, ‘The Trailblazers v the Conservative Crusaders, or Why Arbitrators Should Have Power to Order Ex Parte Interim Relief’ in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond: ICCA International Arbitration Congress*, International Council for Commercial Arbitration Series No 12 (Kluwer Law International, 2005) 272, 273.

¹⁸¹ See Nottage and Garnett, above n 146, 170.

¹⁸² See Garnett and Pryles, above n 170, 904; also see Robin Burnett and Vivienne Bath, *The Law of International Business in Australasia* (Federation Press, 2009) 468.

was the arbitral award, not the interim measures which was not capable of enforcement on this basis ‘as an arbitral award’ or on the grounds of public policy.

According to Article V(1)(e), the non-final decision is not enforceable, where an English or Australian judge has no *inherent* power to set aside interlocutory orders; thus, it is not the kind of order that the arbitrator can order. Thus, the court will not enforce such orders.¹⁸³

In fact, the Supreme Court of Queensland in this case did not indicate the provisions that are not within its scope in the implementation process. According to this view, the provisions that do not fall within the scope of the court are unknown, which affects the effectiveness of the role of the court. This is due to the fact that the court did not refuse the implementation based on the text of the *IAA* or the *Convention*. In fact, it refused the enforcement based on a special standard which was created by the court itself which is not known or determinable. The court in this case did not classify such award as an arbitration decision that is contrary to the public policy or to any other requirement and it is not interim measure; however, it refused to implement such award based on its new standard ‘not within its scope of implementation’.

Hence, if we assume to argue that point, that there is an arbitral award issued in the Kingdom of Saudi Arabia, where the arbitrators are Muslims and do not recognise or rule on an award with interest ‘as usury’, where it is a forbidden action in *Shari’a*. Additionally, if we assume that the parties or one of them was demanding the application of the interest part; however, the tribunal has ignored this request and issued the award without any approval of the interest.

First of all, it is known that the request for interest is legitimate according to Australian law; thus, the judge cannot ignore such a request, as it is not a judgment that the Australian courts

¹⁸³ For more information, see Albert Jan van den Berg, *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International, 2003) 165. It should be noted that finality as a condition for the implementation of foreign arbitral award (ie, that an arbitration award is binding and not open to appeal on the merits) is not within the framework of public policy. See Yannaca-Small above n 2, 13. In fact, it is considered as an independent objective condition that must be met by the arbitration award, such as the availability of the principle of reciprocity. These conditions were discussed in Chapter 4 (4.1 Role of the Judge in Implementing the Formal Requirements).

can do in general, that is, ‘refusing to apply the interest’. Thus, returning to our example, does the Supreme Court of Queensland or any Australian court have the right to refuse to implement that Saudi arbitral award on the basis that the Australian courts are not accustomed to giving such judgments? Or on the basis that this award is not that order which a Queensland court would make. I believe that this argument is not strong enough to refuse and exclude the foreign arbitral award unless there is a clear and specific violation as stipulated in the *Convention* and in the *IAA* as well.

In fact, these orders (interim measures of protection) did not even solve a part of the conflict and were released by an arbitrator, where by analogy Article V has given the national court the authority to divide the application by refusing the offending part and applying the non-offending part in an instance where part is contrary to the public policy. Thus, the application of an award that solves one part of the conflict is not an obstacle, and it is not out of the scope of the *Convention* as long as it is not mentioned in the national laws, ‘such interims cannot be enforced’. However, these interims, if they are enforceable, should satisfy all other formal requirements, such as the finality. Hence, it is important to examine these interims which may be out of the *Convention*’s scope. The judge in this case believes that the arbitral award under the *Convention* is the award dealing with differences between the parties, and not the order which merely deals with procedural or interlocutory matters.

It is also important to describe how this term ‘interim measures’ is applied to what is contained in the *Convention*. Article 17 of the *UNCITRAL Model Law* states:

An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent

award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.¹⁸⁴

However, the prerequisites of ‘interim measures’ are not strictly defined in arbitration law, except that these orders could be issued by the arbitrators if necessary in relation to the subject matter of the conflict.¹⁸⁵ However, such orders must only be issued after hearing the parties.¹⁸⁶ Wang believes that interim measures are ‘an absolute necessity to protect what is at stake in the arbitration. Regardless of whether evidence, real property, personal property, or financial assets needs to be preserved, there must be an effective procedure for maintaining the status quo.’¹⁸⁷ Therefore, these interim measures are orders made by the arbitrator/s before the issuance of the final award to preserve evidence, stabilise the relation between the parties, and secure the award’s enforcement or its costs or as interim payment.¹⁸⁸

On the other hand, in *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd* uncertainty is used as a basis of argument against enforcement of a foreign award. Under the *Convention*, however, uncertainty is not one of the grounds for refusal to enforce a foreign award, while under Australian law it is a basis for refusal to enforce domestic arbitral awards.¹⁸⁹ The courts used Australian law to make the decision, disregarding the provisions of the *Convention*. Uncertainty, again, is not a defence against enforcement in section 8 of the *IAA*

¹⁸⁴ For more explanations about the purposes of issuing such order, see Rana and Sanson above n 11, 224; Donald Francis Donovan, ‘The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of *UNCITRAL* and Proposals for Moving Forward’ in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International, 2003) 82; Lew, Mistelis and Kröll, above n 19, 595.

¹⁸⁵ See Rafal Morek, ‘Interim Measures in Arbitration Law and Practice in Central and Eastern Europe: The Need for Future Harmonization Arbitration’ in Association for International Arbitration, ‘*Interim Measures in International Commercial Arbitration*’ (Maklu, 2007) 75, 82.

¹⁸⁶ Ibid 84.

¹⁸⁷ See William Wang, ‘International Arbitration: The Need for Uniform Interim Measures of Relief’ (2002–2003) 28 *Brooklyn Journal of International Law* 1059, 1061.

¹⁸⁸ See Lew, Mistelis and Kröll above n 19, 595.

¹⁸⁹ See Garnett and Pryles, above n 170, 905–906. In *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd* (1995) 128 FLR 458, the court considered the arbitral award as vague and refused to implement it on the ground that it was manifestly uncertain and therefore void. Such provision or case is also related to the authority of the arbitrator/s which is discussed in the previous chapter.

neither is it in Article V of the *Convention*; thus, any refusal should be according to these laws.¹⁹⁰

As shown above, the Australian courts have the power to determine the limit of public policy. In fact, Australia has States with different statutory laws and policies and it also has the common law. Because of that, under the public policy exception in the enforcement of a foreign award, different courts apply different public policies in different cases. The Supreme Court of Queensland, for example, will apply the State's public policy in deciding cases, which might not be the same as the Australian public policy.¹⁹¹ That was evident in the *Resort Case*, as explained above, where the Supreme Court of Queensland stated that 'they were not orders that a Queensland court would make' which shows that the court applied the public policy of the state. Additionally, the court in this case used uncertainty as a ground to refuse the enforcement where this defence is not included in the *Convention* or in the *IAA*. In fact, 'uncertainty' is a ground for refusing domestic awards in Queensland.¹⁹² On the other hand, the Supreme Court of New South Wales did not apply this principle regarding 'uncertainty' as a basis for refusing to implement foreign arbitration because it is not a basis for refusing foreign arbitration in the *Convention* nor in the *IAA* and also it is not a basis for rejecting the domestic arbitration in NSW. This is also clear in *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd*, as described above.

In fact, the fusion of common law and equity may affect the decisions of the Australian courts in the application of public policy. This is due to the fact that there are some principles of the *lex mercatoria*, such as good faith, which resemble the principles of equity as applied in Australia.¹⁹³ Additionally, '[L]ike the *lex mercatoria*, the common law and equity "both derive

¹⁹⁰ Garnett and Pryles, above n 170, 905–6.

¹⁹¹ About the authority of the national court in the application of the domestic public policy and the effect of multiplicity of states in Australia, see Ma, above n 56, 48; also see Garnett and Pryles, above n 170, 912.

¹⁹² See *Commercial Arbitration Act 1990* (Qld) s 38(5)(b)(ii).

¹⁹³ See Ma, above n 56, 50. The '*lex mercatoria*' consists of rules and principles governing international trade and commerce which exist independently of any national legal system, or which are common to

their content from the prevailing public and moral or community values”.’¹⁹⁴ These play an important role in what the Australian courts consider public policy. Indeed, common law and equity are parts of general public policy; however, they will be influential when applying public policy.¹⁹⁵ This is due to the fact that the court in implementing foreign awards cannot separate the common law and equity which forces the judge to create new principles to maintain consistency and structure underlying of the common law and equity.

Thus, it can be said that that Australian courts enforce foreign awards using a strict approach. In New South Wales, the weight or value given to the public policy exception is more that public policy is considered in the context of the enforceability or validity of the award.¹⁹⁶ Hence, public policy in Australia is almost like public policy in the provisions of the *Convention*, which refers to a nation’s public policy. In section 8(7) of the *IAA*, the public policy exception is used when the competent authority in the country where recognition and enforcement is sought finds that ‘a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or b) The recognition or enforcement of the award would be contrary to the public policy of that country.’

Finally, it should be mentioned that Australian courts are based in different States as well as there being a federal jurisdiction; however, according to the provisions in the *Convention*, if enforcement of an award will be contrary to the public policy of a place, then such an award should not be implemented. This justifies the actions of the Australian courts in refusing cases on the basis of being contrary to public policy, which means that the court has the power to determine that such an award is a contrary to public policy. In fact, it is very hard to determine justice in maintaining the policies that provide law and order in a nation, state or region.

several legal systems.’ For more information about the *lex mercatoria* and its principles and applications, see Ma, above n 56, 92.

¹⁹⁴ For more information and explanation about this fusion, see *ibid*.

¹⁹⁵ *Ibid* 49–50.

¹⁹⁶ *Ibid* 48.

The cases presented above raised a doubt about the fairness of the Australian courts where, for example, uncertainty is not one of the grounds for refusal to enforce a foreign award.

The *Resort Condominiums v Bolwell Case* is another example where it was necessary for the court to consider the merits of the case in order to implement the public policy principle, which shows the higher value placed on preserving social values rather than the individual cases themselves.¹⁹⁷ In this case the court used its residual discretion to reject the awards where the case was handled to argue that the award was against public policy.¹⁹⁸ This might be viewed as unfair, but considering other cases involving foreign arbitral awards and the use of contrary to public policy as a defence against enforcement of an award, such a case can be considered fair and just.

Moreover, there are three cases, in which the courts used their own residual discretion to make judgments, and these cannot be considered as unfair judgments.¹⁹⁹ These are: *Xiaodong Yang v S&L Consulting Pty Ltd* [2008] NSWSC 1051, *China Sichuan Changhong Electric Co Ltd v CTA International Pty Ltd* [2009] FCA 397 and *Transpac Capital Pte Limited v Buntoro* [2008] NSWSC 671. In all these cases, the defendants did not appear in court to challenge the awards.

In *Transpac Capital Pte Limited v Buntoro* case, the court, by its motion, still considered whether (under section 8 of the *IAA*) the grounds applied for the refusal of enforcement of the Singapore award.

¹⁹⁷ Such a trend may exclude the arbitration process from its scope which may make the resort to arbitration without meaning for the parties. For more information about this case, see Garnett and Pryles, above n 170, 904.

¹⁹⁸ Departure from the standards set out in the *Convention* and the *IAA* by reporting the uncertainty as a criterion for determining the violation of public policy could be accounted a different approach from the legal texts which may cause injustice. Thus, such approach may pose the question as to the breach of justice. The answer could be 'yes', where any new approach in the law should come in accordance to a legal justification. In fact, in regard to that case, there is no legal text or a precedent to support 'uncertainty' as a separate criterion. However, the general and vague meanings of the term 'public policy' may enable the court to add more terms like 'uncertainty' under the public policy defence.

¹⁹⁹ These cases were discussed in the literature review (1.6 Literature Review).

This case concerns an application of foreign award pursuant to section 8 of the *IAA*. The plaintiff was a Singaporean company. The foreign award was issued by the Singapore International Arbitration Centre in 2007. The award was made against the defendant, who lived in NSW, and two other respondents. At the hearing of this case the defendant was absent; however, the defendant had been made aware of the date of the hearing so the judge proceeded on an undefended basis.

The case was about the provision of USD 5 million by the plaintiff to an Indonesian company PT Eurasiawood Industries (PTEI) (in consideration of which the plaintiff was to receive fifty USD 100,000 bonds) under a Bond Subscription Agreement to assist in establishing a wood-processing project in Indonesia;²⁰⁰ there was a further Investment Agreement with the defendant and another which involved an irrevocable ‘put option’.²⁰¹ Both agreements contained an arbitration clause. At the expiry date of the Bond Subscription Agreement (which had ten year term starting in 2003), PTEI was obliged to pay the plaintiff the full value of the bonds with interest.²⁰² The plaintiff claimed that PTEI had failed to repay the plaintiff the full value of the bonds with interest, nor had the company (when the plaintiff attempted to exercise the put option) purchased the bonds as required.²⁰³ In this case, Singapore law was the governing law for the arbitration process. On both issues (as regards the bond and investment agreements) the arbitrator ruled in favour of the plaintiff and issued a binding award. It was this award that the plaintiff sought to have implemented in Australia.

In this case it is clear that the judge has the power to examine the breach of the public policy without the need for a separate request by any of the parties, where the judge came to a conclusion that ‘there is no evidence supporting the existence of any of the grounds

²⁰⁰ *Transpac Capital PTE Limited v Buntoro* [2008] NSWSC 671[10]–[12].

²⁰¹ *Ibid* [16].

²⁰² *Ibid* [13], [21]. The interest rate was 1% per annum compounding [13].

²⁰³ *Ibid* [22].

contemplated in ss. 8(7) and 8(8) of the Act'.²⁰⁴ This case illustrates the power of the judge in the investigation and consideration of the public policy defence by himself, even if there is no request for that from any of the parties.

In *China Sichuan Changhong Electric Co Ltd v CTA International Pty Ltd*,²⁰⁵ the court made its judgment based on whether the defendant had been properly notified; hence, the court found that the decision went in favour of the plaintiff. The *Xiaodong Yang v S&L Consulting Pty Ltd* case was also considered on the basis of the plaintiff's evidence meeting the criteria in section 8 of the *IAA* and proper information given to the defendant about the application of the enforcement. Leave to enforce was granted on the basis that there was no reason not to grant such an award.

In all these cases, the courts used their own residual discretion, as it can be referred to, to make decisions regarding enforcement of foreign awards. The issue of 'residual discretion' is not considered wrong here, but in the cases where the courts indicated violation of public policy, the decisions are considered wrong by some academics.²⁰⁶ This may indicate that Australian courts aim at justice and morality although some of their decisions may seem not to go by the provisions of the *Convention*. The information provided above also emphasises what courts consider as public policy. It is their domestic policy which protects the reason for its establishment or development, that is, justice and morality.

Therefore, the reasons for court's rejection of enforcement of the award in Australia are as follows:

1. *Existence of Fraud*: as in *Yang v S & L Consulting*, where the defendant perpetrated fraud in the formation of the agreement since they knew that the Minister's decision to cancel

²⁰⁴ Ibid [46]–[47] with amounts as at the date of the original award payable (additional interest after that date waived by the plaintiff), costs against the defendant.

²⁰⁵ [2009] FCA 397.

²⁰⁶ According to Garnett and Pryles, 'By relying on a ground of refusal not mentioned in the Convention, the court exercised a "residual discretion" not to enforce the award': see Garnett and Pryles, above n 170, 906.

the plaintiff's visa was not determined by their actions. Additionally, the primary criteria of a subclass 127 visa holder would not be met by the plaintiff if that clause was enforced. The defendant of the case could not be aided for the reason stated above where the judgment by White J stated: 'If clause 6 [was] unlawful [this clause] could be severed. The elimination of clause 6 would not change the nature of the remaining promises in the agreement'.²⁰⁷ This may indicate that when forming the agreement the defendant had no intention of abiding by its provisions or contracting rules. Because of that, they went against public policy by committing fraud against the plaintiff.²⁰⁸

2. *To ensure Justice and Morality for the Public:* Generally, the role of the court is to achieve justice between the parties while maintaining the values of the society. Regarding the enforcement or refusal of international arbitration, the court shall make sure the parties to the arbitration agreement have received a just treatment, which allows them to raise any objection (especially the public policy defence) in the enforcement proceedings, even if the public policy issue was discussed and dismissed by the arbitrators. The court aims to protect society; and as each country has public policy that reflects its society, it is thus necessary for the court to apply its own public policy to achieve this goal. This does not mean automatic compliance between states of foreign arbitral awards but it does ensure just treatment in line with that country's policy. It is clear that with changing times, human actions have to be evaluated to ensure justice or moral behaviour. This will not be obtained unless the judge has been given the right to examine each case separately to determine a just outcome, which makes him/her always obliged to apply the national public policy.

²⁰⁷ See *Yang v S & L Consulting* [2009] NSWSC 223, 24.

²⁰⁸ See *Baker and McKenzie*, above n 137, 8.

3. *Non-Arbitrability*: Arbitral awards are not enforced if the subject matter or the award is not arbitrable according to the laws of Australia. These reasons for the rejection of the enforcement of foreign awards should not ignore any of the following points:
- a. Court residual discretion as a reason is not mentioned in the *New York Convention* or the *IAA*; however, some court decisions show such discretion where the court has refused to implement a foreign award because that award was so vague and sweeping making the enforcement of the award impossible. Thus, it can be said that the enforceability of the award is one of the most important factors that can affect the application of the arbitral awards.
 - b. Uncertainty has been used as a basis for arguments against enforcement of a convention award, while uncertainty is, as mentioned before, a basis for non-enforcement of domestic arbitral awards under Australian law. Thus, uncertainty as a defence against the enforcement is not included under section 8 of the *IAA* or Article V of the *Convention*. On the other hand, ‘an arbitral award, irrespective of the [Australian] State or Territory in which it was made, is to be recognised in this State as binding.’²⁰⁹ Accordingly, the court can exercise its own ordinary powers in that regard.²¹⁰

Finally, there are other principles that may relate to the public policy defence related to the enforcement of foreign arbitral awards, which have been cited and recognised by some court

²⁰⁹ See *CAA 2010 (NSW)* s 35. For more information see, International Chamber of Commerce, *Country Answers: Australia* (Law as at 18 July 2008) [Material Reproduced from: ICC, *Special Supplement 2008: Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards* (2009) 29] <http://www.iccdri.com/CODE/LevelThree.asp?page=Country%20Answers&Locator=32.2&L1=Country%20Answers&tocxml=ltoc_CountryAnswersAll.xml&contentxml=arbSingle.xml&tocxml=toc.xml&contentxml=CA_SUPP_0021_3.xml&AUTH=&nb=0>.

²¹⁰ For more information about the types of non-arbitrable claims that have, or easily could, arise see Troy L Harris, ‘the “Public Policy” Exception to Enforcement of International Arbitration Awards under the New York Convention: With Particular Reference to Construction Disputes’ (2007) 24(1) *Journal of International Arbitration* 9, 22.

judgments according to the domestic Commercial Acts which also can be accounted as general principles in the Australian judiciary system.²¹¹ These principles can be discussed as follows:

i. *The Arbitral Award Should Be Based on Valid Reasons and These Reasons Not Violate the Law*

Section 31(3) of the *Commercial Arbitration Act 2010* (NSW) states that ‘the award must state the reasons upon which it is based ...’.²¹²

Therefore, the existence of the reasons in the arbitral award is very important factor in knowing the legal method that has been applied by the arbitrator to reach his final decision. That is because an axiom of justice is that there are substantial grounds for the judgment. In fact, the presence of these reasons gives a sense of justice; the judgment must be based on logical reasons to satisfy the parties to the conflict. Otherwise, the parties have the right to appeal against the judgment and this appeal focuses on the reasons expressed by the judge. This makes the existence of these reasons necessary for the protection of justice in the society where people has the right to know the real reasons for a judgment against them. This in turn makes the existence of these reasons, one of the principles of public policy. But whether a judge must examine this reasoning is another thing altogether, and if he or she does so, there is the issue of the weight given to any such error (its degree of significance or relevance to the arbitration).

In *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd*,²¹³ the defendant claimed (as ground (g) in the challenge to implementation) that the arbitrator in the award used ‘an erroneous reasoning process involving mistakes of fact and law.’ However, Foster J stressed:

Section 8(5) of the Act does not permit a party to a foreign award to resist enforcement of that award on such a ground [erroneous reasoning involving errors of fact and law]. Nor is

²¹¹ Such a defence may be accounted as a principle of law which in turn affects public policy.

²¹² ‘[U]nless the parties have agreed that no reasons be given or the award is one on agreed terms under section 30’: s 29(2). See also section 29(1)(c) of the *Commercial Arbitration Act 1984* (Vic) states; ‘Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall ... include in the award a statement of the reasons for making the award.’

²¹³ [2011] FCA 131 (22 February 2011).

it against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award.²¹⁴

This could mean that as long as the foreign award is final and satisfies the formal requirements with the existence of the award reasons, rather than the nature of those reasons, then enforcement was able to proceed.

The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards *wherever possible* in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.²¹⁵

Foster J maintained the principle of the ability of the Court to exercise discretion in such matters (at [1331]) approvingly cites *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317 at [18] where McDougall J states:

The very point of provisions such as s 8(7)(b) is the right of the Court to apply its own standards of public policy in respect of the award. In some cases the inquiry that is required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion,

The exercise of discretion in this 2011 case appears to be the key and determines the degree to which examination is required and the weight given any fault in the reasons provided. But it should be noted that this is unrelated to the earlier question of ‘residual discretion’ regarding the grounds upon which an awards may be refused.

In one noted case, that of *BHP Billiton Ltd v Oil Basins Ltd*, the issue of whether inadequate reasons constitute an error on the face of the interim award was examined (as was that of whether this comprised judicial ‘technical’ misconduct — in the sense of inadequacy rather than moral failing). Hargrave J cites a number of cases to support his view that the presence of reasons alone is insufficient; their quality must also be taken into account (with several cases

²¹⁴ Ibid [125].

²¹⁵ Ibid [126] (emphasis added). He also quoted the court in para 306 of *Karaha Bodas (Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 (5th Cir 2004)): ‘Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the *New York Convention*’: at [133].

cited among them *Waterways Authority v Fitzgibbon* 2005 HCA 57 and *Hunter v Transport Commission* [2005] VSCA 1)). The case demonstrates the importance of the existence of valid reasons and valid reasoning. Decided in the Supreme Court of Victoria, Hargrave J stated that if the reasons given by arbitrators for making the interim award are ‘manifestly inadequate’, this constitutes ‘an error of law on the face of the interim award’. A failure to examine materials submitted by one of the parties to the arbitration and upon which they party relied fails to satisfy not only the ‘fairness’ criteria but also marks a failure to satisfactorily fulfil the role of arbitrator. Such technical misconduct in the arbitral process then entails the refusal of the decision.²¹⁶ (In this instance the interim award was set aside and fresh arbitration begun with a differently constituted panel.) The case did, however, highlight the need for valid reasons and reasoning (and its record), and adequate consideration of materials submitted to arbitration, and thus panel member responsibility (see further below).

ii. *Examine and Respond to All Substantive Defences*

In the case concerning *BHP*, the plaintiff sought to challenge the award because the arbitrators’ ‘failure to deal with to deal with substantial and serious submissions and evidence relied upon by *BHP* in the arbitration’.²¹⁷ This shows the need to consider any substantive defences that have been made by all parties in order to secure a final legal arbitral award. Once again, the Court could refuse to implement the foreign award in such a case on the basis of violation of principles of natural justice (‘fairness’) where all parties’ submissions are properly examined and responded to, which is a right for all parties to any dispute. Failure to do so is a misuse of the power of the arbitrators who, under the law where the award was issued have a great duty. The ‘fairness’ principle is also evidenced in the requirement for legal notice as this aims to

²¹⁶ See *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402 [143]. It should be noted that this arbitration was conducted under *CCA 1984* (Vic), which means it is a domestic award which exceeded the scope of this thesis; however, it has been mentioned here just to examine the court decision and whether the court will apply the same principle to any foreign award. However, the arbitration agreement provides that it ‘shall be interpreted and applied in accordance with the law of the State of New York, United States of America.’

²¹⁷ *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402.

ensure the presence of all parties before the arbitrator to defend themselves. In such a case, the presence of the parties with the lack of response to all substantive defences may equate with non-attendance or failure to provide the necessary defences.

In fact we cannot say for sure that the court will adopt such defences where these are just assumptions. Thus, to ensure the court's position on such points, we need to examine actual cases before the court where the court will be obliged to give a legal opinion about such points, or there will be amendments to the *IAA* that make such conditions in force in the implementation of the provisions of foreign arbitral awards.

5.5 Conclusion

5.5.1 Findings and Analysis

The *Saudi Arbitration System* does not explicitly mention the term '*public policy*' as the *IAA* did, but refers to *Shari'a*. However, Saudi *public policy* is more than the violation of *Shari'a* law. Saudi Arabia is signatory to the *Riyadh Convention* which considers public policy as inclusive of Islamic *Shari'a*, and the public order or morality (rules of conduct, morals). This regulation demands non-violation of the social order by the arbitral award. In practice, however, the cases reviewed show that a breach of public policy is considered the violation of *Shari'a* and the violation of legal regulations relating to the arbitration, that is 'the mandatory norms of public policy'. Public policy also demands non-violation of formal requirements and the *Shari's* provisions.

However, there is no absolute certainty in some Saudi court rulings. This is due to the fact that public policy in some court rulings relating to *Shari'a* is very wide in reference to the violation of *Shari'a* in general without any further specifications. In other rulings, this term became more specific by referring to the fact that the violation related to a particular asset of *Shari'a*. Observed practice in the Saudi courts is the giving of general comments on rulings. No specific details are provided to defend the rulings. This is evident in a ruling that used Article II of the

Arabic Convention 1952 and another which copied the text of Article 3(d) without any explanation or comment.

Also it is observed that violation of Islamic law means violation of provisions from the *Sunnah* and *Qur'ān* and *Ijma'a* in some cases. There should be direct texts from these, indicating any violations of Islamic law. The competence of judges in Sub-Circuits is also questionable, as can be seen from the fact that most of the cases that were reviewed were later reversed by the Audit-Circuits (Appeal Courts) with explanations of what should have been done. Most of these cases are related to the public policy principle where the court used a direct texts from *Sunnah* and the *Qurā'n*), and consideration of the merits of the case is not required.

What is understood is that the Audit-Circuits have the final say. In some cases, rulings were made giving no specific comments on the reasons for decisions made; the texts were general and only indicated that the implementation of a foreign judgment or a foreign award was not against *Shari'a* provisions.

In fact, there is a lack of evidence in some of the decisions issued by the Audit-Circuits (that is, direct texts from the *Qurā'n* and *Sunnah*) as a reason for reversing a sub-circuit's ruling. In some cases, where there is controversy about an issue, the Sub-Circuits seemed to just decide based on such an issue being contrary to public policy. The Audit Circuit, however, reversed such rulings based on lack of evidence [that is, no conclusive evidence or express provision in the *Qur'ān* or *Sunnah*], indicating that controversial issues are not against public policy unless determined so by the Audit-Circuit. An example is *Ruling No 189 / T / 4 of 1427 AH 2007*. The problem remains that the Sub-Circuit judges are not informed on what to do in such cases and their decisions have to be reviewed by the Audit-Circuit.

Public policy is not specified. In the consideration of public policy as limited to the assets of *Shari'a*, there are issues that are still controversial and unresolved by scholars in regard to public policy, that are excluded from public policy. Islamic provisions that are not *Shari'a* assets are also not included in the concept of public policy. Another example of the general

description of public policy is the consideration of certain legal mandatory norms as under public policy by the Grievances Board, but not specified as legal regulations that can be used as a public policy defence. It is a general judicial principle which does not exist in any convention related to the enforcement of foreign arbitration or in the *Saudi Arbitration System*.

There is controversy that exists in the conceptual meaning of *Ribā*. This affects application and interpretation of cases where different types or concepts of *Ribā* are involved. *Gharer* is a fraud and such are forbidden just as it is indicated in the *Convention* that enforcement will be refused if the making of the award was induced or affected by fraud or corruption.

In Australia: The public policy exception is guided by regulations from the *Convention*. Enforcement is refused if the award is contrary to public policy, just like it is in Saudi Arabia. In Saudi Arabia, public policy is limited to the *Shari'a* assets and certain legal peremptory norms. In Australia, public policy as a defence against enforcement of foreign awards is rather more like, in the name of acting according to the legal requirement of a country, nation or region, preventing the recurrence of immorality. Such a statement refers to morality in the broadest sense — a breach would mean not conforming to accepted practice or to the most basic notions of morality, such as where there is a breach of the rules of natural justice (such as a lack of fairness to the parties), or where the making of the award was ‘induced or affected by fraud or corruption’. Public policy is making the right judgment to ensure Convention rules and the national public policy are respected and justice is served. In the long run justice and moral behaviour is achieved in the society. The courts have the discretion to determine what public policy is and how to handle the cases: ‘the court [is] to be master of its own processes and to apply its own public policy’. Moreover, with changing times, environment and human activities, reasons behind human actions have to be determined in order to ensure justice or moral behaviour.

It is important to note that each judge is obliged to apply the national public policy and this will be possible by considering any stage of the arbitration proceedings to make sure there is no violation of the public policy (yet without considering the matter of the case).

The courts determine the breach of public policy. Fraud and corruption are forbidden and are determined by the courts. This is similar to the Saudi Arabian conditions. There is no agreement on what level of further inquiries is acceptable, and in what circumstances, or if they should be made to establish if enforcement of an award is contrary to public policy due to corruption or fraud, when there are claims of existence of fraud or corruption. Much is left to judicial discretion in this regard, as can be seen from earlier in this chapter.

Cases are dealt with based on rules and regulations guiding foreign arbitral award implementation, ensuring public order and morality, and previous rulings that are relevant to the cases handled are used as references (precedents).

Arbitrability is a common cause of refusal to implement foreign arbitral award in both countries. A lack of arbitrability is considered against public policy and the *Convention*. This is also similar to the Saudi Arabian conditions of implementation which consider arbitrability as public policy.

In Australian courts the principles applied in interpreting jurisdiction clauses are similar to those applied in the interpretation of arbitration clauses.

Australian courts have exercised a general discretion as an additional ground for not recognising and enforcing an award which otherwise qualifies to be recognised under the *Convention*. This is quite similar to the case of Saudi Arabia where the Audit-Circuits have general discretion to determine what public policy is and what it is not.

‘Uncertainty’ is used as a basis of argument against enforcement of a foreign award. Under the *Convention*, however, uncertainty is not one of the grounds for refusal to enforce a foreign award, although under Australian law it is a basis for refusal to enforce *domestic* arbitral

awards. This is an example of the use of judicial discretion to determine what public policy is and to decide on what foreign arbitral award should be enforced or not. It is also an example of the influence of domestic law in the enforcement of foreign arbitral awards.

This could be related to the Saudi decision on what is against public policy. The Sub-Circuits' decisions overturned by the Audit Courts are a perfect example. Especially in the areas where there are controversies on whether to consider a certain contract, or act as against public policy. The limits of public policy are determined by the Australian courts and this is the same practice in Saudi Arabia except that Saudi Arabia has a different legal structure. It is the Audit Circuits that determine the limits of public policy. Public policy is also limited to domestic law in Australia. This is also the case in Saudi Arabia.

5.5.2 Applying the Three Criteria

In Saudi Arabia: Under the old *Grievances Board System* it was clear that the efficiency of the court's role was affected by the appeal system, where the case has to be returned from the Audit-Circuit to Sub-Circuits. The review of the Saudi court system that concluded in the new *Saudi Grievances Board System* being decreed was a step in the right direction and rulings now do not go back again from the High Court to the Appeal Court. Whilst it is an additional layer in terms of levels of court structure (see Figures 3 and 4 earlier in the thesis), it is not an additional layer in terms of activity. Rather it is a final layer where expertise can be expected to be relied upon. This is an important step in achieving efficiency in the role of the court in the enforcement of foreign arbitral awards.

Regarding public policy, there is disparity in some rulings about the public policy principle. The courts in several rulings used general terms such as 'not violating the *Shari'a* law'. Thus, they did not provide any specific details or exemplar texts to support their rulings. These types of decisions may discourage arbitration based on justice to the parties. Additionally, ambiguity in the meaning of the term 'public policy' will discourage arbitration because ambiguity will affect

the efficiency and justice to the parties where the parties do not know with any degree of certainty the reason for the refusal or the enforcement when the ruling comes in general terms. Additionally, issues that are still controversial and unresolved by scholars in regard to public policy are also confusing and can discourage arbitration by parties for fear of injustice and inefficiency where such issues are not limited or specified.

The competency of the judges in Sub-Circuits is also questioned. This affects arbitration in terms of the efficiency of the courts in handling such cases and even affects justice to the parties, in cases where one selects Saudi Arabia as the country in which to enforce an award.

Consequently, public policy is more than a violation of *Shari'a* as morals are also considered when determining if an award should be implemented. Hence, the scope of public policy is very wide in Saudi Arabia. However, this is not discouraging arbitration, since it is understood that the term 'public policy' means more than maintaining social order. It is important to mention that for greater efficiency in the judge's role, severability is important. Severability of particular sections of an arbitration clause or agreement or in regard to the underlying contract can help speed arbitration. Here some parts of the arbitration may be contrary to the public policy can be severed and not implemented, while sections that are not contrary to public policy can be implemented. Such an approach serves the implementation process and achieves justice where the court will enforce the non-offending part.

Finally, it could be said that in the Saudi case, justice is also achieved, but efficiency is lacking. The Sub-Circuits competency is questionable and any party wishing to resort to arbitration will worry about the future rulings of the Audit-Circuits on their award, given the number of awards that are overturned on appeal to that court. However, this has been changed by the implementation of the new system as has been explained above, which will contribute to raising the standard of the court's efficiency.

In Australia: Like Saudi Arabia but less severe in the generalisation of what is considered public policy, nevertheless this could be a hindering factor in regard to resorting to arbitration where in both countries public policy as a term is not precisely defined.

On the other hand, the Australian courts having general discretion is more advantageous than disadvantageous in arbitration because evidence show that they handle their cases justly. It could be said that the commitment of the Australian courts to the texts of the *Convention* (which is part of the *IAA*) contributes to determining the meaning of public policy by identifying the defences that can be used to reject the implementation based on this principle.

5.5.3 Discussion

Several observations should be made before starting to compare the situation in both countries by the standards of comparison used in this research. First, there are significantly more Australian cases than Saudi ones, which increase the ability to understand the implementation process in Australia and to be able to observe the Australian experience in the implementation of foreign arbitral awards. Second, the adoption by the Australian Parliament of the *Convention* within the *IAA* where it is annexed to the framework of a national law is a great step in understanding and facilitating the implementation of foreign arbitral awards, compared to the situation in Saudi Arabia. Third, the Saudi courts have to consider several laws and conventions regarding the implementation of the provisions of foreign arbitral awards, because currently there is no special law to implement the provisions of foreign arbitral awards (unlike Australia, which has its *International Arbitration Act 1974* (Cth)).

In addition, judges in Australian courts are assisted in their duties by the rapid publication and wide availability of proceedings of court cases (with their reasons for decisions stated). This dissemination of information helps educate the members of the judiciary as to the most recent decisions and reasoning adopted. This practice is necessitated by the use of ‘precedents’, which is common to all common law systems, though differences are observable between jurisdictions.

It is clear that the *Convention* did not add much to the implementation of the provisions of foreign arbitral awards in Saudi Arabia except that it expanded the scope of countries that were linked with the Kingdom in an international convention, which excludes the application of the reciprocity principle in approving any foreign award issued in a signatory country.

Thus, the Saudi courts rely on the international and regional conventions and also on what is stated in the decisions of the President of the Grievances Board. From the cases of Saudi Arabia analysed, this implementation system of the Saudi legal system (the use of international and regional conventions, and decisions stated by the Grievances Board) could be the source of errors observed in these cases. The courts made some errors in the application of the appropriate convention or interpreted in different ways the same legal principle.

One major issue identified in both countries is the definition of public policy. Neither is able to define public policy as a term; and thus they could not avoid the use of the open-ended words that cannot be developed as a criterion applicable to all cases. Actually, there are different situations, considerations and settings influencing what should be defined as public policy. It is considered to reflect the fundamental moral, economic, legal, religious, social and political standards of every community or state. In Saudi Arabia, for example, the court defines violation of public policy as violation of *Shari'a*, and also violation of legal regulations relating to the arbitration system as violation of public policy. This shows that public policy is not defined as a term and is influenced by several factors, some of which have been described above.

It is clear through the examination of these cases that the Saudi courts have attempted to apply and respect the international conventions as much as possible while preserving and clinging to the application of *Shari'a*, but they could not determine specifically what can be considered as Islamic public policy. On the other hand it is clear that Australian courts tried to comply with the *Convention* as a basis to determine what could fall under public policy except when uncertainty is involved as a public policy element.

Another issue that has been observed in both countries is the use of the public policy defence. In both countries, the basic principle that has been used by Australian and Saudi courts in the application of public policy defence is the domestic public policy and the violation of any national law, while the international laws or conventions (ones under discussion in this thesis) act as guidance to maintain law and order or other purposes for which these conventions were implemented. The *Convention*, for example, was implemented to help speed up resolution of international disputes. The basic role of expediting case resolution is achieved through obtaining signatory countries, but national laws ultimately guide the resolution of such cases. Australian courts recognise public policy in the moral values and national public policy, which represent the national laws and natural justice principles. Nearly the same meaning is applied by the Saudi courts where public policy is defined by the assets of *Shari'a* which also define the scope of national public policy and the principles of natural justice in the court's view.

The difference in implementation of foreign arbitral awards may arise due to the differences that the two countries have in the origin of their laws, that is, the fact that Australian law is adapted from the British Common Law while the Saudi law has origins in Islamic, Egyptian and Middle Eastern laws. It is clear that there is a difference in the binding nature of the arbitral awards or decisions where it is binding on parties involved in arbitration in the Western world, while under *Shari'a* it is still not clear whether acceptance of arbitration is a lawfully binding decision. The binding nature is guided by the *Qur'an* and the *Sunnah* although some Middle East states support international standards. In the Eastern countries in addition to the laws and international conventions, the parties can bring claims relating to contractual nature of arbitration. For example, parties can either raise the violation of *Shari'a* concerning the susceptibility of the dispute to arbitration or conciliation, or in terms of whether it is proved that the contract (contract of the main transaction) is within the *Gharer* contracts, where there is ambiguity or 'uncertainty' in the responsibility of the parties.

In Saudi Arabia, the definition of public policy determines which foreign arbitrations are to be implemented. The definition of public policy includes more than the *Shari'a*. Public morals are also considered when determining if an award should be implemented. Considering efficiency in Saudi Arabia, it can be said that the implementation conditions lead to the achievement of the freedom and encouragement for the use of arbitration in Saudi Arabia.

One problem is the misunderstanding of what Saudi Arabia considers public policy, and what others may expect it to consider as public policy. What the country considers public policy should not be an issue when it comes to implementing foreign arbitral awards since these define the moral values of the country and maintain order. Different countries have different cultures and beliefs and these contribute to their daily economic and social activities. They, therefore, determine what laws are implemented to achieve public policy.

Saudi Arabia has controversies just like other countries that are signatory to the *Convention*. In one decision, *Ruling No 235 / T/ 2 of 1415 AH (1995)*, there was controversy as to whether the foreign judgment should be implemented or not because one court indicated that such a judgment was contrary to public policy while the higher court argued that there was no such evidence. 'Evidence' is considered to be a direct text from the *Qur'an* or the *Sunnah* or an *Ijma'a* between Muslim scholars. Thus, if the implementation of an award decides what *Shari'a* decides, it is not contrary to the law.

Noticeably, implementation is also flexible and this is an advantage to the parties who would like to resort to arbitration. As much as some parts of the arbitration may be contrary to public policy, sections that are not contrary to public policy can be implemented. One example given is the implementation of a foreign arbitral award in *Ruling No 269 / ES / 4 of 1431 AH 2010*, in which annual interest was required to be paid on profit. This interest or *Ribā* is against *Shari'a*, but the whole compensation or profit (as structured in accordance with *Shari'a* dictates) and that the plaintiff should have received is not against *Shari'a* and that refusal to implement the *Ribā* part was a clear implementation of what Article V of the *Convention* is designed for. Because of

that, implementation of the award was undertaken but the part involving interest was excluded. This could be a disadvantage which may discourage the resort to arbitration by some, but then with any understanding of the scope of the public policy of a country, such matters should not be an issue.

The above explanation shows how effective the laws involved in implementing foreign arbitral awards are, except for some areas of possible disadvantage. The Saudi Arabian Grievances Board has limited Islamic public policy to the assets of *Shari'a* (that is, involvement in or having agreements involving prohibited contracts, having contracts with *Ribā*, but if the contract is valid, the usury part will not be implemented, nor will a *Gharer* contract). All these provisions, actions and the knowledge of these limitations may encourage arbitration and affect positively its implementation and so the use of Islamic public policy is effective in the implementation of foreign arbitral awards.

Violation of legal regulations relating to 'mandatory norms of public policy' is also considered against the public policy. Saudi Arabia has regulations that guide implementation of foreign arbitral awards, such as: those concerning courts with authority to carry out such jurisdictions; arbitrability; requirements of an arbitral award for it to be implemented; and legal status. Going against any of these is considered going against public policy. This does not discourage arbitration at all; instead, it encourages it through its just system where the clarity of the texts, or at least the general principles of the public policy, help people to understand the arbitration system in Saudi Arabia, which could encourage arbitration.

There are negative perceptions about Saudi Arabia being a country that discourages enforcement of foreign arbitral awards. These negative perceptions are as a result of a lack of thorough research, a lack of understanding of the Saudi Arabian legal system and laws, and a lack of translations of Saudi laws and regulations in English for non-Arabic speakers. Additionally, a lack of publicly available published decisions causes misunderstandings, even among many researchers.

Some of the perceptions are that Saudi Arabian laws favour Saudi Arabian investors; that the Saudi government reserves the right to refuse enforcement of an award; that awards rendered by default against a Saudi party are automatically unenforceable; and that Saudi Arabia does not provide the freedoms expected in its implementation of the foreign arbitral award provisions through international laws. These claims being available to someone who does not understand the Saudi Arabian legal system and laws may be regarded as reducing the chances of resorting to arbitration in Saudi Arabia. If one's interests could be removed because of the laws of a country relating to arbitration, the investor or businessman, may not wish to do business in that country, for fear of loss of wealth. This is understandable, and discourages the resort to arbitration, but more should be understood about the laws that guide taking of such interests before general conclusions are made about the Kingdom of Saudi Arabia discouraging arbitration. The country has domestic laws and it has to abide by the laws. It is important to first understand the scope of Islamic public policy, which depends on the Islamic assets, social morality and consensus (*Ijma'a*) among scholars. Just like any other country, Saudi Arabia has its own national scope of public policy; it is just that the Kingdom of Saudi Arabia has a different culture from that of Western countries, and it is clear that the Kingdom has *Shari'a* as a basic guide to the courts, compared to Australia, which has Australian laws guiding their courts. *Shari'a* prohibits interest on profits, while other country's laws do not prohibit the imposition of interest on a loan or similar nor earning of such money over and above the capital on a business deal. Businesses sometimes make decisions in ignorance of the acceptable alternatives or avoid investing altogether. Acting according to the prohibitions in Saudi Arabia is in accordance with *Shari'a*, does not need to discourage arbitration. In fact, Saudi laws have encourage arbitration (as in the *Commercial Court System 1350 AH (1930)* and the *Arbitration System 1983*). Additionally, *Shari'a* has traditionally encouraged arbitration on many matters.

There is evidence showing that Saudi courts do not refuse to implement foreign arbitral awards as long as the arbitrator is competent and the awards are not contrary to *Shari'a* and public morality. Additionally, court will apply the part that corresponds to the arbitration agreement,

while the other part, which is exceeded, will be refused. Evidence of this kind is found in *Ruling No 33 / T / 4 of 1414 AH 1994*. According to Article 3(d) ‘competent judicial authority: shall not refuse to implement the provision except in the following circumstances: (c) If the verdict was contrary to public policy or public morals in the requested state of implementation ...’

The merits of the case must not be considered *except* in cases where the public policy of the state is affected. In Saudi Arabia, the general rule is that the Board retries the entire case on its merits only in order to ensure that the award does not violate *Shari’a*. As a result, any retrial of cases, to determine if Saudi public policy has been violated, is considered just.

Based on the sample of cases that have been used in this research, there is no cases which show that the Saudi courts had considered the merits of the case. The evidence is provided, however, in *Ruling No 157 / T / 4 of 1427AH 2007* where the Audit-Circuit states that ‘the court had no right to consider the merit of the case or answer any substantive defence as long as that foreign rule did not violate the Islamic law.’ It is also evident in the cases that justice was achieved in the cases handled (*Ruling No 13 / T / 4 of 1425 AH 2005* and *Ruling No 102 / T / 4 of 1424 AH 2004* among others), where the courts preserved *Shari’a*, which ensures public policy, and any award that is contrary to the nation’s public policy should not be implemented.

It is true that Saudi Arabia needs a special law for the implementation of foreign arbitral awards, as Australia has in its *International Arbitration Act 1974* (Cth). This will facilitate the work of judges where they can refer to only one law not as is the case now where a judge must refer to more than five international and regional agreements as well as two decisions of the President of the Grievances Board. It might also help identify some of the Islamic principles applicable in the international area and thus further facilitate the judge’s works by saving time and effort and also provide more clarity for foreign investors. These factors in the Saudi legal system seem to discourage arbitration because they prolong processes and procedures.

The courts are just, for the scope of public policy allows debate on contestable issues to produce evidence to prove the illegality or not in cases. An example is *Ruling No 189 / T / 4 of 1427 AH*

2007, where the judge believed that music songs were prohibited in Islam, and so he refused to implement a foreign provision on this basis. The Audit-Circuit revoked this ruling and the reason for doing that was that ‘the prohibition of songs is not in accordance to an explicit text in the holy *Qur’ān* or *Sunnah* or in accordance with *Ijma’a* between the Muslim scholars.’ Thus, the judgment that something is contrary to public policy should be in accordance with the existence of an explicit text in the *Qur’ān* or *Sunnah* or in accordance with *Ijma’a*.

Saudi Arabia also has legal principles that prevent implementation of illegal contracts and other contracts that violate the *Shari’a*. Examples are the prohibition of usury (*Ribā*) and *Gharer* contracts. The prohibition of *Gharer* prevents exploitation and manipulation of any of the parties involved in the contract and also ensures the rights of those with logical and legitimate grounds.

In Australia, from the cases presented, public policy is shown to be acting according to the law by ensuring awards’ arbitrability as well as ensuring justice by preventing fraud or corruption within the process and applying the principle of natural justice. The courts’ main objective is to preserve social morality and justice; thus, in a case where a defendant argues that the plaintiff’s case is contrary to public policy and it should not be implemented, the court will determine the plaintiff’s fault or role in that claim. Justice to parties maintains the public policy argued about. An example of the case is *Yang v S & L Consulting* [2009] NSWSC 223.

Controversially, Australian courts decided many cases based on section 8(5) being understood as indicating the existence of residual discretion as an additional ground for refusal by the courts of enforcement of such awards based on their being contrary to public policy.

This, however, could not be accepted by the current amended *IAA 2010*, where section 8(5) of the *IAA* defences that were previously considered non-exhaustive by the Australian courts, are now exhaustive according to the amended *IAA 2010*.

It is clear that solving the cases by the courts is done according to the law and no laws are violated (except for areas of controversy in previous years, such as the rare case where the law had been violated and therefore implementation refused, or in another case, a new court process begun). Because of that clarity, and transparency implementation of foreign arbitral awards in the country are considered just and this, together with the resulting general degree of predictability and reliability, encourage international foreign arbitration. This has been increased since the 2010 amendment to the *IAA*, which clarified that only grounds listed in the *New York Convention* could be used to refuse recognition of an arbitral award (substantially reducing if not eliminating the uncertainty generated by the existence of ‘residual discretion’ utilised in the *Queensland Resort Condominiums Case*).

Australian courts limit the scope of public policy; however, according to the undefined and general term of ‘public policy’ they may still have that residual discretion to make decisions on what they consider public policy. In one case, the judge decided to make more investigations about the case without any request from the parties involved in the arbitration (that is, *Resort Condominiums International Inc v Bolwell* [1995] 1 QR 406). The outcomes of that case produce a positive and a negative perception. The negative perception is that the judge decides what public policy is when dealing with a case. The use of court discretion and existence of uncertainty as the basis of refusal to enforce a foreign arbitral award in two different cases is not taken lightly by some scholars. Court discretion is one important factor that shows the power of the courts to make decisions regarding what is public policy to the nation.

The positive perception is that it gives an indication of the Australian courts aiming at justice and morality, although some of their decisions may seem not to go by the provisions of the *Convention*, such as the *Resort* case where the court relies on uncertainty as a ground to refuse the implementation while uncertainty is not a ground of refusal in the *Convention*. In fact, uncertainty is a ground for refusing domestic awards.

Justice is observed in many cases handled by the Australian courts. According to the *Convention*, only legal arbitral awards should be implemented. There is a case where the judge refused to implement an award under the terms of the *Convention* because the awards were interim orders ‘measures of protection’ and so are not subject to enforcement by a court as explained above (that is, *Resort Condominiums v Bolwell* [1995] 1 QR 406). According to the *Convention*, it is the arbitral award that should be enforced and not an interim award which is not final. Enforcement of such an interim would be contrary to public policy. The policy here is from the *Convention*.

It can be said that the scope of public policy is limited by national public policy and this is determined by the judges. So many cases may seem unjust based on the argument of being against national public policy yet considered not against international public policy. The main misunderstanding again here is the use of domestic laws to determine violation of public policy. An example is in the use of uncertainty as a basis for refusal to implement a foreign arbitral award, considering implementing such an award to be contrary to public policy. In Australian laws, as mentioned previously, uncertainty is used to refuse implementation of domestic arbitral awards. An example case is *International Movie Group Inc (IMG) v Palace Entertainment Corp Pty Ltd* [1995] 128 FLR 458.

Although the scope of public policy is determined by the judges, most of the cases decided aimed at justice and morality. This is evidence that there is justice in individual cases. There is one case where one might think justice was not achieved. In earlier cases, such as *Resort Condominiums v Bolwell*, the court was able to refuse to implement an award as contrary to public policy by exercise of judicial discretion acting beyond the grounds listed in the *Convention* (articles 8(5)–(8)). The court found something important that could affect future court decisions if the foreign award was implemented. It is very true that previous court decisions are used to handle future cases to ensure justice, on this, the court was right; but from the point of the view of the plaintiff, this could be an injustice to the company. If one assumes

that there is a contravention of public policy, the judge is obliged to consider the merits of the dispute; however, this consideration is driving arbitration out of its scope and making the resort to arbitration meaningless for the parties, but it was necessary to examine the public policy principle by the judge which shows the value of preserving the social values more than the individual cases. The basis of making the ruling could be unjust, although it is the judge's general discretion to decide to enforce an award or not is based on the legal rules applicable in this regard.

In deciding on what public policy is, the Australian courts can decide on the merits of the case, as in the case of *Resort Condominiums v Bolwell* to identify whether something is contrary to public policy. This may be considered unjust. In this case, however, there are three other reasons why the enforcement of the award was contrary to public policy and so was not implemented. A summary of the reasons for Australian courts' rejection of enforcement of foreign arbitral awards also prove that these cases are handled justly. These reasons are: to ensure 'arbitrability', to refuse to enforce when there is existence of influence or fraud, and to ensure justice and morality for the public.

Similarities: in both countries the national law guides the definition and scope of public policy. This affects the implementation of foreign arbitral awards in both countries differently since both countries have different national laws and a different legal basis. It is an advantage because both countries maintain moral, legal and social values, but a disadvantage to arbitration if the parties involved do not understand the principles of laws in other countries. A problem arises though, if local 'public policy' is what is considered by the courts as public policy as is provided in the *Convention*, then cases that are not arbitrable in both countries or in any signatory country cannot find a place to be handled. This means that there is need to define public policy and draw its border in the *Convention* to have a clear meaning for signatory countries.

The cases handled show that in both countries, there is a wide conception of ‘public policy’ as a defence against implementation of foreign arbitral awards. Saudi Arabia has concepts like the assets of the *Shari’a* law, morals, social values, while Australia includes concepts like uncertainty, ‘fairness’ and court discretion. Therefore, it is very hard to give a final judgment about which judicial system is more efficient or gives a wider conception of this defence where each system has given wide concepts (or, in the case of Australia, did until the 2010 amendments narrowed the interpretation of the acceptable the grounds and have rendered the *IAA* even more amenable to implementation of foreign arbitral awards in line with the amended *New York Convention*).

However, it is clear that the adoption of the *Convention* within the *IAA* and also the existence of the *IAA* as a special law to implement foreign arbitral awards in Australia, are factors that give preference to Australian legislation in terms of clarity and speed of knowledge of the limits and scope of public policy, where the *IAA* has tried to determine the public policy in the existence of fraud, corruption or breach of natural justice.

But on the Saudi side, one can notice that the *Saudi Arbitration System* did not mention any of these, and rulings by the Saudi Grievances Board are guided by two decisions that have been issued by its President which contain wide terms, such as ‘violation of *Shari’a*’ (that is, *Ruling No 95 / T / 4 of 1427AH 2007* and *Ruling No 269 / ES / 4 of 1431 AH 2010*). Despite the fact that there are attempts by the Saudi courts to identify and limit that violation of *Shari’a* to the assets of *Shari’a*, this mystery is still unsolved and the limit of violation of *Shari’a* is still undefined. Therefore, it can be said that efficiency will not, by itself, provide fairness in an unclear system.

Both countries consider what is against the national laws as against public policy. This was clear in *Ruling No 236 / T / 4 of 1426 AH 2006* and also in *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1. Finally, the two nations similarly consider the maintenance of order in the society as a something all aim for. Australia develops policies to guide public policy, while

Saudi Arabia has *Shari'a* and scholars to debate on consensus issues and to ensure public policy which also includes social morality.

In both countries, it is the courts that determine or define what public policy is and decide on the 'contrary to public' issue of an award. The composition of the courts and the laws guiding the courts, however, differ. Saudi Arabia is guided by *Shari'a*, public morality and Muslim scholars on matters concerning public policy, while Australia is fully guided by Australian laws, interpreted by the judges. In both countries, they aim to preserve justice and morality but some of their court decisions are not direct implementations of the *Convention*, where they in some cases, are applying national principles. Therefore, it could be said that laws and also courts, through the exercise of that right, in both countries have given the judge the freedom to determine what public policy is and also the right to intervene to consider the subject matter of the case in order to determine the extent of the infringement of public policy.

Differences: One difference is in what the two countries consider to be public policy. Therefore, it could be said that the scope of public policy in Australia lies within the courts guided by the national laws while the scope of public policy in Saudi Arabia is limited by *Shari'a*. The *Convention* is implemented through the *International Arbitration Act 1974* (Cth) (as amended in 2010) in Australia, while in Saudi Arabia, there is no specific Act through which the *Convention* is implemented, although the country is a party to it. That is due to the difference in the legal system between the two countries as in Saudi Arabia, according to Article 70 of the Saudi *Basic Law of Governance*, any international convention after ratification is treated at the level of law or as a national law.

The publication and public authority of judicial decisions in Australia foster a greater understanding of the role of the Australian judicial system in implementing foreign arbitral awards in general and to explore the limits of public policy in particular. The absence of publication of Saudi judicial cases, by contrast, has helped to increase uncertainty about the role of the judiciary in the interpretation of public policy. Additionally, judges on the Grievances

Board lack the necessary legal education in international trade law, conventions and norms, and also lack of professional training. In fact, while all of the Grievances Board judges have a degree in *Shari'a*, nearly all of them did not have any special degree in international commercial law which shows the importance of the training programs for judges.²¹⁸ Improving the laws and professional training for the judges, and reforming the Saudi Arabian courts will improve efficiency of the courts. It should, in particular, reduce the number of appeals, and the number of successful appeals where a decision by a lower court is overturned and further action then having to be undertaken before the courts.

It can be considered that there was justice in almost all the cases and injustice in very few, although injustice in this case may be due to the different scope of what each country considers public policy, influenced by their national laws and legal principles. Some parties did not have their claims satisfied because of the public policies of respective countries in which the award was to be enforced.

It could be said that social values and public policy is well maintained. This is because in both countries, the domestic laws maintain order and ensure justice and preserve the most basic notions of social morality, which in turn preserves the social values. As indicated in the criteria, laws that ensure both elements are achieved are those that are 'better and more worthy of being followed through [their] maintenance of public and private rights, whilst facilitating and encouraging people to resort to arbitration.'

Finally, a low level of accuracy reduces the parties' confidence in the judicial process where it makes the provisions of the courts unpredictable and prolongs the proceedings of the litigation (and as earlier noted: 'justice prolonged may involve justice denied'). Nevertheless a higher level of accuracy (as indicated by fewer cases being overturned upon review) and therefore a more reliable projection of prospective outcome leads to a greater dependence on arbitration as

²¹⁸ For example, Saudi judges do not need to complete a law degree but a certificate of one of the faculties of *Shari'a* in Saudi Arabia (Article 37(d) of *Saudi Judicial System 2007*).

lengthy proceedings contribute to a reluctance to resort to arbitration as it undermines one of its chief goals, that is, speediness.

To sum up, the balance between these three criteria (efficiency, justice for the parties in the individual cases, and maintenance of societal values) could be established by saying that the Australian courts have given greater value to the freedom of parties, but did not ignore the discretion of the judge in determining the meaning of public policy. In addition, the availability of the direct legal texts (such as the *IAA*) helps to increase the efficiency of the court role in Australia. Regarding the *societal values*, it could be said that Australian courts aim to maintain public policy, where it is clear that the courts maintain social values and morality over individual rights.

6 CONCLUSION, FINDINGS AND RECOMMENDATIONS

6.1 Conclusion

This research has reached several important findings, and a number of recommendations will be made on the basis of those findings. These cover several areas, including the impact of *Shari'a* on the role of the Saudi judges in enforcing foreign arbitral awards, the effect of international norms (which have an impact that cannot be overlooked), and the ambiguity of the principle of public policy, which is a threat to the implementation of the provisions of foreign arbitral awards as it gives the national courts the opportunity to expand their residual discretion in rejecting the implementation of foreign arbitral awards.

6.1.1 General Observations

All cases presented in this thesis were against private parties. In addition, it was clear that Saudi courts implement foreign arbitral awards, and that it is the difference in culture, laws, and practice that lead to different negative perceptions about the country's arbitration system.

In fact, the legal basis and also the judicial system in Saudi Arabia and Australia are different and this in turn is reflected in the approach to the implementation of the provisions of foreign arbitral awards. Therefore, it is true that religion, culture and international norms have a significant effect on the enforcement process. In both countries it could be said that public policy was the most used defence. It is also true that the *Convention* is the most important agreement regarding the implementation of the provisions of foreign arbitral awards and both countries are signatory to this convention.

Additionally, the adoption of the *Convention* within the *IAA* facilitates the application of any foreign arbitration in Australia. This agreement is applied significantly in all the decisions of the State Supreme and Federal Courts of Australia. In contrast, this agreement did not add much to the Saudi courts except by expanding the application of the principle of reciprocity so that the

signature by any State on this agreement is sufficient to demonstrate adherence to the principle of reciprocity.

Australia has adopted the *UNCITRAL Model Law* while Saudi Arabia is signatory to the *Riyadh Convention*. The *UNCITRAL Model Law* and the *Riyadh Convention* are not similar in their provisions but similar in their aims; for example, both provide provisions on grounds of refusal to implement a foreign arbitral award. Both have specific formal requirements for an award to be recognised and both have provisions on awards not under arbitration or non-arbitrable, among their many other provisions. There are distinctive interpretations or applications of these conventions in regard to formal requirements, judicial authority, the principle of reciprocity, and public policy.

A. Formal Requirements

The national laws have adopted the formal requirements of international conventions through stating the terms of the international formal requirements in their laws.

From the research analysis, Saudi Arabia's formal requirements that have been implemented by the Grievances Board were considered to be in two groups, namely the conditions or requirements set out in international conventions and national laws, and the conditions in the Decision of the President of the Grievances Board (currently, Decision No 116 of 1428 AH 2007). In all these conditions, there is no clear reference to the *Convention* and even to the application or interpretation of the *Convention*.

Saudi Arabia is a signatory to the *Convention* and, according to this convention, there are formal conditions that should be met by signatory states. But Saudi Arabia does not show any interpretation of the *Convention* in any of its requirements or procedures. It just states its formal requirements at national and international levels and those given by the President of Saudi Grievances Board. This is unlike in Australia where the provisions of the *Convention* are clearly stated and implemented in the *IAA*. The formal requirements as described in Article IV of the

Convention are reflected in section 9 of the *IAA*. Thus, it can be said that the formal requirements of implementing foreign arbitral awards in Australia are provided by the *Convention* and the *IAA*.

On the other hand, it is important to highlight the modernisation of arbitration which creates new situations that require new conditions. For example, arbitration through the use of the internet or any electronic means lacks the physical presence of the parties and others before the arbitrator/s, which may be accounted as a failure to fulfil some of the formal conditions that are to be met under the *Convention*. Consequently, it is better for national laws (Saudi and Australian) to adopt special provisions in their arbitration laws to enforce any electronic arbitral award and to go beyond any formal requirements.

But this may require the creation of new conditions, such as requiring the issuance of the arbitral award by an international institution in which governments and business people have a high degree of confidence in its ability to carry out this process accurately and professionally (that is, the issuance of the award by an international arbitration centre (ICC)). Additionally, there should be a requirement for an electronic signature that would work in parallel with a special legal regime for registered electronic signatures. Such steps must take into account the rules of arbitration in general and the anti-crime information system as a preventive measure that imposes the necessary legal protection of data and electronic records and signatures.

B. Judge's Authority

Analysis of the literature and cases of Australia and Saudi Arabia reveals that, in both countries, the legal nature of arbitration affects the work of the judge. In Australian rulings, arbitration was found to be of a mandatory nature while in Saudi Arabia the nature of arbitration is not addressed in the Saudi Grievances Board's rulings as mandatory nor whether they are binding or not. However, there is real support for implementation. Additionally, there is no clear definition of arbitration and the rulings reveal a view of arbitration as *quasi-judicial* in nature and not 'fully' a judicial work. These differences over the legal nature, however, are no more

than theoretical differences which will not affect the legal force of arbitration when a special law exists, which recognises arbitration as a means of settling disputes.

Additionally, in Australia the judge's power to refuse to implement a foreign arbitral award is limited by the requirements in section 8 (3A) of the *IAA*. From an examination of the *IAA* and the *Convention*, it could be concluded that the power of the judge is to make sure that the formal requirements are met without going into the merits of the case. However, judges have discretionary powers that they can use to make decisions on a refusal to implement foreign arbitral awards, particularly in regard to the public policy defence (and under the definition it is given). Thus, while courts in both countries are generally not to consider the merits of the case, the judge himself retains the right to examine the arbitral award for any violation of public policy that might render it invalid or partly or wholly unable to be implemented. Finally, the role of the judges is affected by the court system. For example, under some circumstances in Saudi Arabia decisions made by the Sub-Circuit have to be reviewed by the Audit-Circuit courts 'mandatory revision' even if the losing party did not appeal.

C. Principle of Reciprocity

Both Australia and Saudi Arabia consider signatory status of the *Convention* as proof of reciprocity and both have no defined rules or requirements on how to assess reciprocity. Saudi Arabia, however, has many judgments where reciprocity has had to be demonstrated before the Saudi Arabia became a signatory to the *Convention*. This is in contrast to Australia where there are no such judgments. This is due to the fact that Australia joined this most relevant, important and widely accepted convention on the matter in early 1970s, while Saudi Arabia joined this convention in the mid-1990s. This convention has 146 states members who substitute signatory status for any other proof of reciprocity requirement. Australia has entered no reservations to the *Convention*. Saudi Arabia also appears to have ratified the *Convention* without entering a formal reservation as to the supremacy of the tenets of Islam (the *Qur'ān* and more) in relation to the

text of the *Convention*, instead relying on the inclusion of the ‘public policy’ provisions in the *Convention*.¹

D. Public Policy

It is impossible to define the public policy as a defence in the recognition and enforcement of foreign arbitral award as such a policy is related to several factors, such as religion, culture, national and international norms. However, in Saudi Arabia, public policy is considered *Shari’a* and more. An award is enforceable if it does not violate the *Shari’a* assets (which include, for many, explicit texts of the *Qur’ān*, or *Sunnah*, and the existence of *Ijma’a* (a consensus of Muslim scholars)). Considering the provisions of the international treaties, especially the *Riyadh Convention*, it is agreed that arbitration should be recognised and implemented, unless ‘the ruling of the arbitrators is contrary to the provisions of Islamic law or public policy or morality of the contracting party.’ In this case, *Shari’a*, public policy and morality (*Aladab*) are all considered public policy, contributing to the idea that public policy is social order. Islamic public policy is also considered to contain procedural and substantive features, and outline contracts forbidden by *Shari’a*. These features come from the prohibition of *Gharer* contracts, *Ribā* and the use of supporting scriptural sources. This shows the significant impact of *Shari’a* on the role of the Saudi courts. Therefore, the concept of public policy has some specific limits that are not to be breached, such as in regard to *Ribā*.

Moreover, Islamic legal schools are also allowed to interpret and generate the method of identifying what is permitted and what is not under the *Gharer* or forbidden contracts. This means that what is permitted and what is not forms part of public policy. Thus, public policy, under arbitration, in the Saudi Grievances Board decisions is considered as violations of legal

¹ See UNCITRAL website on status of the signatories to the *Convention*, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>. See also Hatam Abbas Ghazzawi and Co: Saudi Legal, *Saudi Arabian Law Overview: 19 Dispute Resolution* (2011) <http://www.saudilegal.com/saudilaw/19_law.html>. The only reservation that has been made by Saudi Arabia was regarding the reciprocity principle as explained earlier. See UN website on the Treaty Collection, *Status* (2012) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec>.

regulations, of public policy's peremptory norms, and of *Shari'a*. The scope of *Shari'a* in this regard is limited to the assets of *Shari'a*, which were identified by the Grievances Board in definitive texts in the *Qur'ān* and *Sunnah*, and also in the consensus *Ijma'a*. This excludes the issues that remain the subject of controversy among Muslim scholars from the category of public policy.

In Australia (unlike Saudi Arabia), public policy is determined by the judges although guided by laws. The judges use the international convention provisions and the national law to determine what is against public policy. Cases analysed show that public policy is social order, morality and law. The judges work towards maintaining the law and order, and preserving the role of the court in ensuring justice and morality. It should be noted that judges are given discretion to determine what public policy is while handling a specific case.

The case analysis shows that, when considering a case, public policy is not just following laws, but determining whether the effect of the court's decision would serve to maintain social order, morality and the role of the courts.

E. *Understanding the System of Enforcement of Foreign Arbitral Awards in Saudi Arabia*

There is a significant level of misunderstanding of the Saudi courts' role in implementing foreign arbitration. From their observation of the way in which cases have been handled by Saudi courts, many western researchers (such as Carbonneau, Gravelle and Wakim) consider that the *Saudi Arbitration System 1983* does not support foreign arbitration, mainly due to their incomplete or clear interpretation of the Saudi laws that govern arbitration.² Wakim, for example, noted that 'Saudi Arabia has been described as "traditionally hostile" to the recognition and enforcement of non-domestic arbitral awards, finding such awards contrary to Saudi Arabian law and public policy.' This, as proven, is not true at all, arbitration is a legal

² See the discussion in section 1.6.2 Implementation in Saudi Arabia (B) Previous Studies.

means and a valid option in Saudi Arabia to solve any commercial disputes; however, investors, researchers and practitioners must consider the significant impact of *Shari'a* on the arbitration process in Saudi Arabia, where *Shari'a* governs the arbitration process in general, and must be especially mindful of its impact in the stages of the implementation of foreign arbitral award. For example, the principle of public policy is dominated by the Islamic character more than by the legal requirements that are contained in *Saudi Arbitration System*.

As a result, studies involving foreign arbitration in Saudi Arabia have to clarify the lack of understanding and lack of legal texts. This lack of understanding can be reduced through the support for more research, the publication of the court's decisions and an increased effort in translating the Saudi laws into English and other languages.

F. *Understanding Shari'a*

Given the great geopolitical and economic significance of the Middle East, lawyers outside the region's borders must obtain an insight into the area's sources of law. *Shari'a* is one of the three major legal systems, and it is remarkable that there has been little examination of its footing in the Middle East. In the face of economic globalisation, and particularly the increased trade among those of the various law jurisdictions and their participation in business not just in each other's areas but with each other, *Shari'a* is no longer a field reserved for Middle East specialists, Arabic researchers, and comparative law experts. Therefore, it is helpful to add to those materials available in the field of arbitration in *Shari'a* so these can be studied by Western scholars. What supports the importance of studying Islamic laws and their impact on the Saudi legal system in general is the power of their impact on the arbitration system, especially with regard to the implementation of the provisions of foreign arbitral awards.

G. *Importance of Culture and International Norms*

Diversity and culture is important and has to be respected. Nations cannot be forced to abide by international rules that contravene their cultural norms. Policy makers and nations signatory to

the *Convention* should come to an agreement on the basis of using public policy. The suggestion of adding ‘international public policy’ in addition to national public policy in the *Convention* (such as the *UNCITRAL Model Law*) is strongly supported as giving any country the right to choose the suitable position and give them the right to make reservations so as to be able to choose to implement one of these public policy standards or be able to use either of them, depending upon the circumstances, and as determined by the domestic laws. Policy makers should also encourage the sharing of their laws with each other to reduce the instances of lack of understanding of a nation’s laws and subsequent problems regarding implementation of foreign arbitral awards on contracts that have been formulated in ignorance of the laws applying in the country in which the arbitral award may be expected to be implemented (for example, Saudi Arabia). Furthermore, the international norms, which stem from international transactions between traders, represent the ‘international culture’ in this regard. International commercial norms can be defined as a global understanding between the merchants about the best behaviour in a particular matter in the field of international trade. These norms must be taken into account in any studies related to the role of national courts in the enforcement of foreign arbitral awards.

6.2 Recommended Amendments

There are several recommendations that this research has reached in different areas regarding the implementation of foreign arbitral awards. These comprise recommendations in regard to the need for a new comprehensive law in Saudi Arabia; the need to amend a decision by the President of the Saudi Grievances Board, to reduce delays in proceedings, clarify definitions (including that of ‘public policy’), and consider issues relating to reciprocity and competent courts. These are covered in greater detail below.

6.2.1 The Need for a New Comprehensive Law in Saudi Arabia

It is true that in regard to the implementation of foreign arbitral awards, Saudi judges are confronted by several applicable international conventions and the national *Saudi Arbitration System 1983* and two decisions released by the President of the Grievances Board. This shows

the need for enacting a special law for the enforcement of foreign arbitration in Saudi Arabia along the lines of the *International Arbitration Act 1974* of Australia, where such enactment helps to raise the efficiency of judiciary and the law and facilitates the judges' work.

Unfortunately, the new law that has been released recently after the completion of this research concerns the domestic arbitration more than the foreign or international arbitration.³ In fact, it could be said that the focus of this law concerns the role of the arbitrator more than the implementation of foreign arbitral awards. Additionally, this law did not clearly exclude the decision of the Grievances Board which was released 'especially' to implement foreign arbitral awards and foreign judgments. This could prolong the previous problem where the Saudi judges are confronted by several pieces of legislation relating to the implementation of foreign arbitral awards, which will negatively affect judicial efficiency in the international arbitration. This may show the need for a special law concerning the enforcement of foreign arbitration in Saudi Arabia along the lines of the *International Arbitration Act 1974* of Australia. This will help to increase the efficiency of judiciary and the law in regard to the enforcement of foreign arbitral awards.

6.2.2 Constitutional Violation by Paragraph No 5 in the Decision No 116 of 11/7/1428 AH (2007) of the President of the Saudi Grievances Board

The Saudi lawmaker shall delete the requirement that exists in Decision No 116 of the President of the Grievances Board which excludes the award that has been issued against any government department from consideration by the Grievances Board. This condition (paragraph 5 in Decision No 116 of the President of the Grievances Board) is contrary to Article 13(d) of chapter III of the *Grievances Board System* where the Grievances Board is the competent court in considering *any* dispute to which the Saudi Government is a party.

³ It was issued by the Royal Decree No M /34 of 24/5/1433 (AH 16/4/2012) *Umm al-Qura Gazette* No 4413, 18/07/1433 (AH 8/6/2012).

6.2.3 Solution for the Court's Delay

The best action would be for both countries to try to develop a judicial system that links the appeal to a single level which can be more effective and eliminate the time consuming appeal process being repeated. This will attract those in the international trade area to invest within these countries since arbitration is very important feature in resolving any future issues.

6.2.4 Partial Reciprocity

For Australia partial reciprocity seems to be reinstated by section 8 of the *IAA*, even though this is not something that Australia made a reservation to when it acceded to the *Convention*. This could be considered against the reservations of the *Convention* and its spirit. Indeed, Australia has done well not to include the 'reciprocity' reservation; however, the existence of section 8(4)(b) in the *IAA* could hamper the implementation of the arbitration, and thus it would be better if it were reviewed.

6.2.5 Article VII in the New York Convention

Article VII of the *Convention* may violate the *res judicata* of the judicial decisions with respect to private international law as explained above. Hence, the recommendation is to review this vague and unclear article.

6.2.6 Competent Courts

The determination of the competent court, the one that is most able to understand the needs of international trade, is part of the process of facilitating and supporting arbitration. There is, therefore, an urgent need to assign the task of implementing the provisions of foreign arbitration to the competent court that has jurisdiction in the consideration of trade issues (that is, the Commercial Court in Saudi Arabia) in order to understand the needs of international trade and facilitate the acceptance of the implementation of the provisions of foreign arbitral awards quickly and easily.

Therefore, it is better to refer the consideration of the implementation of the provisions of foreign arbitration to the jurisdiction of the Commercial Court in Saudi Arabia. That is due to their understanding and in fact their specialisation in trade disputes (national and international); unlike the role of the Grievances Board which is an administrative Court. If such modification is not possible at this stage for any reason, the judges in the Grievances Board have to have some training sessions to understand the requirements of international trade agreements and to learn to implement the proper convention.

In Australia, the jurisdiction of the Supreme Court of each State over the arbitration awards was perceived as a disadvantage, given that the limited number of international arbitration cases before the state courts made it difficult for the judges to develop an appropriate level of knowledge of international arbitration. Additionally, parties by resorting to different state courts can slow down the implementation. However, it is not possible to give the Federal Court an exclusive jurisdiction for many reasons explained earlier.⁴ Thus, the recommended approach is to have a specialist list and to distribute a Practice Note within the Supreme Courts and also the Federal Court. This would without doubt help to improve the efficiency of the court's role in the implementation.

6.2.7 Public Policy (Definition)

Public policy extends beyond causes of illegality. It is contained in arbitrability as a public policy defence and also it is a principle of law, where Croft J stated in his judgment (*Altain Khuder v IMC*) that Sir Anthony Mason had said:

In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art V, notably art V(2)(b) relating to public policy have been given a narrow construction. It has been generally accepted that the expression 'contrary to the public policy of that country' in art V(2)(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum.⁵

⁴ See section 2.2.2 Competent Court of Australia (ii. Supreme Court of NSW).

⁵ See *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1, 53.

Determining what constitutes public policy and whether an arbitral award should be enforced or not are under the jurisdiction of the national courts. Thus, it is very useful for the national courts to consider how courts of other countries have applied public policy to achieve the greatest support for arbitration. This requires the publishing of all decisions that will be issued in regard with the recognition and enforcement of foreign arbitral awards. This also depends on the availability of analytical comparative studies between different countries.

Most importantly, the national courts should point out the reasons for refusing the implementation in detail, including their method and the grounds for refusing recognition or enforcement and not just limit themselves to a mere reference to Article V(2)(b) of the *Convention* or to their own law or case law in refusing the recognition or enforcement of foreign arbitral award. Such a trend will help to achieve more coherent practice and will develop the principles and rules of the public policy defence which in turn will narrow the limits of that principle.⁶

6.2.8 Scope of Public Policy

Unfortunately there is no clear standard that can help to measure the scope and the extent of the public policy. This supports the trend that advocates the necessity of adding ‘international public policy’ to the texts of the *Convention* on par with what exists in the *UNCITRAL Model Law*.

Kutty argues that ‘public policy’ in the *Convention* is ‘international public policy’. This is contrary to the provision in article V(2)(b) of the *Convention* which states that contrary to public policy means contrary to the public policy of the country in which the award is to be implemented. Public policy, therefore, is just the nation’s public policy. If international public policy is to be used, cases where arbitrations are against a specific nation’s public policy will be implemented. This will affect the justice system of the nation and the citizens may not trust their

⁶ For more explanation, see Pierre Mayer and Audley Sheppard, ‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) *Arbitration International* 249.

judicial system. ‘International public policy’ as defined by Kuttu, however, reduces the level of refusal to implement foreign arbitral awards on the basis of contrary to public policy.

Finally, there are some future studies recommended, which include Islamic arbitration; the application of interim measures under the national laws and the possibility of enacting these within the *Convention*, such as in the *UNCITRAL Model Law*; the implementation of foreign arbitration before the enactment of the *Arbitration System 1983* in Saudi Arabia to clarify the implementation in that period of time as a historical study to show the development of the law and judicial efficiency; and finally there should be some studies and surveys targeting the companies and foreign investors to know what attracts them to resorting to arbitration with Eastern parties in order to know the barriers and obstacles need to be overcome in the national laws.

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